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

REPORT OF THE PANEL

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Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998: III, p. 1003
Australia – Apples	Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R, DSR 2010: VI, p. 2371
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998: VIII, p. 3327
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Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000: VI, p. 2985
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004: VI, p. 2739
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China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013: IV, p. 1041
China – Broiler Products (Article 21.5 – US)	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS427/RW and Add.1, adopted 28 February 2018
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China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012: XII, p. 6369

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EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001: VI, p. 2077
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011: VII, p. 3995
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011: VIII, p. 4289
EC – Fasteners (China) (Article 21.5 – China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW and Add.1, adopted 12 February 2016, DSR 2016: I, p. 7
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998: I, p. 135
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Russia – Commercial Vehicles	Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/AB/R and Add.1, adopted 9 April 2018
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011: IV, p. 2203
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001: VII, p. 2701

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Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001: VII, p. 2741
Ukraine – Ammonium Nitrate	Panel Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/R, Add.1 and Corr.1, adopted 30 September 2019, as upheld by Appellate Body Report WT/DS493/AB/R
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011: V, p. 2869
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US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005: XVI, p. 8131
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015: I, p. 7
US – Countervailing Measures (China) (Article 21.5 – China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China*, WT/DS437/AB/RW and Add.1, adopted 15 August 2019
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000: III, p. 1619
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996: I, p. 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001: X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001: IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012: II, p. 649

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US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004: VII, p. 3257
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007: IX, p. 3523
US – Shrimp II (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R, DSR 2015: III, p. 1341
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006: XI, p. 4865
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003: VII, p. 3117
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US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016: V, p. 2505
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001: II, p. 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997: I, p. 323

EXHIBITS REFERRED TO IN THIS REPORT

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JPN-2.b (redacted) KOR-4.b (BCI)	KTC's final resolution	KTC, Final resolution regarding the sunset review of anti-dumping duties on Japanese, Indian, and Spanish stainless steel bars (17 March 2017)
JPN-3.b (redacted) KOR-5.b (BCI)/ KOR-5.c (BCI)	OTI's final report	OTI, Final report regarding the sunset review of anti-dumping duties on Japanese, Indian, and Spanish stainless steel bars (March 2017)
JPN-4.b	Application	Application for the sunset review of anti-dumping duties on Japanese, Indian, and Spanish stainless steel bars (29 March 2016)
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JPN-8.b (BCI)	Aichi questionnaire response	Aichi, response to anti-dumping inquiry (Case No. Guje23-2016-4) (27 July 2016)
JPN-9.b (BCI)	Daido questionnaire response	Daido, respondent's response in relation to sunset review on stainless steel bars from Japan, India, and Spain (27 July 2016)
JPN-10.b (BCI)	Japanese exporters' opinion regarding injuries	Submission of opinion regarding injuries to the industry related to the sunset review of anti-dumping measures against Japanese stainless steel bars (31 August 2016)
JPN-11.b	Rebuttal opinion of the applicants	Rebuttal opinion of the applicants for the review against the industrial injury opinion of the Japanese companies subject to the review (4 November 2016)
JPN-12.b	Consumer's summary of the statement at public hearing	Summary Statement dated 7 November 2016 of Consumer at public hearing
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JPN-15.b	Applicants' statement of opinion after the public hearing	Statement dated 8 December 2016 of the applicants after the public hearing
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JPN-18.b	Japanese exporters' opinion regarding OTI's revised interim report	Submission of opinion of Japanese manufacturers on the revised interim report following public hearing regarding sunset review of the anti-dumping measures on stainless steel bars from Japan, India, and Spain (8 February 2017)
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KOR-11 (BCI)	OTI's final report (second sunset review)	OTI, Final report for the sunset review of anti-dumping duties on stainless steel bars originating from Japan, India, and Spain and price undertaking (24 July 2009)
KOR-13	USITC report (first review)	USITC, Stainless steel bars from Brazil, India, Japan, and Spain, Investigation Nos. 731-TA-678-679 and 681-682, Publication No. 3404 (March 2001)
KOR-14	USITC report (second review)	USITC, Stainless steel bars from Brazil, India, Japan, and Spain, Investigation Nos. 731-TA-678-679 and 681-682, Publication No. 3895 (January 2007)
KOR-17	KS specification	KS specification of stainless steel bar products
KOR-18	JIS specification	JIS specification of stainless steel bar products
KOR-19.b (BCI)	Minutes of public hearing (24 November 2016)	KTC and interested parties, minutes of public hearing dated 24 November 2016
KOR-20-b (BCI)	ISSF statistics	ISSF public realm data stainless steel capacity archive
KOR-21	ISSF Website profile page	ISSF Website profile page, available
KOR-22	JSSA Website members page	JSSA Website members page
KOR-24	USITC report (original investigation)	USITC, Stainless steel bar from Brazil, India, Japan, and Spain, Investigation Nos. 731-TA-678, 679, 681, and 682, Publication No. 2856 (February 1995)
KOR-25.b (BCI)	Japanese exporters' submission of opinion dated 7 November 2016	Japanese exporters, submission of response to supplementary questionnaires regarding the opinion on industrial injury caused by stainless steel bars from Japan, India, and Spain (7 November 2016)
KOR-26.b (BCI)	Minutes of meeting dated 21 September 2016	OTI and Japanese exporters, minutes of the meeting dated 21 September 2016
KOR-27.b (BCI)	Official log of investigation	Official log of investigation of the third sunset review
KOR-34.b		Article 15 of the Enforcement Rules of the Customs Act of Korea
KOR-35		Korea's response to Japan's Article 6.5.1 allegations
KOR-37	OTI import statistics	Compilation of import statistics presented in the OTI's final reports in the original investigation, first, second, and third sunset reviews
KOR-40 (BCI)	Excerpt of applicants' statement of opinion after the public hearing	Applicants' statement of opinion after the public hearing, (Exhibit JPN-15.b, pp.1-2)
KOR-41.b (BCI)	Korea's response to the Panel's Article 13 of the DSU information request	Appendix 1 of information request under Article 13 of the DSU (statistics on general-purpose steels and special steels originating from Japan, India, Spain, China, Chinese Taipei, Italy, and other countries)
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KOR-58		Commentary on HS code classification
KOR-62	High adaptability of secondary processing facilities	High adaptability of secondary processing facilities for various steel products, including stainless steel
KOR-64		Atlas steels stainless steel grade database
KOR-68 (BCI)	More purchase order examples	More purchase order examples showing that orders are placed on the basis of grade specifications
KOR-72.b (BCI)	Injury questionnaire response	SeAH Special Steel Co., Ltd., response from domestic producer (29 July 2016)
KOR-82 (BCI)		Korea's response to Exhibit JPN-39

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Aichi	Aichi Steel Corporation
Daido	Daido Steel Corporation
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
ISSF	International Stainless Steel Forum
Japanese respondents; Japanese exporters	Aichi, Daido, and Sanyo
JSSA	Japan's Stainless Steel Association
KIA	Korean investigating authorities
KITA	Korea International Trade Association
KRW	Korean Won
KTC	Korea Trade Commission
OTI	Office of Trade Investigation
POR	period of review
Sanyo	Sanyo Special Steel Corporation
SSB	stainless steel bar
USITC	United States International Trade Commission
Vienna Convention	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Japan

1.1. On 18 June 2018, Japan requested consultations with Korea pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 13 August 2018, but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 13 September 2018, Japan requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 17.4 of the Anti-Dumping Agreement.[2] At its meeting on 29 October 2018, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Japan in document WT/DS553/2, in accordance with Article 6 of the DSU.

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

> To examine, in the light of the relevant provisions of the covered Agreements cited by the parties to the dispute, the matter referred to the DSB by Japan in document WT/DS553/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those Agreements.[3]

1.5. On 14 January 2019, Japan requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 21 January 2019, the Director-General accordingly composed the Panel as follows:

Chairperson:	Ms Elaine Feldman
Members:	Ms Ana Teresa Caetano Mr Justin Wickes

1.6. China, the European Union, India, Kazakhstan, the Russian Federation, Chinese Taipei, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultation with the parties, the Panel adopted its Working Procedures[4], Additional Working Procedures on Business Confidential Information[5], and timetable on 23 April 2019. The timetable was subsequently updated and revised as appropriate during the proceedings.

1.8. The Panel held a first substantive meeting with the parties on 9 and 10 September 2019. A session with the third parties took place on 10 September 2019. The Panel held a second substantive meeting with the parties on 17 and 18 December 2019. On 17 March 2020, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 June 2020. The Panel issued its Final Report to the parties on 21 October 2020.

[1] Request for consultations by Japan, WT/DS553/1 (Japan's consultations request).
[2] Request for the establishment of a panel by Japan, WT/DS553/2 (Japan's panel request).
[3] Constitution note of the Panel, WT/DS553/3.
[4] See the Panel's Working Procedures in Annex A-1.
[5] See the Panel's Additional Working Procedures on Business Confidential Information in Annex A-2.

1.9. In its first written submission, Korea made a request for certain preliminary rulings pursuant to Article 6.2 of the DSU. On 21 October 2019, the Panel informed the parties that it would defer making rulings based on Korea's request until the issuance of its Report to the parties.[6]

2 FACTUAL ASPECTS

2.1 The measures at issue[7]

2.1. Japan's challenge concerns the third sunset review by the Korean investigating authority (KIA) of anti-dumping duties on certain stainless steel bars (SSB) from Japan, namely:

> Korea's measures to continue the imposition of anti-dumping duties on stainless steel bars from Japan is set forth in the Korea Trade Commission's ("KTC") "Resolution of Final Determination on the Sunset Review of Anti-Dumping Duties on Stainless Steel Bars from Japan, India and Spain" ("Resolution of Final Determination") and in the Office of Trade Investigation's "Final Report on the Sunset Review of Anti-Dumping Duties on Stainless Steel Bars from Japan, India and Spain" ("Final Report") with respect to Investigation Trade Remedy 23-2016-3, both dated 20 March 2017, including any and all annexes and amendments thereto.[2][8]

[2] This determination in the third sunset review is identified in Korea's notification G/ADP/N/300/KOR dated 17 August 2017.
For the sake of completeness, the measures include the Office of Trade Investigation's "Preliminary Report regarding the Sunset Review of Anti-Dumping Duties on Japanese, Indian, and Spanish Stainless Steel Bar (Amended after Public Hearing)" ("Preliminary Report") dated 1 February 2017, to the extent it is referred to in paragraph 4 below.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Japan requests that the Panel find that:

a. The KIA's determination that the expiry of the anti-dumping duties would be likely to lead to recurrence of injury is inconsistent with Article 11.3 of the Anti-Dumping Agreement because the determination (including the finding of a causal nexus between the expiry of the duties and the likelihood of injury, if any) does not rest on a sufficient factual basis and reasoned and adequate conclusions, due to the following specific reasons individually and collectively:

   i. the use of a cumulative assessment of the effects of the imports from Japan, India, and Spain was not based on positive evidence and an objective examination, because the KIA did not examine the competitive relationships or market interactions among the alleged dumped imports from Japan, on one hand, and the domestic like products and the dumped imports from India, on the other hand;

   ii. factors other than dumping that may lead to the likelihood of injury (in particular, the third-country imports, the material costs, and the weak demand in the domestic and export markets) were not examined in the analysis of likelihood of injury, despite the

[6] Clause 4(1)(b) of the Working Procedures provides: "[t]he 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."

[7] For the avoidance of doubt, this description is based on Japan's panel request setting forth the Panel's terms of reference (WT/DS553/2), and is without prejudice to the Panel's resolution of Korea's request for preliminary rulings under Article 6.2 of the DSU. These objections are addressed in section 7.1.

[8] Japan's panel request, p. 1. In its first written submission, Japan sought to correct certain errors concerning the dates referenced in this extract from its panel request, as follows:
> In the consultation and panel requests, Japan described the date of OTI's Final Report as "20 March 2017"; the actual date noted on the report is "March 2017".
> …
> In the consultation and panel requests, Japan described the date of KTC's Resolution of Final Determination as "20 March 2017"; the actual date noted on the report is "17 March 2017".
> (Japan's first written submission, fns 14 and 20)

fact that the KIA itself recognized that they had effects on the current actual injury to the domestic industry;

iii. the volume and price effect analyses relied upon in the determination are not reasoned and adequate since (a) these analyses failed to examine the conditions of competition among the relevant products, the other factors, and the incentive for the Japanese exporters to export the product under investigation; and (b) the evaluation of specific data is biased and unreasonable; and

iv. the finding that Japan's SSB sector had sufficient additional production capacity for exports cannot by itself support the determination of likelihood of injury, unless the competitive relationships among the imports from Japan and India and the domestic like products are examined, and is based on the International Stainless Steel Forum (ISSF) data that is less accurate and reliable than the production capacity data that the three Japanese exporters themselves submitted.

b. The likelihood-of-injury determination is inconsistent with Article VI:6(a) of the GATT 1994, because Korea is levying the anti-dumping duties without establishing that the effect of the dumping is such as to cause or threaten material injury to an established domestic industry due to the reasons set out in paragraphs 3.1(a)(i)-(iv).

c. With respect to the KIA's recourse to facts available by using the ISSF data instead of the data submitted by the three Japanese exporters regarding the production capacity of the industry in Japan, the KIA acted inconsistently with:

i. Articles 11.4 and 6.8 and paragraph 3 of Annex II to the Anti-Dumping Agreement because the KIA adopted the ISSF data even though the data submitted by the Japanese exporters were verifiable, were appropriately submitted so that they could be used in the investigation without undue difficulties, and were supplied in a timely fashion; and

ii. Articles 11.4 and 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement because the KIA relied upon information from a secondary source regarding the production capacity of Japanese exporters without special circumspection.

d. The KIA acted inconsistently with:

i. Articles 11.4 and 6.5 of the Anti-Dumping Agreement with respect to its treatment of information provided by the applicants as confidential information without requiring that good cause be shown; and

ii. Articles 11.4 and 6.5.1 of the Anti-Dumping Agreement with respect to its failure to (a) require the applicants to furnish non-confidential summaries of their submissions, questionnaire responses, and amendments thereof; and (b) irrespective of whether such summaries have been provided, require that such summaries be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.

e. The KIA acted inconsistently with Articles 11.4 and 6.9 of the Anti-Dumping Agreement with respect to its failure to inform all interested parties of the essential facts under consideration that formed the basis for the decision to extend the anti-dumping duties.

f. The KIA acted inconsistently with Articles 12.2, 12.2.2, and 12.3 of the Anti-Dumping Agreement with respect to its failure to provide, in sufficient detail, the findings and conclusions reached on all issues of fact and law that it considered material, as well as all relevant information on the matters of fact, law, and reasoning that led to the sunset review determination.[9]

[9] Japan's second written submission, para. 584.

3.2. Japan further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that Korea bring its measures into conformity with its WTO obligations.[10]

3.3. Korea requests that the Panel reject Japan's claims in this dispute in their entirety. As mentioned above, Korea also requests the Panel to find that Japan's claims are not properly before the Panel under Article 6.2 of the DSU.[11]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the United States and the European Union are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1 and C-2). The other third parties did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 29 June 2020, the Panel issued its Interim Report to the parties. On 13 July 2020, Japan and Korea each submitted written requests for the review of precise aspects of the Interim Report. Neither party requested an interim review meeting. On 27 July 2020, both parties submitted comments on each other's requests for review. The Panel's discussion and disposition of the parties' submissions related to the interim review are set out in Annex A-3.

7 FINDINGS

7.1 Terms of reference: Korea's request for a preliminary ruling

7.1. We begin with the initial question concerning Korea's objections as to whether Japan's claims are properly before the Panel under Article 6.2 of the DSU. Korea claims that Japan's request for the establishment of a panel (panel request) is inconsistent with the requirements of Article 6.2 of the DSU and Article 17.4 of the Anti-Dumping Agreement because it fails to identify the specific measure challenged.[12]

7.2. Korea further claims that the inclusion of certain matters in Japan's panel request and first written submission is inconsistent with Articles 4.4 and 6.2 of the DSU and Article 17.3 of the Anti-Dumping Agreement.[13] In particular, Korea argues:

a. in relation to claim 3 of the panel request, that Japan failed to link claim 3 to the particular circumstances of the investigation at issue[14];

b. in relation to claims 1(b), 1(d), 5(b), and 5(c) of the panel request, that Japan unduly expanded the scope of the dispute beyond what had been included in Japan's request for consultations (consultations request)[15]; and

c. in relation to claims 1, 4, and 5 of the panel request, that Japan's first written submission unduly expanded the scope of the dispute beyond what had been included in its panel request.[16]

[10] Japan's first written submission, para. 389.
[11] See para. 1.9 above and section 7.1 below.
[12] Korea's first written submission, paras. 8-16 and 28.
[13] Korea's first written submission, paras. 17-26.
[14] Korea's first written submission, para. 22.
[15] Korea's first written submission, paras. 17-20.
[16] Korea's first written submission, paras. 21 and 23-26.

7.3. Korea first made a request under Article 6.2 of the DSU in its first written submission.[17] Although there was no explicit mention of clause 4.1 of the Working Procedures, the Panel afforded Korea the opportunity to clarify whether it intended to follow the procedures pursuant to clause 4.1 at the first substantive meeting.[18] Korea confirmed that it did indeed intend for the procedures under clause 4.1 of the Working Procedures to be applied. Accordingly, upon affording an opportunity to the parties to comment, the Panel announced that, in accordance with clause 4.1 of the Working Procedures, it would set 24 September 2019 as the date for Japan to submit a response to Korea's request for a preliminary ruling, and 1 October 2019 for Korea to respond, with 8 October for Japan's comments on Korea's response. At the third-party session on 10 September 2019, the Panel informed the third parties of this approach and gave the third parties an opportunity to comment. On 21 October 2019, the Panel conveyed to the parties that it would defer its ruling on the issues raised by Korea's preliminary ruling requests until the issuance of its Report to the parties.[19]

7.1.1 Whether Japan failed to identify the measure at issue in its panel request

7.4. Korea claims that Japan's panel request failed to identify the measure at issue as required by Article 17.4 of the Anti-Dumping Agreement and Article 6.2 of the DSU.[20] Korea argues that a dispute concerning compliance with the Anti-Dumping Agreement can only be based on a challenge to the three categories of measures identified in Article 17.4 of the Anti-Dumping Agreement.[21] These three measures are: a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure.[22] Korea argues that Japan fails to meet this requirement as the panel request only refers to relevant sunset review determinations.[23] Japan responds that the panel request identified the definitive anti-dumping duties levied by Korea as constituting the specific measures at issue.[24]

7.5. Article 6.2 of the DSU requires that a panel request identify the specific measure at issue in a dispute. As noted by Korea, Article 17.4 provides for challenges regarding, *inter alia*, the imposition of definitive anti-dumping duties. Japan's panel request identifies the challenged measure as the continued "imposition of anti-dumping duties on stainless steel bars" as set forth in the KTC's resolution of final determination and Office of Trade Investigation (OTI)'s final report, both dated 20 March 2017.[25] Japan's panel request further identifies the measure referred to as the third sunset review contained in Korea's notification G/ADP/N/300/KOR dated 17 August 2017, which in turns refers to the "[d]efinitive [d]uty".[26] Accordingly, Japan's panel request adequately identifies the definitive anti-dumping duty at issue as required by Article 6.2 of the DSU and Article 17.4 of the Anti-Dumping Agreement. Korea's claim thus fails.[27]

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[17] Korea's first written submission, paras. 8-28.

[18] This followed a letter from Japan to the Panel dated 2 September 2019 inquiring into whether Korea intended for the procedures under clause 4.1 of the Working Procedures to be applied.

[19] We also note that, in response to Korea's comments on Japan's responses to questions from the Panel (dated 3 February 2020), Japan requested the opportunity to make a submission on a matter that had been raised by Korea concerning the Panel's jurisdiction (dated 10 February 2020). Korea objected to Japan's request, and noted *inter alia* that "there is nothing 'new' about the argument reflected in Korea's comments on the replies of Japan" (dated 12 February 2020). With this understanding of Korea's argument in mind, and in light of the proper timing and nature of the arguments to be submitted at the various stages of the proceedings as provided for in the Working Procedures, the Panel declined Japan's request.

[20] Korea's first written submission, para. 12; opening statement at the first meeting of the Panel, para. 5.

[21] Korea's first written submission, paras. 14-15 (quoting Appellate Body Report, *Guatemala – Cement I*, para. 79).

[22] Korea's first written submission, paras. 14-15.

[23] Korea's first written submission, para. 15.

[24] Japan's response to Korea's preliminary ruling request, paras. 6-7 and 10-11; response to Korea's comments on Korea's preliminary ruling request, paras. 2-10.

[25] Japan's panel request, p. 1.

[26] Japan's panel request, fn 2.

[27] We note that Korea also appears to argue that Japan's claim fails to meet the requirements of Article 6.2 because it refers to both the final and preliminary sunset review determinations. (Korea's first written submission, para. 12). Korea's argument fails as it is clear that the subject of the challenge is the continued imposition of anti-dumping duties on SSBs.

7.1.2 Whether Japan failed to identify the confidentiality claims with sufficient precision in its panel request

7.6. Korea claims that claim 3 of Japan's panel request concerning confidentiality under Articles 6.5, 6.5.1, and 11.4 of the Anti-Dumping Agreement failed to present the legal basis of Japan's complaint. In particular, Korea argues that claim 3 of Japan's panel request merely paraphrases Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, and is not linked to any particulars of Korea's third sunset review.[28] Japan responds that claim 3 of its panel request connects the alleged breaches of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement with the measure at issue.[29]

7.7. Article 6.2 of the DSU requires that a panel request provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Claim 3 of Japan's panel request puts forward the legal basis of Japan's claims concerning confidentiality with sufficient precision to present the problem clearly. First, Japan's panel request clearly identifies Articles 6.5 and 6.5.1 as the provisions that were allegedly breached. Second, the panel request indicates which components of the measure at issue are involved in the alleged breach, being the KIA's treatment of certain information as confidential and the KIA's alleged failure to ensure the provision of sufficiently detailed non-confidential summaries. Third, the text of Articles 6.5 and 6.5.1 provide for clear legal obligations that are alleged to have been breached by the challenged aspects of the measure at issue. This information is sufficient to present the problem clearly as required by Article 6.2. Korea's argument thus fails.[30]

7.1.3 Whether Japan's panel request unduly expanded the scope of the dispute beyond what was included in the consultations request

7.8. As noted above, Korea contends that claims 1(b), 1(d), 5(b), and 5(c) of Japan's panel request unduly expand the scope of the dispute beyond what had been included in the consultations request.[31] Korea argues that claims 1(b), 1(d), 5(b), and 5(c) concern matters 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.[32] Japan responds that claims 1(b), 1(d), and 5 of its panel request merely clarify and further specify issues raised in the consultations request, and do not change or expand the scope of Japan's complaint.[33]

7.9. We note that it is well established that the legal basis for a complaint in a panel request may reasonably evolve from the consultations request, although the addition of new aspects to a panel request should not have the effect of changing the essence of the complaint as set out in the consultations request.[34]

7.10. In respect of claim 1(b), Korea argues that Japan added two novel items to the list of factors alleged by Japan to have been inadequately considered by the KIA in determining that the expiry of duties on SSBs would be likely to lead to continuation or recurrence of injury to the domestic industry under Article 11.3 of the Anti-Dumping Agreement.[35] The essence of claim 1(b) is the alleged failure of the KIA to assess factors other than the Japanese imports that may have caused injury to the domestic industry irrespective of the expiry of the anti-dumping duties.[36] We consider that the additional two factors are further specifications of this claim, which could reasonably be said to flow

[28] Korea's first written submission, para. 22.
[29] Japan's response to Korea's preliminary ruling request, para. 36.
[30] We note that the Appellate Body reached the same conclusion in respect of a substantially similar matter. (Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.370-5.385).
[31] Korea's first written submission, paras. 17-20.
[32] Korea's first written submission, paras. 17-18.
[33] Japan's response to Korea's preliminary ruling request, para. 16.
[34] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[35] Japan added: 1(b)(ii) "the decline of the sales price of such imports"; and 1(b)(v) "the continuing trend of decrease in the volume of exports by the domestic industry and the ratio of the export volume to the total volume of sales by the domestic industry". (Japan's panel request, p. 2). The consultation request only identified "the growing volume and market share of the imports of SSB from third countries", "the declining material costs" and "the continuing trend of slow growth in domestic demand". (Japan's consultations request, p. 2).
[36] Japan's consultations request, p. 2; panel request, p. 2.

from a natural evolution of the consultation process.[37] We thus find the addition of these two items does not change the essence of the complaint as set out in the consultations request.[38]

7.11. In respect of claim 1(d), Korea alleges that Japan added novel concerns and improperly elaborated its claims through the addition of subsections 1(d)(i) and 1(d)(ii).[39] The essence of claim 1(d) is the alleged failure of the KIA to establish that the expiry of the anti-dumping duties was likely to lead to an increase of imports from Japan. Claim 1(d) in Japan's consultations request and panel request is directed at linking the expiry of the anti-dumping duties with the continuation or recurrence of dumping and injury as required under Article 11.3 of the Anti-Dumping Agreement.[40] Claim 1(d) in Japan's panel request added an element concerning the impact of an increase in Japanese imports on the domestic industry. The consultations request already referred to the effects of increased imports from Japan by stating that Korea had failed to demonstrate how such imports could affect imports of SSBs from other countries and domestically produced SSBs.[41] We thus consider the modifications in the panel request to be a further clarification of the claims in the consultations request, and to reflect a natural evolution of the consultation process. Further, subsections 1(d)(i) and 1(d)(ii) simply restructure information already contained in the consultations request and thus do not change the essence of the complaint.

7.12. Finally, Korea argues in respect of claim 5 that Japan added two additional items.[42] The essence of claim 5 is the alleged failure of the KIA to provide, in sufficient detail, public notice of the findings and conclusions reached by the investigating authority on all issues of fact and law as required under Articles 12.2, 12.2.2, and 12.3 of the Anti-Dumping Agreement.[43] In both its consultations request and panel request, Japan identified certain matters for which Korea allegedly failed to meet its obligations under Articles 12.2, 12.2.2, and 12.3 of the Anti-Dumping Agreement. We find that the two additional items in the panel request simply support the claim under Articles 12.2, 12.2.2, and 12.3 and do not change the essence of the dispute as set out in the consultations request. Korea's claim on the foregoing points thus fails.

7.1.4 Whether Japan's first written submission unduly expanded the scope of the dispute beyond what was included in the panel request

7.13. Korea claims that Japan's first written submission unduly expands the scope of the dispute as set out in the panel request.[44] First, in relation to Japan's arguments under Article 11.3 of the Anti-Dumping Agreement, Korea argues that Japan "abruptly changed its position" in its first written submission by introducing arguments that a "causal nexus" should be established between the expiry of the anti-dumping duties and the continuation or recurrence of dumping.[45] Second, Korea argues that Japan's references to "dumping" in the claims made under Articles 6.9 and 12 of the Anti-Dumping Agreement in its first written submissions fall outside the scope of claims 4 and 5 of the panel request.[46]

7.14. In relation to Korea's first argument, Japan responds that it has not raised a separate claim with regard to Korea's determination on the likelihood of recurrence of dumping as being inconsistent with Article 11.3 of the Anti-Dumping Agreement.[47] A review of Japan's first written submission makes clear that Japan's "causal nexus" arguments are related to and support Japan's claims that the determination of the likelihood of recurrence of injury is inconsistent with Article 11.3 of the

[37] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[38] This is consistent with a substantially similar finding by the Appellate Body in *Korea – Pneumatic Valves* (paras. 5.99 and 5.108).
[39] Korea's first written submission, para. 18.
[40] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 108.
[41] Japan's consultations request, p. 2.
[42] Japan added in the panel request the following two items: 5(b) "the finding of additional production capacity, and the capacity for exports, of foreign producers including those in Japan"; and 5(c) "the finding of a nexus between the expiry of the duties and a continuation or recurrence of dumping and injury by imports under review, despite acknowledging the impact of other known factors on the domestic industry". (Japan's panel request, p. 3).
[43] Japan's response to Korea's preliminary ruling request, para. 20.
[44] Korea's first written submission, paras. 21 and 23-26.
[45] Korea's first written submission, para. 21.
[46] Korea's first written submission, paras. 23-26.
[47] Japan's response to Korea's preliminary ruling request, para. 27.

Anti-Dumping Agreement. As this claim was clearly established in Japan's panel request, Japan did not improperly introduce arguments relating to a "casual nexus" in its first written submission.

7.15. In relation to Korea's second argument, Japan notes that contrary to Korea's arguments, the wording in Japan's panel request does not limit the scope of claims 4 and 5 to the determination of the likelihood of "injury".[48] We agree with Japan, and consider Korea's allegations to be based on the flawed premise that there was no reference to "dumping" in claims 4 and 5 of the panel request. Claim 4 plainly refers to "the continuation or recurrence of dumping and injury". Claim 5 refers to sufficient public notice of matters of fact and law leading to the "sunset review determination", which necessarily entails a review of whether the expiry of the duties would lead to the recurrence or continuation of dumping and injury. Additionally, subparagraphs 5(c) and 5(d) refer to the "recurrence of dumping" as part of the matters challenged under claim 5. Consequently, we do not consider that Japan unduly expanded the scope of the dispute in its first written submissions. In any event, having reviewed the substance of Japan's first written submission on these points, we take the view that they are squarely part of the KIA's likelihood-of-injury determination. Some of Japan's arguments under Articles 6.9 and 12 ostensibly reference the "recurrence of dumping" but pertain, in substance, to factual or analytical matters that were part of the KIA's "recurrence of injury" assessment, such as unused export capacity, trends in the import volume and domestic market share of the "product under investigation", and the Japanese exporters' failure to cooperate with the dumping investigation as a basis for rejecting their production capacity figures.[49] In that regard, we consider it noteworthy that Japan stated explicitly in its first written submission that "Japan is not disputing the [KIA's] determination of likelihood of dumping in this proceeding".[50] We construe Japan's claims and arguments in light of that statement.

7.2 Introduction: Japan's claims under the Anti-Dumping Agreement

7.16. The proceedings involved extensive exchanges between the parties. Over one thousand seven hundred pages have been submitted in argumentation and rebuttal, together with well over one hundred exhibits. We have reviewed all of these materials closely, and as we will explain in this Report, it is apparent that the prompt and effective resolution to the dispute hinges on two key questions. These concern whether Japan has demonstrated that the KIA failed to undertake an "unbiased and objective" evaluation of the facts in respect of the following two findings:

a. the finding that the lifting of the anti-dumping duties and the resulting drop in the price of Japanese imports by [[***]] ([[***]]in 2015[51]) would lead to a weakening of domestic price competitiveness and an increase in the volume of Japanese imports[52]; and

b. the finding of a capacity utilization rate of [[***]] for Japan, together with the conclusion that Japan had "sufficient additional production capacity and room for exports".[53]

7.17. In sections 7.5.3 and 7.5.5.1 we examine these two overarching questions. In section 7.5.4 we address Japan's claims concerning "other injury factors", and in section 7.5.5.2 we address Japan's claims concerning the alleged use of "facts available" regarding capacity utilization. In section 7.6 we examine Japan's confidentiality-related claims under Article 6.5 of the Anti-Dumping Agreement. In section 7.7 we explain why it is unnecessary for the prompt and

[48] Japan's response to Korea's preliminary ruling request, para. 39.
[49] See, e.g. Japan's first written submission, paras. 290, 292-294, 363-364, and 367.
[50] Japan's first written submission, fn 80.
[51] See paras. 7.71-7.72 below.
[52] KTC's final resolution, (Exhibit KOR-4.b (BCI)), pp. 21-22. See also OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 63 and 67. The public versions of these same documents are exhibit JPN-2.b and exhibit JPN-3.b respectively. For ease of reference, we generally refer to the versions submitted by Korea, including where e.g. a party has quoted from the other version, unless the matter at issue pertains specifically to the public version. The Panel took note of the cited differences in translation between these versions, and did not consider that they had a bearing on the outcome of this dispute. Finally, we note that Korea submitted a further version of exhibit KOR-5.b (BCI) – namely, exhibit KOR-5.c (BCI) – which highlighted a series of corrigenda and revisions. Since we understand the latter version to supersede the earlier version, we generally refer to the latter version, even if a given quotation or reference was cited to the earlier version. In that regard, we reviewed the changes between these versions referred to in the document "Exhibit KOR-5.c addendum" and did not consider that they materially altered the outcome of this dispute.
[53] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 22. See also OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.

effective resolution of the present dispute to present recommendations to the DSB regarding the remaining claims and arguments of the parties. The Panel recalls that it has the autonomy to decide the order of its own analysis.[54]

7.3 General principles regarding treaty interpretation, standard of review, and burden of proof

7.3.1 Treaty interpretation

7.18. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered Agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention) are such customary rules.[55]

7.19. Article 17.6(ii) of the Anti-Dumping Agreement sets forth a specific standard of review applicable to anti-dumping disputes, namely:

> [T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

7.3.2 Burden of proof

7.20. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreements must assert and prove its claim.[56] Therefore, Japan bears the burden of demonstrating that the challenged measures are inconsistent with the cited provisions of the WTO Agreements.

7.21. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case that, in the absence of effective refutation by the responding party, requires a panel, as a matter of law, to rule in favour of the complaining party.[57] It is generally for each party asserting a fact to provide proof thereof.[58]

7.22. Korea raised a concern that the Panel, through its questioning of the parties, had appeared to apply a "double standard of proof".[59] Korea's concern seemed to be that the Panel's questions unduly helped Japan to make its case, whilst also applying greater scrutiny to Korea's case and unduly shifting the burden onto Korea despite the fact that Japan bears the initial burden of proof to make a *prima facie* case.[60]

7.23. It is not the task of a panel to enter into a debate with the parties about how it chooses to exercise discretion in conducting the proceedings within the parameters of the DSU and the Working Procedures, such as through the questions it puts to the parties.[61] We nonetheless make a number of observations of relevance to the concerns raised by Korea.

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[54] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126; Panel Report, *Argentina – Financial Services*, para. 7.67. We are mindful that the order we choose may also have an impact on the potential to apply judicial economy when making our determinations in this case. (Panel Reports, *India – Autos*, para. 7.161; *Argentina – Financial Services*, para. 7.63).

[55] Appellate Body Reports, *US – Gasoline*, DSR 1996:I, pp. 15-16; *Japan – Alcoholic Beverages II*, DSR 1996:I, pp. 104-105, section D.

[56] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 337.

[57] Appellate Body Report, *EC – Hormones*, para. 104.

[58] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 335.

[59] Korea's common response to Panel questions after the second meeting with the Panel, para. 6.

[60] Korea's common response to Panel questions after the second meeting with the Panel, paras. 5-7; responses to Panel question No. 92, para. 50, and No. 100, para. 173.

[61] We are cognisant of the requirements in the Working Procedures and the DSU to consult with the parties upon adopting and modifying rules of procedure. However, beyond certain special circumstances that are not relevant to the present case, nothing in the Working Procedures or the DSU prescribes a role for *the*

7.24. Our primary task is to help the parties resolve their dispute in a prompt and effective manner.[62] Ordinarily[63], this involves making findings as to whether a complaining party has presented a *prima facie* case of inconsistency with the applicable obligations of the WTO Agreements and whether, in response, a responding party has effectively rebutted the *prima facie* case of the complaining party.[64] While a panel may develop its own reasoning in arriving at its findings, it is of course not for a panel to make the case for either party.

7.25. The fact that it is for the complaining party to discharge its burden of proof by establishing a *prima facie* case at first instance, and then for the responding party to effectively refute that case, does not mean that a panel is frozen into inactivity.[65] The extensive discretionary authority of a panel to request information from any source (including a Member that is a party to the dispute) is not conditional upon a party having established, on a *prima facie* basis, a claim or defence.[66] The same is true for a panel's extensive discretionary authority to put questions to the parties in order to inform itself of the relevant facts of the dispute and the legal considerations applicable.[67] It would thus be erroneous for a party to suggest that we can ask a question of the responding party only upon arriving at an initial determination that the complaining party has established a *prima facie* case. It would further be erroneous for a party to seek to divine from the existence or formulation of a given question that it is reflective of a position already adopted by the Panel, for instance that we had already determined that the complaining party established a *prima facie* case.[68]

7.26. Indeed, in all instances during the proceedings where the Panel posed questions to the parties orally and in writing, we explained that our questions were intended to facilitate our work, and that our questions did not in any way prejudge our findings on the matter before us.[69] For the avoidance of doubt, the purpose of this explanation was to assure the parties that the inclusion of a certain proposition in a question was not reflective of a predetermined position adopted by the Panel regarding that question. While it should be self-evident, we additionally explained that "[a]ll questions are without prejudice to the Panel's resolution of the claims and arguments of the parties, including objections pertaining to the Panel's terms of reference or the admissibility or relevance of certain evidence".

7.27. To reiterate, we explained throughout the proceedings that the Panel's questions were intended to "facilitate its work". The "work" of the Panel is guided at all times by the standard of review prescribed in Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. It should be unsurprising that where a determination by the authority of one party is the matter at issue, more questions may be directed towards that party. For instance, that party may be in a better position to shed light on the evidence and reasoning underpinning the determination made by its own authority, and what may or may not have been taken into account by its own authority in that

parties in determining the precise formulation, nature, or content of the questions that a *panel* seeks to put to the parties.

[62] Articles 3.3, 11, and 21.1 of the DSU.

[63] We note that parties may resolve their dispute through a mutually satisfactory solution, and pursuant to Article 11 of the DSU, "[p]anels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution".

[64] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.354.

[65] Panel Report, *Thailand – H-Beams*, para. 7.50.

[66] Article 13 of the DSU. See also Panel Reports, *Thailand – H-Beams*, para. 7.50; and *Argentina – Import Measures*, para. 6.59. Of course, we cannot use such authority to rule in favour of a complaining party who has not established a *prima facie* case. (Appellate Body Report, *Japan – Agricultural Products II*, paras. 129-130). But that does not mean that a panel's ability to put questions to the parties is conditional upon arriving at an initial finding that a *prima facie* case or defence has been established.

[67] Appendix 3, clause 8 of the DSU; Working Procedures, clause 9; and Panel Report, *Thailand – H-Beams*, para. 7.50. Of course, the nature, form, and quantity of the questions posed is guided by the overall task of helping the parties to resolve their dispute in a prompt and effective manner, as well as our standard of review.

[68] Moreover, the DSU does not contemplate that a party can decide *for itself* whether a question posed by a panel is relevant for the resolution of the dispute, nor whether the other party has already established a *prima facie* case on a given point that would in turn justify a question by a panel to the other party on that point. (Panel Reports, *Argentina – Import Measures*, para. 6.59).

[69] For instance, all written documents containing questions from the Panel to the parties included the covering note that "[t]hese questions are intended to facilitate the work of the Panel, and do not in any way prejudge the Panel's findings on the matter before it". This was also conveyed to the parties at the hearing regarding the Panel's oral questions.

regard. That is especially so in circumstances where the responding party relies on "implicit" findings or uncited record evidence as part of its defence of its authority's determination.

7.28. Likewise, with respect to our examination of the facts, it should be unsurprising that our focus is on how the *authority* solicited and examined the facts, including whether and where such an examination might be reflected in the authority's determination. Such a focus is not indicative of a "double standard of proof"[70], but merely reflects that "[t]he *authority* is under an obligation to properly establish the facts and evaluate them in an objective and unbiased manner" in the underlying investigation.[71]

7.29. Indeed, the party of the authority may be best placed to explain why it did not address, in its determination (or any other document), a matter that an interested party raised during the underlying investigation, for instance because the matter was unsubstantiated or irrelevant.

7.30. Accordingly, for some questions, we chose to direct the question to a particular party, e.g. where it appeared that this party might be better placed to respond. However, the Panel explained that "[t]he fact that a question may be primarily directed towards one party does not preclude a response from the other party".[72] It would therefore be erroneous for a party to draw any inferences from whether the Panel addressed a question to one party or another.

7.31. We also observe that the posing of questions in panel proceedings can serve multiple purposes. One purpose can be to obtain missing information or fill gaps in the panel record. Another purpose can be to clarify the precise nature and scope of a party's legal claim or defence. A further purpose can be to scrutinize the credibility or reliability of the contested materials before the panel. The way in which a question is framed can depend on the purpose for which it is asked. None of these purposes, however, are indicative of a panel having reached any predetermined conclusions on any point, nor having decided to adopt a particular approach. Indeed, a panel's discretion concerning the form, nature, and content of its questions to parties is unfettered in the DSU.[73] In all instances, the posing of questions is intended to build a sufficient understanding of the legal arguments and evidence at issue to "facilitate [the Panel's] work". It may well emerge from the response to a question that it is not a relevant consideration in resolving the dispute; it may also emerge that it is unnecessary for the Panel to address the substance of the response, for instance due to the exercise of judicial economy over the relevant claim, or because the Panel ultimately finds that the other side did not make a *prima facie* case. It would therefore be erroneous for a party to extrapolate anything from the posing of a given question, other than that the Panel seeks a response.

7.32. Finally, we note that the parties' respective positions in panel proceedings are not prejudiced by the specific formulation of a question posed by a panel when, as in the present case, each party is allowed to comment on responses to the panel's questions received from the other side, to pose its own questions to the other side at multiple junctures during the proceedings, and to comment on the responses received from the other side to its own questions.[74] The parties in the present dispute have had exhaustive opportunities to present their respective cases and rebuttals. As affirmed above[75], we have taken into account all of the materials submitted by the parties during these proceedings in arriving at a resolution to the dispute that is as effective and prompt as possible.

7.3.3 Standard of review

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

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[70] Korea's common response to Panel questions after the second meeting with the Panel, paras. 5-7; response to Panel question No. 92, para. 50.

[71] Korea's response to Panel question No. 3(b) (emphasis added). See also first written submission, para. 43; and response to Panel question No. 32(b)(ii).

[72] For instance, all written documents containing questions from the Panel to the parties included this in the covering note.

[73] Appendix 3, clause 8 of the DSU. Of course, in all aspects of the conduct of the proceedings, a panel must ensure that its assessment of the matter is "objective" under Article 11 of the DSU and must ensure due process for both sides to the dispute. A panel must also ensure that the resolution of the dispute is prompt and effective. We thus agree with the Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 147-150.

[74] See, by analogy, Panel Report, *Australia – Apples*, para. 7.67.

[75] See para. 7.16 above.

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

7.34. Both parties accept the Appellate Body's explanation that the "objective assessment" to be made by a panel reviewing an investigating authority's determination under Article 11 of the DSU is to be informed by an examination of whether the authority provided a "reasoned and adequate" explanation as to (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.[76] We proceed on that basis.

7.35. Both parties also accept that Article 17.6(i) of the Anti-Dumping Agreement sets forth a specific standard of review applicable to anti-dumping disputes, namely:

> (i) [I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned[.][77]

7.36. It is common ground amongst the parties that, based on this standard of review, a panel reviewing an investigating authority's determination may not undertake a *de novo* review of the evidence, nor substitute its judgement for that of the investigating authority.[78] For instance, an alternative explanation of the record evidence cannot impugn an authority's determination merely because it seems preferable.

7.37. At the same time, a panel must not simply defer to the conclusions of the investigating authority.[79] Rather, we understand it to be common ground amongst the parties that a failure by the authorities to adequately account for an alternative explanation of the record evidence can potentially illustrate that the "establishment of the facts was [not] proper and … the evaluation was [not] unbiased and objective".[80] This is because, as Korea indicates, an authority's explanation must "fully address[] the nature, and especially the complexities, of the data and respond[] to other plausible interpretations of the data", and that "[w]hat matters is simply that the overall determination remains adequate in light of such alternative explanation of the data".[81] Of course, this does not mean that an authority must explicitly and exhaustively discuss every matter raised or alleged by an interested party during a review.[82] However, the failure of an authority to address a directly-relevant and substantiated point, or the adoption by the authority of one side's argument and evidence without addressing the other side's argument and evidence, or the presence of meaningful inconsistencies in the authorities' own reasoning, could impugn the "objectivity" of an authority's assessment insofar as it improperly favours the interests of certain interested parties over others.[83]

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[76] Japan's first written submission, para. 54; Korea's second written submission, para. 22. This language comes from the Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

[77] Japan's first written submission, paras. 51-53; Korea's response to Panel question No. 1.

[78] Japan's response to Panel question No. 2, para. 8; Korea's first written submission, paras. 33 and 36. See also Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.84 and 5.86.

[79] Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; *US – Lamb*, paras. 106-107.

[80] Korea's response to Panel question No. 1; Japan's response to Panel question No. 1, para. 5; and Japan's first written submission, paras. 52-54. See also Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

[81] Korea's response to Panel question No. 1. See also Japan's first written submission, para. 53.

[82] We agree with Korea in that regard. (Korea's responses to Panel question No. 2, and No. 97, para. 121). An investigating authority would ordinarily be expected to consider a pertinent matter explicitly when confronted with sufficient evidence. (Panel Report, *EU – Fatty Alcohols (Indonesia)*, paras. 7.196 and 7.204).

[83] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.138 (quoting Appellate Body Report, *China – GOES*, para. 126); *Mexico – Anti-Dumping Measures on Rice*, paras. 180-181; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93 and 97.

7.38. Since a panel may not conduct a *de novo* assessment of the case, it must limit its examination to the evidence that was before the authority during the investigation.[84] However, a panel's assessment is not limited to the evidence cited by an authority in its determination, and we understand this to be the position of both parties.[85] Rather, a panel must take into account all record evidence submitted by the parties in the panel proceedings.[86] In that regard, a panel may be called upon to respond to allegations by a complainant concerning the significance of record evidence that the investigating authority allegedly ignored, or on which it placed insufficient weight, or from which it drew incorrect inferences.[87] The fact that an investigating authority has not cited every piece of record evidence that negates or substantiates these kinds of allegations does not mean that a panel is prevented from considering such evidence to test the veracity of those allegations. A panel's review of the record evidence in order to establish the veracity of such allegations, and thus determine whether the complaining party has demonstrated that the authority's conclusions were not reasoned and adequate, does not amount to a *de novo* review of the record evidence.[88] We understand that both parties accept this as a general proposition.[89]

7.39. Equally, a panel's examination of whether an investigating authority's conclusions were reasoned and adequate is not necessarily limited to the pieces of evidence *expressly* relied upon by the authority in its establishment and evaluation of the facts in arriving at a particular conclusion.[90] Rather, a panel may also take into consideration other pieces of evidence that were on the record and that corroborate the explanation provided by the investigating authority in its determination. This is because investigating authorities are not required to cite or discuss *every* piece of supporting record evidence for each fact in their determination.[91] There is no such obligation in the Anti-Dumping Agreement. Thus, Korea is not precluded from now relying on record evidence that was not explicitly cited or discussed by the KIA, but nonetheless substantiates the reasoning of the KIA as reflected in its determination.[92]

7.40. In summary, there are at least two general ways in which panels may permissibly consider record evidence that was not explicitly cited by an investigating authority in its determination:

a. where the complaining party bases its claim on record evidence that was not cited by the authority, and asserts that this uncited record evidence demonstrates that the authority's evaluation was not "unbiased and objective"; and

b. where the evidence was not cited by the investigating authority but nonetheless corroborates the inferences, reasoning and conclusions reached by the authority.[93]

7.41. However, since a panel's review cannot be *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on record evidence – cannot form the basis of a panel's finding that the authority's conclusion was reasoned and adequate.[94] This is because such rationalizations would be *new* rationalizations. If a panel were to rely on new rationalizations to substantiate an authority's determination, it would effectively be substituting its own judgement for that which was actually made by the authority, and hence engage in a *de novo* assessment.[95] Thus, we accept Korea's point that it "is entitled to rely on and refer to evidence on the record *to confirm the reasonableness of the authorities' determination so long as it is clear that*

[84] This is also reflected in Article 17.5(ii) of the Anti-Dumping Agreement, through which panels are limited to examining the matter based on "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

[85] Korea's response to Panel question No. 2; Japan's response to Panel question No. 2, paras. 9 and 11.

[86] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

[87] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.99.

[88] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.99.

[89] Korea's response to Panel question No. 2 (agreeing with the extracts of Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.86 and 5.99); Japan's response to Panel question No. 2, para. 11.

[90] Appellate Body Report, *Thailand – H-Beams*, paras. 117-119.

[91] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164. See also Korea's responses to Panel question Nos. 2 and 3(a); and second written submission, para. 154.

[92] We note, however, that if the uncited evidence constitutes an "essential fact" under Article 6.9 of the Anti-Dumping Agreement, the failure to cite that fact (i.e. "disclose" it) could lead to a violation of Article 6.9.

[93] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, paras. 7.5-7.6 and fn 196.

[94] See e.g. Appellate Body Reports, *US – Tyres (China)*, para. 329; *Japan – DRAMs (Korea)*, para. 159; and Panel Reports, *Argentina – Ceramic Tiles*, para. 6.27; *Argentina – Poultry Anti-Dumping Duties*, paras. 7.48-7.49.

[95] Japan's response to Panel question No. 1, para. 4.

this was evidence taken into consideration by the authorities".[96] We also accept Korea's point that certain intermediary findings or considerations may be "implicit" in an authority's determination.[97] The existence, as a factual matter, of "implicit" findings, analyses, or considerations by an authority must be demonstrated by the party asserting their existence. This could be shown, for instance, by reference to the nature and implications of the investigating authority's reasoning on a given point or to the procedural circumstances of the review. We would therefore disagree with Japan that a panel can never take into account "implicit" findings, analyses, or considerations that are not expressed in the text of an authority's determination.[98] However, we accept Japan's point that Korea cannot rely on uncited evidence or "implicit" analyses to substantiate a new or different rationale to that articulated by the KIA in its determination.[99] In our view, the party asserting the existence of an "implicit" finding, analysis, or consideration must demonstrate a link to the text of the determination, such that it does not constitute an *ex post* rationalization or lead the Panel to make a *de novo* finding.

7.42. This leads to a related point, namely the extent to which the responding party can link together different aspects of its investigating authority's determination to clarify what the authority meant, or to rebut the complaining party's claims in WTO panel proceedings. Determinations of investigating authorities are often segmented into distinct parts that contain different headings and different analyses. This does not mean that one is unrelated to another, nor that the analysis ostensibly directed at one matter cannot be used by a responding party in WTO panel proceedings to shed light on another matter in a different part of the determination.[100] Thus, the mere fact that a given analysis occurs under one heading/section of a determination does not preclude it from shedding light on the analysis of another matter in a different heading/section for the purposes of WTO dispute settlement.[101]

7.43. On the other hand, "it is not for panels to find support for [an authority's] conclusions by cobbling together disjointed references scattered throughout a competent authority's report".[102] We understand, at least in general terms, that both parties accept that there must be some form of reasonable "connection" or "linkage" between findings or reasoning that appear in different parts of a determination before they may permissibly be used to shed light on each other.[103]

7.44. At this juncture, it is useful to set out how we intend to approach Japan's objections that numerous aspects of Korea's description of the KIA's determination and reasoning comprise impermissible *ex post* explanations[104], which Korea considers to be meritless and unsupported by the record.[105] As the foregoing discussion shows, objections that an explanation comprises impermissible *ex post* reasoning are significant. To reiterate, if a panel were to uphold a determination on the basis of impermissible *ex post* reasoning, it would be conducting a *de novo* review of the underlying investigation, contrary to its basic duty under Article 17.6 of the Anti-Dumping Agreement. However, whilst an authority's reasoning must be "discernible from the published determination itself", "the meaning of a determination [can] be clarified" by parties to a dispute, for instance "by referring to evidence on the record".[106] In our consideration of the matters before us, we see no reason why Korea might be precluded *a priori* from clarifying the meaning of the KIA's determination in this dispute, including by reference to record evidence, so long as the clarification does not amount to a new rationale absent from the determination itself. We will examine the veracity of Japan's objection that a given aspect of Korea's case comprises

[96] Korea's response to Panel question No. 7. (emphasis added)
[97] Korea's second written submission, para. 160. See, e.g. Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, paras. 7.211 and 7.219.
[98] Japan's second written submission, paras. 32-37.
[99] Japan's second written submission, para. 36.
[100] See, e.g. Panel Reports, *US – Coated Paper (Indonesia)*, paras. 7.159 and 7.164; *EU – Fatty Alcohols (Indonesia)*, paras. 7.173-7.174; and *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.178.
[101] See, e.g. Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.
[102] Appellate Body Report, *US – Steel Safeguards*, para. 326. See also Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.239.
[103] Korea's response to Panel question No. 6(c); Japan's responses to Panel question No. 6(a), para. 24, No. 6(b), para. 28, and No. 6(c), para. 33.
[104] See, e.g. Japan's second written submission, paras. 21, 231, 265-266, and 284; and responses to Panel question No. 6(a), para. 24, No. 10, para. 50, No. 16, para. 94, No. 20(a), para. 115, No. 20(b), para. 118, No. 24, para. 151, and No. 31, para. 184.
[105] Korea's second written submission, paras. 71 and 160-162.
[106] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.164-5.165.

impermissible *ex post* reasoning where such objections arise below in our substantive evaluation of the claims advanced in this dispute. However, given the volume of *ex post* objections made by Japan, we decline to examine every such objection in an itemized way, particularly if such an examination is not strictly required to ensure the proper resolution of the claim at issue. Thus, we will limit our examination to only those instances where the challenged aspect of Korea's case has the potential to uphold the KIA's determination. This avoids the risk of an outcome based on a *de novo* review, whilst focusing the assessment of Japan's *ex post* objections on those instances where resolving the objection was necessary to the resolution of the claim.

7.45. Finally, we note that not every error made or questionable inference drawn by an investigating authority in its treatment of a given piece of evidence will necessarily rise to the level of a violation of an obligation of the WTO Agreements.[107] Rather, a panel's evaluation of whether an investigating authority's evaluation is "unbiased and objective" requires an assessment of the totality of the evidence, inferences, and intermediary findings relied upon by an investigating authority to justify its reasoning on a given point.[108] We have been particularly cognisant of this point in relation to Japan's claims under Article 11.3 of the Anti-Dumping Agreement in light of the nature of that particular provision.[109]

7.4 Japan's objections concerning certain exhibits

7.46. Japan objects that numerous documents submitted by Korea in these proceedings have not been shown to be on the record in the underlying review.[110] Korea responds that all of the submitted documents were properly on the record in the underlying review.[111]

7.47. Japan argues that, in respect of exhibits KOR-8, 13, 14, 17, 18, 21, 22, 24, 37, 41, 43, 51, 52, 53, 56, 57, 58, 62, 64, and 68[112], there is no indication from the evidence submitted in these dispute settlement proceedings that they formed part of the record in the underlying review.[113] Japan contends this is inconsistent with the requirement in Article 17.5(ii) of the Anti-Dumping Agreement that a panel shall examine a matter, *inter alia*, based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". Korea responds that all the contested exhibits can be reasonably inferred to have been considered by its authorities at the time of the underlying review, and were thus within the scope of our purview in these proceedings.[114]

7.48. As stated by the Appellate Body in *Russia – Commercial Vehicles*, when faced with a challenge that certain documents do not form part of the record before an investigating authority, a panel must take certain steps to assure itself that the documents are genuine and contemporaneous.[115] The steps required depend on the facts of a particular case, and may include posing additional

[107] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.7.

[108] See e.g. Appellate Body Report, *Japan – DRAMs (Korea),* paras. 133-134. See also Panel Report, *EC – Fasteners (China*), para. 7.359.

[109] See para. 7.57 below. We agree with Korea that the proper standard of review to be applied by a panel must also be understood in the light of the specific obligations of the relevant agreements that are at issue in the case. (Korea's second written submission, para. 16 (referring to Appellate Body Report *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 92)).

[110] See generally Japan's response to Panel question No. 120.

[111] Korea's comments on Japan's response to Panel question No. 120, p. 70; response to Japan's question after the first meeting of the Panel No. 1, paras. 3-40.

[112] ISO stainless steel grade comparability tables, (Exhibit KOR-8); USITC report (first review), (Exhibit KOR-13); USITC report (second review), (Exhibit KOR-14); KS specification, (Exhibit KOR-17), JIS specification, (Exhibit KOR-18); ISSF Website profile page, (Exhibit KOR-21); JSSA Website members page, (Exhibit KOR-22); USITC report (original investigation), (Exhibit KOR-24); OTI import statistics, (Exhibit KOR-37); Korea's response to the Panel's Article 13 information request, (Exhibit KOR-41); Import Clearance Matrix, (Exhibit KOR-43); Translation of the JSSA Website members page, (Exhibit KOR-51); Sanyo and Aichi catalogues, (Exhibit KOR-52); Websites of Yamashin, Kansai, and Tohoku, (Exhibit KOR-53); Purchase order, (Exhibit KOR-56); Explanation on ISSF statistics methodology, (Exhibit KOR-57); Commentary on HS code classification, (Exhibit KOR-58); High adaptability of secondary processing facilities, (Exhibit KOR-62); Atlas steels stainless steel grade database, (Exhibit KOR-64); and More purchase order examples, (Exhibit KOR-68).

[113] Japan's response to Panel question No. 120, para. 125; Korea's response to Japan's question after the second meeting of the Panel No. 1, paras. 1-56.

[114] Korea's comment on Japan's response to Panel question No. 120, p. 70; response to Japan's question after the second meeting of the Panel No. 1, paras. 1-56.

[115] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.134.

questions to the submitting party or examining additional evidence concerning the contested documents.[116]

7.49. We do not consider in this case that Japan has established cause to doubt that the documents in question were genuine and contemporaneous parts of the record before the KIA. As there is no domestic law governing the KIA's management of record evidence, whether evidence was on the record must be assessed on the basis of the totality of the evidence.[117] In response to questions from the Panel, Korea explained that "every single piece of evidence that Korea submitted in this dispute properly supports or ties to the explicit determinations by the Korean authorities, either directly or indirectly through intermediate findings".[118] Korea specifically identified that (a) the applicant's application contained a section titled "Evidentiary Materials" which included exhibits KOR-8, KOR-17, KOR-18, KOR-52, and, KOR-64; (b) exhibits KOR-56 and KOR-68 were obtained from the applications by the KIA during on-site verification; (c) exhibit KOR-62 is composed of material contained in the KIA's case handler's file; (d) exhibit KOR-43 contains customs data from the Korean Customs Service and that was referred to in the OTI's final report; (e) exhibit KOR-41 was prepared in response to a request from the Panel and is based on data contained in the OTI's final report; (f) exhibit KOR-37 is a compilation of import statistics contained in the OTI's final report; (g) exhibits KOR-13, KOR-14, KOR-21, KOR-22, KOR-24, KOR-51, and KOR-53 were obtained by the KIA on its own initiative; and (h) exhibit KOR-58 is an HS code classification referred to in the OTI's final report.[119] We consider that Korea's response leaves no reason to doubt that these exhibits are genuine and contemporaneous.[120] Japan's argument thus fails, and we do not exclude these materials from our evaluation of the matters at issue in this dispute.

7.5 Likelihood of recurrence of injury: Japan's claims under Articles 11.3 and 6.8 of the Anti-Dumping Agreement

7.5.1 Introduction

7.50. Japan made several substantive claims in these proceedings concerning the KIA's finding that lifting the anti-dumping duties would be "highly likely"[121] to lead to a recurrence of material injury to the domestic industry. Japan structured these claims under Article 11.3 of the Anti-Dumping Agreement as follows: (a) the KIA erred in cumulating Japanese imports with Indian imports for the purposes of its likelihood-of-injury assessment; (b) the KIA erred by disregarding the Japanese exporters' data in making findings on the exporters' production capacity and capacity utilization; (c) the KIA erred in its examination of the price and volume effects of the Japanese imports; and (d) the KIA erred by failing to examine other potential injury factors.[122] According to Japan, each of these alleged errors gives rise to a standalone violation of Article 11.3.[123] Japan also made a standalone claim under Article 6.8 that is similar in substance to the alleged error mentioned in (b) concerning the exporters' production capacity and capacity utilization.

7.51. We begin in this section with Japan's claims under Article 11.3 concerning price and volume effects, and other injury factors. We then examine Japan's claims under Articles 11.3 and 6.8 of the Anti-Dumping Agreement concerning capacity utilization.

7.5.2 Legal standard under Article 11.3 of the Anti-Dumping Agreement

7.52. Article 11.3 of the Anti-Dumping Agreement provides:

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[116] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.134.
[117] Korea's comments on Japan's response to Panel question No. 120, p. 70.
[118] Korea's comments on Japan's response to Panel question No. 120, p. 70.
[119] Korea's comments on Japan's response to Panel question No. 120, p. 70; response to Japan's question after the second meeting of the Panel No. 1, paras. 3-40.
[120] We note that Korea asserted that all evidence submitted in this dispute was properly on the record of the underlying investigation, but did not provide any particular discussion of Japan's concerns regarding exhibit KOR-57. Given the extensive response by Korea in relation to the other challenged items, we do not consider there to be any reasons to doubt the genuineness of exhibit KOR-57.
[121] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 23; OTI's final report, (Exhibit KOR-5.c (BCI)) p. 67.
[122] Japan's first written submission, paras. 5-8.
[123] Japan's first written submission, para. 4.

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.[124]

7.53. Japan's claims before us relate to the KIA's determination that the expiry of the anti-dumping duties would be likely lead to the recurrence of injury.[125] A determination that the expiry of the anti-dumping duties would likely lead to the recurrence of injury requires, in effect, the establishment of a link between the expiry of the anti-dumping duties and the likely recurrence of injury to the relevant domestic industry.[126] Although the parties used different terminology to describe such a link, we understand this general proposition to be common ground amongst the parties.[127] Korea took issue with Japan's description of this link as a "causal nexus" or "causal link", inferring that Japan was thereby contending for a "new causation analysis" in a sunset review.[128] Korea instead used the term "nexus".[129] In our view, the text "unless" and "would be likely to lead to" in Article 11.3 clearly presuppose a relationship of cause and (likely) effect between the expiry of the duty and the continuation or recurrence of injury.[130]

7.54. As the text of Article 11.3 shows, there is no prescribed methodology that authorities are required to follow in determining whether such a link exists.[131] More specifically, we agree with Korea that there is no legal requirement on authorities to follow the disciplines set out in Article 3 of the Anti-Dumping Agreement that govern the establishment of the causal link between dumping and injury in the original investigation.[132] This is because the injury assessment under Article 11.3 is different to that under Article 3. The assessment under Article 11.3 is not about whether dumping is causing injury[133], but is instead about whether the expiry of anti-dumping duties would be likely to lead to the continuation or recurrence of injury.[134] Thus, as both parties accept, the causal link between dumping and injury need not be established afresh in a sunset review.[135] Of course, this does not foreclose the ability for an interested party in a sunset review to seek to rebut the continued existence of a causal link between dumping and injury, by e.g. substantiating that continued dumping would not be likely to lead to a continuation or recurrence of injury if the anti-dumping duty were lifted.

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[124] Fn omitted.
[125] Japan's first written submission, para. 191.
[126] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 123.
[127] Korea's first written submission, para. 52; Japan's first written submission, para. 2.
[128] Korea's comments on Japan's response to Korea's question No. 3, pp. 9-10; first written submission, paras. 134 and 140.
[129] Korea's comments on Japan's response to Korea's question No. 3, pp. 9-10; first written submission, paras. 52 and 286.
[130] European Union's third-party submission, para. 9.
[131] Panel Report, *EU – Footwear (China)*, para. 7.157 (referring to Appellate Body Reports*, US – Corrosion-Resistant Steel Sunset Review*, paras. 124 and 149; and *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 105).
[132] Korea's first written submission, paras. 46 and 52. See also Panel Report, *EU – Footwear (China)*, para. 7.157; and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 274-280.
[133] Indeed, for the purposes of a sunset review, this causal link is assumed to have already been established in the original investigation. (Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 121; see also Panel Report, *EU – Footwear (China)*, para. 7.157; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 106-107).
[134] See, by analogy, Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 106-107. We recognize, as have past panels and the Appellate Body, that the disciplines and concepts in Article 3 on how to establish whether dumping is causing injury could provide guidance on the kinds of factors and evidence that authorities may seek to consider under Article 11.3 to produce a reasoned and adequate determination on the link between the expiry of anti-dumping duties and the likelihood of injury. (Panel Report, *EU – Footwear (China)*, paras. 7.158 and 7.333; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284). We note that both parties accept this point. (Korea's first written submission, para. 50; Japan's first written submission, paras. 62-63).
[135] Japan's response to Korea's question No. 3, para. 10; Japan's first written submission paras. 62-64; and Korea's first written submission, para. 140.

7.55. Despite the absence of a prescribed methodology in Article 11.3, authorities must conform to certain basic standards in reaching a determination in a sunset review. In particular, both parties agree that authorities are required to act with an "appropriate degree of diligence" in arriving at a "reasoned and adequate explanation" for the likelihood-of-injury determination.[136] The "appropriate degree of diligence" involves making an objective evaluation of the arguments and evidence submitted by interested parties to the review, conducting a "rigorous examination", and basing the determination on a sufficient factual foundation.[137] These requirements flow from the text of Article 11.3, which places the onus on the "authorities" to conduct a "review" and proactively reach a "determin[ation]".[138]

7.56. The onus on the "authorities" to conduct a "review" and reach a "determin[ation]" on the basis of information gathered in the process of examination under Article 11.3 implies an active role on the part of the authorities.[139] This implication is strengthened by the reapplication, through Article 11.4 of the Anti-Dumping Agreement, of the evidentiary and due process disciplines to the authorities' conduct of the review that were applicable in the original investigation.[140] This implication is also strengthened by reviews being contemplated to run for up to 12 months. Thus, authorities have a duty under Article 11.3 to conduct a sufficiently diligent investigation into, and solicitation of, relevant facts.[141] Both parties accept that if an interested party submits a relevant argument to the authorities and substantiates it with sufficient evidence, it is incumbent on the authorities to take that argument into account, as appropriate, in arriving at their determination.[142] Further, though an interested party must substantiate its case, its argumentation and evidence need not be perfect in all respects in order to warrant consideration by the authorities.[143] Rather, Article 11.3 assigns an "active rather than a passive decision-making role to the authorities", and thus places upon authorities "a duty to seek out relevant information and to evaluate it in an objective manner".[144] Consequently, if an authority identifies deficiencies in an interested party's case, it would ordinarily be incumbent on the authority to actively seek out pertinent information and clarify such shortcomings as appropriate to the investigation at hand.[145] We also agree with the general sentiment expressed by Korea that "[a]n interested party cannot merely raise a matter and expect the authorities to examine it without substantiating the argument with evidence, especially not if the relevant information is in the hands of that exporter".[146] In our view, it would be reasonable to expect only a limited or implicit analysis (including e.g. the authorities' dismissal of an argument) if the argument was raised without substantiating evidence.[147]

[136] Korea's first written submission, para. 41 (quoting Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 111; and *US – Oil Country Tubular Goods Sunset Reviews*, paras. 283-284); Japan's second written submission, para. 73 (also quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111).

[137] Panel Report, *EU – Footwear (China)*, para. 7.158; Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, paras. 111-112; *US – Oil Country Tubular Goods Sunset Reviews*, para. 180. See also Korea's first written submission, para. 47; Korea's opening statement at the first meeting of the Panel, para. 10; Japan's first written submission, para. 2; and Japan's opening statement at the first meeting of the Panel, para. 21.

[138] Korea's first written submission, paras. 41, 43, and 47; Japan's second written submission, para. 73. These basic standards also flow from the very nature of sunset reviews as an exception to what would otherwise be the expiry of the anti-dumping duties.

[139] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111. See also Korea's first written submission, para. 43.

[140] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 112-113.

[141] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 199. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.152 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602).

[142] Korea's response to Panel question No. 3(a) (where the specific context and legal provision in question makes such consideration appropriate); Japan's response to Panel question No. 3(a), para. 13.

[143] See, by analogy, Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.163; *EC – Fasteners (China)*, paras. 488 and 519; and Panel Reports, *Argentina – Poultry Anti-Dumping Duties*, para. 7.238; *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.92; and *Argentina – Ceramic Tiles*, para. 6.116.

[144] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 111 and 199.

[145] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 111 and 199. See also, Appellate Body Reports, *EU – PET (Pakistan)*, paras. 5.130 and 5.133; *US – Washing Machines*, para. 5.268; *US – Wheat Gluten*, paras. 53 and 55; *US – Anti-Dumping and Countervailing Duties (China)*, para. 344; and Panel Report, *China – Broiler Products*, para. 7.261.

[146] Korea's comments on Japan's response to Korea's question No. 10, p. 23.

[147] See, e.g. Panel Report, *EU – Fatty Alcohols (Indonesia)*, paras. 7.196 and 7.203-7.204.

7.57. We recall that not every error made or questionable inference drawn by an investigating authority in its treatment of a given matter or piece of evidence will necessarily rise to the level of a violation of an obligation of the WTO Agreements.[148] This is particularly relevant to Article 11.3, which is a single holistic provision that does not prescribe a specific methodology nor particular steps or analyses that must be undertaken by investigating authorities. Thus, even where there is a clear factual or analytical error by an authority in respect of one facet of its likelihood-of-injury determination, it is possible that the final conclusion could remain consistent with Article 11.3. A panel's evaluation of whether an investigating authority's determination is consistent with Article 11.3 requires an assessment of the totality of the evidence, inferences, and intermediary findings relied upon by the authority to arrive at its final conclusion.[149]

7.5.3 Japan's claim under Article 11.3 of the Anti-Dumping Agreement concerning price and volume effects

7.58. Japan challenges the KIA's conclusion that "it is highly likely that once the anti-dumping measures are terminated, a drop in the price of the product under investigation and an increase in imports will again cause material injury to the domestic industry".[150] Japan presents multiple grounds on which this conclusion is inconsistent with Article 11.3 of the Anti-Dumping Agreement.[151] We begin our analysis with Japan's contention that this conclusion reflects a failure to properly analyse the likely consequences of the drop in the price of Japanese imports of the dumped products as a result of the removal of the anti-dumping duties (the "Japanese price drop").

7.59. Japan contends that the KIA's conclusion quoted above rests on a defective analysis of the likely consequences of the Japanese price drop. Japan focuses on the KIA's intermediate finding that:

> 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.[152]

7.60. As we understand it, Japan presents three main arguments in contending that this intermediate finding lacks reasoning and is unsupported by positive evidence[153], namely that the KIA erred by:

a. considering that the Japanese price drop would weaken the price competitiveness of the domestic like products[154];

b. considering that the Japanese price drop would lead to an increase in the volume of Japanese imports into Korea[155]; and

[148] See para. 7.45 above.
[149] By analogy, see Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 133-134. See also Panel Report, *EC – Fasteners (China)*, para. 7.359.
[150] Japan's first written submission, para. 148 (referring to KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 23; and OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67). As we have explained, we generally refer to the unredacted Korean versions of these exhibits, even where Japan cited the redacted Japanese versions.
[151] Japan's first written submission, paras. 7 and 151; second written submission, paras. 161-168.
[152] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 22; OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67; and Japan's first written submission, paras. 151 and 158-159.
[153] Japan's first written submission, para. 151.
[154] Japan's first written submission, paras. 158, 164, and 166; second written submission, paras. 387-388.
[155] Japan's first written submission, paras. 151, 166, and 171-172; second written submission, paras. 336 and 355-359.

c. failing to account for differences in the levels of "general-purpose steel"[156] and "special steel"[157] in the product mixes of the various countries at issue, given that these product types would have differing effects on the prices of domestic like products.[158]

7.61. We address each of these arguments in turn. In evaluating these arguments, we are cognisant of Korea's point that the KIA's likelihood-of-injury determination under Article 11.3 was based on multiple intermediate findings and considerations arising from the interaction between various pieces of evidence.[159] We agree with Korea that it is important to avoid examining certain pieces of evidence or intermediary findings in isolation from the overall body of reasoning that supports the KIA's final conclusion.[160] To the extent that Japan demonstrates that there are errors or flaws in the KIA's assessment of the consequences of the Japanese price drop, we examine holistically whether such errors rise to the level of a violation of Article 11.3 in section 7.5.3.4 in light of the totality of evidence and other intermediary findings.

7.5.3.1 Whether the KIA erred by finding that the Japanese price drop would weaken the price competitiveness of the domestic like products

7.62. Japan contends that Japanese prices would still be "substantially higher than other products (and particularly, higher than the domestic like products)" upon the lifting of the anti-dumping duties.[161] According to Japan, therefore, "the fact that [Japanese] prices fall somewhat does not sufficiently indicate that they have a negative impact on the price of the domestic like products".[162]

7.63. According to Korea, "[t]he removal of the duties would automatically mean that import prices would decrease at least equal to the level of the duty", and the KIA "found that this would of course put additional pressure on domestic prices as well".[163] For Korea, this was the "logical conclusion" in light of the KIA's examination of prices[164], as well as the situation that had prevailed prior to the imposition of anti-dumping duties[165] and the totality of other intermediate findings by the KIA, which together "supported the reasonable conclusion that removal of the duties would likely lead to a continuation of dumping and a recurrence of injury".[166]

7.64. We examine the parties' arguments and rebuttals in greater detail below. We begin with a brief overview of the relevant background, record evidence, and findings by the KIA.

7.65. In their application for the third sunset review, the applicants stated that "the main deciding factor for the purchase of Product Under Investigation is *the price*".[167] They explained that "during the term when anti-dumping measures have been implemented from 2004 up to the present, [they] have proactively made efforts *to improve competitiveness* at various levels … in order to deal with … a large volume *of low price* imported products".[168] They further explained that, during the

[156] In this Report, our use of the term "general-purpose steel" relates to Japan's definition for this term. (Japan's first written submission, para. 27 and fn 17). For the avoidance of doubt, our use of the term is for convenience only, and does not imply that we have reached a view on the utility of this term. In particular, our use of the term is without prejudice to any findings that we may reach on the existence, relevance, or scope of a category of SSBs described as "general-purpose steel".
[157] See ibid.
[158] Japan's first written submission, paras. 164-167; second written submission, para. 350.
[159] Korea's first written submission, para. 6; second written submission, paras. 29, 37, and 185; and response to Panel question No. 2.
[160] Korea's first written submission, para. 37; second written submission, paras. 37 and 106; responses to Panel question Nos. 2, 6(b)(iv), 6(d)(iv), and No. 98, paras. 148-149; and common response to Panel questions after the second meeting with the Panel, para. 2.
[161] Japan's second written submission, para. 387.
[162] Japan's second written submission, para. 387. See also first written submission, paras. 158, 160(c), 160(d), 164 (including the cross-reference to paras. 110(g) and 111), and 166; and responses to Panel questions No. 15, para. 85, and No. 34, para. 193.
[163] Korea's second written submission, paras. 185 and 227-229.
[164] Korea's first written submission, paras. 247-248 and 263-265; second written submission, paras. 185 and 227-229; and response to Panel question No. 64(a).
[165] Korea's second written submission, para. 238.
[166] Korea's second written submission, para. 29.
[167] Application, (Exhibit JPN-4.b), p. 46. (emphasis added)
[168] Application, (Exhibit JPN-4.b), pp. 2-3. (emphasis added)

period of review (POR), there had been an "*inevitable price reduction* of domestic products due to competition with products from India and other countries that are imported at *a low price*".[169]

7.66. According to the applicants' data, average Japanese prices in 2015 were [[***]] higher than those of other imports and the domestic like products.[170] However, the applicants believed that this was because their data additionally encompassed "products excluded from the anti-dumping measures and high-quality special-purpose steel".[171] The applicants anticipated that the Japanese prices would "change"[172] and become "significantly lower"[173] once the data were limited to the products subject to anti-dumping duties.

7.67. The applicants also explained in their application that "stainless steel bars, which is Product Under Investigation have significantly different prices depending on the grades of steel".[174] However, with respect to prices within a given steel grade, the applicants stated at the public hearing that "there is virtually no price difference when comparing 'Apples to Apples 304' steel grades", and "there are no price differences between domestic products and products from Japan and India, when selling the same steel grades of 304 and [316]".[175] A Korean consumer speaking in support of the applicants during the public hearing also explained that:

> Unlike IT-related electronic products whose price can be differentiated according to their quality characteristics, because stainless steel bars can be used when manufactured based on internationally agreed specification, products manufactured within such specification whether produced in Japan or India, will have no significant difference in quality, and thus *price has an absolute effect in deciding whether to purchase the product*. In particular, steel grades of 304 and 316, which are general purpose steel grades that account for most of the demand, are *even more sensitive to price*.[176]

7.68. According to this piece of record evidence, there is price-sensitivity for all SSBs, even if certain grades like 304 and 316 are "even *more* sensitive". We are not aware of any record evidence in which either the applicants or the KIA stated that price was limited to being the most important factor in purchasing decisions for "basic grades" only.[177]

7.69. The Japanese exporters contended that they shipped "high-value products" at higher prices, and could not compete with low-priced products from other countries in the Korean market.[178] They rejected the proposition that they would resume importing high volumes of low-priced products into the Korean domestic market, particularly in view of the aggressive price competition from those low-priced products.[179]

7.70. Turning to the KIA's findings in the third sunset review, the KIA found the "price competition" in 2015 to be (KRW/tonne) [[***]] for dumped imports measured cumulatively, [[***]] for

[169] Application, (Exhibit JPN-4.b), pp. 25-26. (emphasis added)
[170] Excerpt of applicants' statement of opinion after the public hearing, (Exhibit KOR-40 (BCI)), p. 2; Application, (Exhibit JPN-4.b), pp. 20 and 25.
[171] Application, (Exhibit JPN-4.b), pp. 20 and 25. See also Excerpt of applicants' statement of opinion after the public hearing, (Exhibit KOR-40 (BCI)), p. 2.
[172] Application, (Exhibit JPN-4.b), p. 15.
[173] Excerpt of applicants' statement of opinion after the public hearing, (Exhibit KOR-40 (BCI)), p. 2.
[174] Application, (Exhibit JPN-4.b), p. 14.
[175] Minutes of public hearing (24 November 2016), (Exhibit KOR-19.b (BCI)), p. 31 (representative of applicants, Ki-Seok You, accountant). We have corrected the clerical error in the translated version, which referred to grade "306" rather than grade "316" as per the original.
[176] Minutes of public hearing (24 November 2016), (Exhibit KOR-19.b (BCI)), pp. 20-21. (emphasis added)
[177] See paras. 7.65 and 7.67 above, and para. 7.73 below.
[178] Japanese exporters' opinion regarding injuries, (Exhibit JPN-10.b (BCI)), pp. 9-10; Japanese exporters' post-hearing opinion, (Exhibit JPN-16.b (BCI)), p. 6; and Japanese exporters' opinion regarding OTI's revised interim report, (Exhibit JPN-18.b), p. 2.
[179] Japanese exporters' opinion regarding injuries, (Exhibit JPN-10.b (BCI)), pp. 16-17. See also Minutes of public hearing (24 November 2016), (Exhibit KOR-19.b (BCI)), pp. 30-31 (Gwang-yeon Hwang, attorney representing the exporters); and Japanese exporters' opinion regarding OTI's revised interim report, (Exhibit JPN-18.b), p. 2.

Japanese imports, [[***]] for Indian imports, [[***]] for imports from other countries, and [[***]] for domestic like products.[180] The KIA determined that:

> - During the period of review in which anti-dumping duties were imposed, the sales prices of the dumped imports were lower by KRW [[***]] – [[***]] per ton than that of like products.
>
> - If no anti-dumping duties were levied, the sales price of the dumped imports would have been lower by KRW [[***]] – [[***]] per ton than that of like products.
>
> - Once the anti-dumping measures are terminated, this would bring a drastic fall in the price of the dumped imports from Japan (KRW [[***]] per ton in 2015), which would also result in large recovery of price competitiveness in the domestic market.[181]

7.71. We understand that the figure of KRW/tonne [[***]] in the final bullet point in this extract represents the amount of anti-dumping duty in the average Japanese resale price of KRW/tonne [[***]] in 2015.[182] Thus, the KIA's finding in the final bullet point pertains to an average Japanese resale price of KRW/tonne [[***]].[183] As mentioned earlier, the KIA proceeded to find (*inter alia*) that:

> Once the anti-dumping measures are terminated, it is predicted that a deep fall in the price of the dumped imports (△ [[***]]% for Japanese products) … will lead to a growth in exports to Korea and weaken the price competitiveness of the like products.[184]

7.72. We likewise understand that the reference to a [[***]] drop in the price of Japanese imports represents the aforementioned figure of KRW/tonne [[***]], i.e. the amount by which the average Japanese resale price would be lower in 2015 if the anti-dumping duties were removed.[185] In conjunction with other intermediary findings[186], the KIA proceeded to conclude 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 the volume of dumped imports will lead to recurrence of material injuries to the domestic industry".[187]

7.73. Korea explains[188] 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

[180] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 34.
[181] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 63.
[182] Korea's response to Panel question Nos. 64(a) and 64(b); second written submission, fn 130. See also OTI's final report, (Exhibit KOR-5.c (BCI)), p. 63, table 42.
[183] Korea's response to Panel question No. 64(b); second written submission, fn 130.
[184] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.
[185] Korea's second written submission, paras. 124-125 and fn 130; response to Panel question No. 69. We understand that, since the intermediate finding pertained to the 2015 average Japanese resale price in particular (OTI's final report, (Exhibit KOR-5.c (BCI)), p. 63), the subsequent correlative finding in the "Overall Evaluation" section was likewise based on this 2015-specific finding. (Korea's second written submission, para. 160; response to Panel question No. 6(c)). We note that the KIA referenced only the 2015 price levels in the "price competition" column of the table 12 in the OTI's final report (OTI's final report, (Exhibit KOR-5.c (BCI)), p. 34; see also Korea's response to Panel question No. 40; and second written submission, para. 229). Korea also stated that "the most relevant trend should be the trend that is the most recent in time" when explaining why the KIA focused on the slight [[***]] in the volume of dumped imports from 2014-2015 than the larger overall [[***]] in volume over the POR 2012-2015. (Korea's response to Panel question No. 66).
[186] We discuss the significance of these below in section 7.5.3.4.
[187] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.
[188] Our depiction of Korea's description of the KIA's findings in this Report is for convenience only and is without prejudice to any objections by Japan that this depiction encompasses impermissible *ex post* reasoning. (See, e.g. Japan's second written submission, para. 21). For the reasons set out in section 7.3.3, we proceed on the basis of Korea's description in this regard and limit our assessment of Japan's objections in this dispute concerning *ex post* rationalizations to those aspects in which it is specifically necessary to resolve the dispute.

decisions.[189] According to Korea, the importance of price in purchasing decisions arises from the interchangeability of certified products within a given grade.[190] In particular, Korea explains that the KIA found that competition in the SSB market hinged on obtaining certification that a given product type satisfied the criteria for a certain grade, and once such certification was obtained, competition generally occurred amongst SSBs within a given grade, i.e. on a grade-by-grade basis.[191] According to Korea, the KIA "repeatedly confirmed that SSB products with the same grade are being used interchangeably in the market irrespective of their origin".[192] Once certification for a given grade is obtained, "there is no substantial difference to the quality of products that are produced within such standards, be it Japanese or Indian"[193], with "transactions … made based on internationally-recognized standard[s]".[194] Thus, Korea explains that "[t]he Korean authorities obviously considered that [the] termination of the anti-dumping duties would lead to improved price competitiveness of the dumped imports on [a] grade-by-grade basis".[195]

7.74. However, Korea also explains that perceptions of quality, credibility, and technical superiority were found by the KIA to lead to price differences.[196] Specifically, the KIA found 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".[197]

7.75. We turn now to the parties' arguments and rebuttals, and to our evaluation. 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.[198] For Japan, this is because, even without the anti-dumping duties, Japanese prices would remain significantly higher than the prices of the domestic like product.[199] Given the price sensitivity of the SSB market, Japan argues that the KIA's determination failed to articulate how prices at a significantly higher level than the prices of domestic like products could weaken the price competitiveness of domestic like products.[200]

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[189] For a detailed discussion on this point, see Annex A-3 (Interim Review), paras. 2.9-2.30. In its first written submission Korea "recount[ed] … relevant facts and findings reached by the Korean authorities in the original investigation and the previous reviews" (Korea's first written submission, para. 60), which included the finding in the second sunset review that "price was the most important factor for the consumers in making a decision to purchase". (Ibid. paras. 84-85 (quoting OTI's final report (second sunset review), (Exhibit KOR-11.b (BCI)), p. 9)). Korea again quoted this passage when providing pinpoint references about the "repeated confirmations" made by the KIA with respect to the conditions of competition for SSBs in the Korean market. (Korea's response to Panel question No. 6(a)). 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 at paras. 7.74, 7.78, and 7.80 below.

[190] Korea's responses to Panel question Nos. 20(b) and 64(c)(ii). 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.

[191] Korea's first written submission, paras. 56-59; second written submission, paras. 21 and 170; response to Japan's question after the second meeting with the Panel No. 1, para. 15. We note that Korea also contended that, for some grades, there can be inter-grade competition. (Korea's second written submission, paras. 21 and 98). For a detailed discussion on this point, see Annex A-3 (Interim Review), paras. 2.31-2.41. Our findings in this section are without prejudice to that contention.

[192] Korea's responses to Panel question Nos. 6(b) and 20(f).

[193] Korea's response to Panel question No. 37 (quoting Consumer's summary of the statement at public hearing, (Exhibit JPN-12.b), and referring to Minutes of public hearing (24 November 2016), (Exhibit KOR-19.b (BCI)), pp. 20-21).

[194] Korea's response to Panel question No. 20(f).

[195] Korea's response to Panel question No. 64(c).

[196] Korea's responses to Panel question Nos. 6(d), 20(b), and 20(e).

[197] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 55.

[198] Japan's first written submission, para. 151: "Japan considers that there is a lack of reasoning and positive evidence in particular with regard to … (ii) the finding that the termination of anti-dumping duties would lead to a deep fall in the price of the product under investigation and then weaken the price competitiveness of the domestic like products."

[199] Japan's second written submission, paras. 387-388. See also first written submission, paras. 160(c) and (d), and 164 (including the cross-reference to paras. 110(g) and 111).

[200] Japan's second written submission, paras. 194-196 and 387-388. See also Japan's responses to Panel question No. 15, para. 85, No. 19(b), para. 108, No. 19(c), para. 113, No. 20(b), para. 121, and No. 34, para. 193. We recognize that some of Japan's arguments to which we refer in this section pertain to the dynamics of price competitiveness *during the POR*, as opposed to the dynamics upon the *removal of the anti-dumping duty*. We take such arguments into account only to the extent that they shed light conceptually on the role of price competition in the Korean SSB market. We agree with Korea that comparative price-related

For Japan, the presence of a large volume of imports from other countries at significantly lower prices would be a more likely source of price pressure and would effectively nullify any adverse effects that significantly higher Japanese prices could have on domestic like products.[201]

7.76. We agree with Japan that it is not obvious how prices at a significantly higher level than the prices of domestic like products would weaken the price competitiveness of domestic like products in the context of a price-sensitive market. This is particularly so given 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".[202]

7.77. Thus, we disagree with Korea that the "automatic" price drop as a result of the removal of the anti-dumping duties would "of course"[203], "necessarily"[204], or "undoubtedly"[205] lead to price pressure on domestic like products, thereby weakening their price competitiveness. Rather, the price drop would leave average Japanese resale prices in 2015[206] at a level almost [[***]][207] higher than domestic like products and other countries' imports in a price-sensitive market. On its face, the KIA's finding that Japanese prices would weaken the price competitiveness of domestic like products after the price drop is inconsistent with the uncontested facts that the SSB market is price-sensitive and the average Japanese resale price in 2015 would remain almost [[***]] higher after the price drop.[208] For the KIA to engage in an "unbiased and objective" evaluation of the facts in the sense of Article 17.6(i) of the Anti-Dumping Agreement, we would expect the KIA to address and reconcile the apparent contradiction between its finding on this point and these uncontested record facts.[209]

7.78. Korea makes the point that price overselling does not imply a lack of competition, and higher on-average import prices can exert detrimental price pressure on lower on-average domestic prices.[210] We do not exclude this possibility. However, we agree with Japan that the KIA never explained how price overselling could weaken the price competitiveness of domestic like products in the present sunset review.[211] Indeed, Korea appears to accept that the KIA never undertook such

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assessments during the POR may be of limited value where they encompass prices that include the anti-dumping duty as a pricing component. (Korea's response to Panel question No. 19(a)(i)).

[201] Japan's first written submission, paras. 158, 160, and 162; second written submission, paras. 304-305 and 395; and response to Panel question No. 18(b), para. 100.

[202] For a detailed discussion on this point, see Annex A-3 (Interim Review), paras. 2.46-2.54. At para. 121 of its first written submission, Korea states in respect of the original "likeness" finding that "[t]his original finding was repeatedly and consistently confirmed in the first, second, and third sunset reviews", and that this original finding incorporated the consideration that "consumers prefer low-priced products". (OTI's final report (original investigation), (Exhibit KOR-9.b (BCI)), p. 48). See also Korea's response to Panel question No. 6(a) (quoting OTI's final report (second sunset review), (Exhibit KOR-11 (BCI)), p. 9; and OTI's final report, (Exhibit KOR-5.c (BCI)), p. 9 and fn 17 (relying on the "like products" finding in the original investigation)). See further Korea's response to Panel question No. 5: "[i]n the third sunset review, therefore, the KTC confirmed 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."

[203] Korea's second written submission, para. 229.

[204] Korea's second written submission, para. 29.

[205] Korea's opening statement at the first meeting of the Panel, para. 24.

[206] We focus on the 2015 prices because these were the prices explicitly referred to by the KIA when evaluating the consequences of the price drop arising from the lifting of the anti-dumping duty. (OTI's final report, (Exhibit KOR-5.c (BCI)), p. 63).

[207] The 2015 average Japanese resale price (KRW/tonne [[***]]), minus an amount representing the anti-dumping duty (KRW [[***]]), results in KRW/tonne [[***]] (that we refer to as the "Japanese price without the duty"). The Japanese price without the duty is almost [[***]] higher than the 2015 average Korean resale price of KRW/tonne [[***]]. Viewed from the inverse perspective, the Korean resale price is around [[***]] lower than the Japanese price without the duty. (Korea's response to Panel question No. 64(b); Japan's response to Panel question No. 64(b), para. 328). Given the KIA's premise that price was the most important factor in purchasing decisions, and that consumers prefer low price, we generally reference the Japanese price without the duty as being almost [[***]] *higher* in 2015 than both the equivalent Korean resale price and the equivalent third-country import resale price in 2015. We recognize the inverse perspective that average Korean and third-country import resale prices were around [[***]] *lower* than the Japanese price without the duty, and we treat these as effectively the same, namely a reflection of difference in price of KRW [[***]] *vis-à-vis* the Korean resale price and KRW [[***]] *vis-à-vis* the third-country import resale price. The choice of reference point, and the resulting representation of percentage difference, does not affect the outcome of our findings.

[208] Japan's second written submission, para. 387.

[209] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93 and 97.

[210] Korea's response to Panel question No. 64(b); second written submission paras. 179-181.

[211] Japan's second written submission, para. 198.

an analysis.[212] For the avoidance of doubt, we do not consider that a price depression/suppression analysis is legally *required* under Article 11.3 of the Anti-Dumping Agreement.[213] Rather, in our view, it is the *particular circumstances* of this case that would warrant addressing the fact that Japanese prices would remain almost [[***]] higher after lifting the anti-dumping duties. To reiterate, these circumstances are as follows. First, under the approach adopted by the KIA to determine the likelihood-of-injury, significance was placed on what the average Japanese resale price in 2015 would be upon lifting the anti-dumping duties, and whether *that* price would adversely affect domestic price competitiveness.[214] Second, the KIA's findings rested on the premise that price was the most important factor in purchasing decisions and that consumers tended to prefer low prices.[215] Third, the record shows that the applicants themselves described *low* prices as the source of price pressure arising from imports.[216] In view of these circumstances, as part of an "unbiased and objective" evaluation of the facts, we would expect the KIA to address how domestic price competitiveness would be weakened by Japanese prices that would remain almost [[***]] higher even if the anti-dumping duties were lifted.

7.79. Korea suggests a number of ways in which the KIA did indeed address this apparent contradiction. These are as follows. First, Korea explains that the KIA found that average Japanese prices could be higher due to the perception that Japanese products were better in terms of quality and credibility.[217] Second, Korea explains that the "slight difference" in the proportions of product grades in the respective product mixes of Korea and Japan could explain differences in average prices[218], and that the KIA reached its findings on price competitiveness on a grade-by-grade basis.[219] Third, Korea explains that the "price gap" between higher-priced Japanese imports and lower-priced domestic like products is not indicative of a lack of competitive overlap between the two due to the fact that all relevant producers could and did produce the same range of products.[220] Fourth, Korea explains that the Japanese prices would be "relatively close" to the price of domestic like products upon the lifting of the anti-dumping duty, and that "the complex law of the market" would result in even lower prices through "market interplay", in tandem with the additional downward price pressure from Indian imports.[221] We assess each of these in turn.

7.80. We accept Korea's contention that the KIA did not find price to be the only factor affecting purchasing decisions.[222] Rather, the KIA found that "within the same steel grade, Korean and

[212] Korea's response to Panel question No. 19(c)(ii). In response to the Panel's question "[i]s there any analysis of price suppression or price depression in the Korean authorities determination?", Korea responded "no specific price undercutting, suppression and/or depression analyses and findings were made, as they were never needed". Korea proceeded to list certain "price-based findings" made by the KIA, but none of these address how domestic price competitiveness would be weakened by Japanese prices that remained almost [[***]] higher even after the duties were lifted. (See also Korea's second written submission, para. 92).

[213] In this regard, we agree with Korea that Article 11.3 of the Anti-Dumping Agreement does not *prescribe* this kind of price effects analysis as a matter of law. (Korea's second written submission, para. 92). We also agree that, when an authority engages in a price-related inquiry under Article 11.3, it stands to reason that such an inquiry would be directed at the effect of (lifting) the anti-dumping duty on domestic prices as part of the overall forward-looking analysis of what would likely happen if the duty were to be terminated. (Korea's second written submission, paras. 103, 106, and 122).

[214] For a detailed discussion on this point, see Annex A-3 (Interim Review), paras. 2.55-2.68. This is apparent from the plain text of pp. 63-67 and table 42 of the OTI's final report, (Exhibit KOR-5.c (BCI)), in which the KIA examined the future impact of Japanese imports on domestic price competitiveness by deducting the amount of the anti-dumping duty from the contemporaneous average Japanese resale price. Our understanding also accords with Korea's description of the KIA's approach in this regard. (Korea's second written submission, paras. 124, 185, and 240; first written submission, paras. 102 and 239-240; and response to Panel question No. 69).

[215] See paras. 7.73 and 7.76 above.

[216] See paras. 7.65-7.67 above. It is noteworthy that the applicants excluded Japanese exporters from their description of contemporaneous competitors in their application to initiate the third sunset review. (Application, (Exhibit JPN-4.b), pp. 14-15 and 25-26).

[217] Korea's response to Panel question No. 19(c)(iii). See also second written submission, paras. 81 and 178-181; and responses to Panel question Nos. 6(d), 19(b), 20(f), and 64(c) (cross-referencing the responses to Panel question Nos. 19 and 20).

[218] Korea's responses to Panel question Nos. 20(e) and 20(f).

[219] Korea's response to Panel question No. 64(c) (cross-referencing the response to Panel question No. 20).

[220] Korea's second written submission, paras. 233-234 and 242 (referring to Japan's response to Panel question No. 64(c), para. 329).

[221] Korea's response to Panel question Nos. 19(a) and 64(d); second written submission, para. 125.

[222] Korea's response to Panel question Nos. 19(c)(iii) and 20(e)(v); second written submission, para. 178.

Japanese products have high credibility in quality and Indian and Chinese products have high price competitiveness".[223] Thus, we accept Korea's point that "that cheaper priced products will [not] always win the buyer".[224] However, to the extent that Korea relies on this finding by the KIA to justify how higher Japanese prices could weaken the price competitiveness of lower-priced domestic like products[225], we do not consider that it supports Korea's argument. The KIA's finding indicates that both Japanese *and* Korean products command a price premium within a given grade. It does not suggest that Japanese products command a price premium over *Korean* products within a given grade due to perceived differences in quality or other features.[226] The KIA's findings concerning price premiums and price discounts for products of different origin do not shed light on how Japanese prices might affect Korean prices, since they were both found by the KIA to command a premium. Accordingly, the fact that Japanese products might command a price premium does not explain how the price competitiveness of *Korean* producers would be weakened by Japanese prices that remain significantly higher. We agree with Japan that Korea's argument in this regard goes beyond the analysis undertaken by the KIA in the review and reflects *ex post* reasoning.[227] To rely on such reasoning to uphold the KIA's determination would effectively lead the Panel to engage in a *de novo* review.

7.81. We accept Korea's contention that the difference in average prices could be explained by a difference in the proportions of product grades in the countries' respective product mixes.[228] We also accept that, if a weakening in price competitiveness were to be demonstrated on a grade-by-grade basis, the difference in each country's *average* prices in the Korean market may become irrelevant. This is because an assessment of price competitiveness on a grade-by-grade basis could remove the distortion that might arise if one country's product mix is comprised of a higher proportion of grades or product types that occupy a higher price bracket.[229] However, we do not understand that the KIA did, in fact, undertake such an assessment. On one hand, 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*".[230] On the other hand, Korea tells us that the KIA did not make any adjustments in its price-related analyses to account for differences in product mixes, grades, or product types.[231] From our reading of the determination,

[223] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 55.

[224] Korea's response to Panel question No. 19(c).

[225] Korea's responses to Panel question No. 19(b)(iii), fn 87, No. 19(c)(iii), fn 92, No. 20(f)(vii), fn 102, and No. 31(iii), fn 125; second written submission, para. 80 and fn 79. More generally, see Korea's responses to Panel question Nos. 20(e)(v), 20(f)(v)-(vi), and 64(b); and second written submission, paras. 81 and 178-181.

[226] We note that some of Korea's submissions in the present proceedings appear to accord with our understanding in this regard. For instance, Korea submitted (as relevant findings from the second sunset review) that "in terms of quality, Japan and Korea have received outstanding reviews" and that "[t]he 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'" and "[i]n fact, it was confirmed that price was the most important factor for purchasers' buying decisions". (Korea's first written submission, para. 85). Along similar lines, Korea stated that "[b]ecause 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". (Korea's response to Panel question No. 19(a) (italics original; underlining added)).

[227] Japan's second written submission, paras. 195-197.

[228] Korea's responses to Panel question Nos. 20(e) and 20(f).

[229] For the avoidance of doubt, we do not make any findings concerning the link or correlation between price and grade through this observation. Our observation simply follows from Korea's assertion that "the slight difference in the proportions of product grades when looking at averages" may "explain some of the price range differences", and that "these are averages and that such averages may reflect a slight difference in the proportion of products in the basket". (Korea's responses to Panel question Nos. 20(e) and 20(f)). We also do not consider that a grade-by-grade or model-by-model assessment would be legally *required* under Article 11.3 of the Anti-Dumping Agreement. We simply recognize that such an assessment could be useful if a comparison of price averages is affected by differences in product mixes.

[230] Korea's response to Panel question No. 64(c)(iv). (emphasis added)

[231] Korea's response to Panel question No. 19(a)(i)-(ii). According to Korea, this was because price comparability is "naturally ensured for SSB products" since all relevant producers could and did produce the same range of products due to the high adaptability of SSB production facilities. (Korea's second written submission, para. 99; responses to Panel question Nos. 18(a) and 29(ii)). Moreover, the KIA found that the basket of goods sold in Korea by the various exporters and producers "largely overlapped". (Korea's response to Panel question No. 8). See also Korea's responses to Panel question Nos. 6(d) ("same range of models in not too dissimilar proportions"), and No. 7; and comments on Japan's response to Korea's question No. 2, p. 8 ("as found by the Korean authorities during the review … [the] facts on the record … revealed a relatively constant and broad overlap in all types of SSB models during the POR").

the KIA examined the impact of removing the anti-dumping duties on domestic price competitiveness by reference to the *average* Japanese resale price across all covered SSBs and not based on the price within a given grade.[232] Japan shares this understanding.[233] Against that background, we are unwilling to speculate as to whether or how a difference in respective product mixes might explain the apparent contradiction in finding that domestic price competitiveness would weaken as a result of lifting the anti-dumping duties despite the average Japanese resale price remaining significantly higher in a price-sensitive market. To engage in such speculation to uphold the KIA's determination would effectively lead the Panel to engage in a *de novo* review.

7.82. Korea seems to argue that the "price gap" between higher-priced Japanese imports (even upon lifting the anti-dumping duties) and lower-priced domestic like products is irrelevant because there continued to be a "competitive overlap" between the two.[234] According to Korea, this is because all relevant producers could, and did, produce the same range of product types and models, and therefore they all competed over the same demand and were in competition with one another. We accept that such a "price gap" may become irrelevant when the focus is on what producers *could* produce, particularly if production can shift in response to demand for different product types and between product types that command different prices. We also accept that what producers *could* produce in the future may be a useful consideration as part of the forward-looking analysis under Article 11.3 of the Anti-Dumping Agreement. However, this was not the basis on which the KIA reached its finding that domestic price competitiveness would be weakened if the anti-dumping duties on Japanese imports were terminated. This finding was instead reached by deducting an amount representing the anti-dumping duty from the average Japanese resale price in 2015 and by examining whether the resulting figure would cause domestic price competitiveness to weaken.[235] This finding was not based on the prices of what the Japanese exporters *could* produce, but on the average resale price of what they *did* produce and ship to Korea, minus an amount representing the anti-dumping duty. To that extent, we would agree with Japan that an explanation of weakened domestic price competitiveness on the basis of what Japanese exporters *could* produce in the future is not present in the KIA's determination and would therefore reflect *ex post* reasoning.[236] Moreover, we are unwilling to accept that this might have been an "implicit" consideration of the KIA without any evidence demonstrating this. Rather, we agree with Japan that it is not obvious how the mere ability to produce a product in and of itself demonstrates that this product would be competitive in the market, and hence how such an ability would necessarily weaken domestic price competitiveness.[237]

7.83. Korea also appears to contend that removing the anti-dumping duties could lead to a reduction in Japanese prices that is ultimately larger than the simple quantum of the duties, and this would also weaken domestic price competitiveness.[238] Korea's contention is based on a confluence of variables that may produce a larger reduction in Japanese prices and result in additional price pressure through "market interplay"[239] and the "complex law of the market".[240] The KIA's finding that links the removal of the anti-dumping duties to the weakening of domestic price competitiveness is based on the deduction of an amount representing the anti-dumping duty from the average

[232] OTI's final report, (Exhibit KOR-5.c (BCI)) pp. 63 and 67. The examination focused (at ibid. p. 63) on the deduction of KRW [[***]], which was the amount of anti-dumping duty in the 2015 average Japanese resale price of KRW [[***]]. (Korea's response to Panel question No. 69; see also second written submission, para. 122).

[233] Japan's second written submission, para. 350.

[234] Korea's second written submission, paras. 233-234 and 242 (referring to Japan's response to Panel question No. 64(c), para. 329). See also responses to Panel question Nos. 19(a)(ii)-(iii) and 64(c)(i)-(ii).

[235] See paras. 7.71-7.72 above. As Korea explains it, the KIA made the Japan-specific finding that "[t]here would be a drastic fall in the prices of dumped imports from Japan *if duties were removed (i.e. at least by 15%)*, which *would cause* them to be increasingly price competitive in the market". (Korea's second written submission, para. 240 (quoting OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 57-59 and 63 (emphasis added))). Korea also explained that the figure of KRW/tonne [[***]] in the KIA's analysis "stands for the difference between KRW [[***]] and KRW [[***]]", with KRW [[***]] representing the average resale price of the Japanese dumped imports in 2015. (Korea's response to Panel question No. 69).

[236] Japan's second written submission, para. 280.

[237] Japan's second written submission, para. 283. Our remarks in this regard pertain only to an alleged link between weakened domestic price competitiveness and the ability to produce, and compete effectively, in all applicable product lines, and do not imply a broader finding on the conditions of competition generally.

[238] Korea's responses to Panel question Nos. 19(a)(i) and 64(d); second written submission, paras. 124-125.

[239] Korea's response to Panel question No. 64(d).

[240] Korea's response to Panel question No. 19(a)(i).

Japanese resale price.[241] The KIA's finding does not encompass an explanation of other variables that interact in a particular way and thereby cause a further reduction in Japanese prices that would, in turn, exert additional price pressure on domestic like products. While we do not discount the possibility that an authority could reach such a finding, we are unwilling to read into the KIA's determination an "implicit" finding or inference[242] that rests on the proposition that a complicated confluence of variables ("the complex law of the market") causes a particular outcome. There is no evidence that the KIA made that implicit finding or inference[243], and therefore to rely on such reasoning to uphold the KIA's determination would effectively lead the Panel to engage in a *de novo* review.

7.84. For the foregoing reasons, we reject the potential ways advanced by Korea in which the KIA addressed the apparent contradiction in its finding that, in the context of a price-sensitive market, domestic price competitiveness would be weakened by Japanese prices that remain almost [[***]] higher upon the lifting of the anti-dumping duties. As a factual matter, we are not convinced that the KIA sought to address this apparent contradiction as part of arriving at its determination. While we do not exclude the possibility that Korea's arguments before us *could* reconcile this apparent contradiction, we agree with Japan that these "go well beyond" the analysis undertaken by the KIA in its determination and that they represent *ex post* reasoning.[244] As we have stated, to rely on such reasoning to uphold the KIA's determination would effectively lead the Panel to engage in a *de novo* review.

7.85. Given that the KIA did not seek to address this apparent contradiction, we consider that the KIA failed to engage in an "unbiased and objective" evaluation of the facts when concluding that domestic price competitiveness would be weakened by the Japanese pricing level resulting from the removal of the anti-dumping duty from the average Japanese resale price. We address in section 7.5.3.4 below whether this failure rises to the level of a violation of Article 11.3 of the Anti-Dumping Agreement.

7.86. Japan additionally contends that the KIA should have sought to address this apparent contradiction due to the large presence of low-priced imports from other countries in the Korean market.[245] For Japan, a weakening in domestic price competitiveness would be unlikely to arise from higher-priced Japanese imports and would be more likely to arise from these lower-priced third-country imports.[246] We have already found that the KIA's conclusion on the relationship between the drop in Japanese prices upon the termination of the duties and a weakening of domestic price competitiveness did not reflect an "unbiased and objective" evaluation of the facts. Therefore, we do not consider it necessary for the effective and prompt resolution of the dispute to address this additional contention of Japan, nor Korea's rebuttals on this point. We do, however, address substantially the same question in the next section (section 7.5.3.2) concerning whether the KIA erred by considering that the removal of the anti-dumping duties would lead to an increase in Japanese imports into the Korean market.

[241] See paras. 7.71-7.72 and fns 232 and 235 above.

[242] As stated earlier, we accept Korea's point that a panel can take account of implicit inferences or findings, but the burden falls on the party relying on that implicit matter to prove that it exists (see para. 7.41 above). Moreover, we agree with the Appellate Body that "[i]n assessing the WTO-consistency of a decision by an investigating authority, it is *not* for a panel to develop an explanation of the basis for the investigating authority's conclusions, *nor* to 'infer' the existence of such a basis as China seems to suggest from some general economic logic". (Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.258 (italics original; underlining added)).

[243] To the extent that Korea's contention rests on an increase in volume from Japan upon the lifting of the anti-dumping duties in light of the situation that prevailed prior to the imposition of the anti-dumping duties (Korea's second written submission, para. 238), we address it at paras. 7.91-7.93 below.

[244] See, e.g. Japan's second written submission, paras. 195-197.

[245] Japan's first written submission, paras. 158 and 161.

[246] Japan's first written submission, paras. 161-162 and 172; second written submission, paras. 303-304 and 390.

7.5.3.2 Whether the KIA erred by finding that the Japanese price drop would lead to an increase in Japanese imports

7.87. The KIA found that an increase in the volume of Japanese imports would be a likely consequence of the drop in the price of those imports upon the expiry of the anti-dumping duties. Japan contends that the KIA erred in reaching this finding.[247]

7.88. As a brief overview, we recall that the KIA found specifically that:

> 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.[248]

7.89. During the sunset review, the Japanese exporters had argued that they could not compete with low-priced imports from third countries in the Korean market and therefore had no incentive to increase imports into Korea even if the anti-dumping duties were lifted.[249] The applicants contended that the fact that volumes of dumped imports had increased *despite* the application of anti-dumping duties showed that their volumes would increase further if the duties were lifted[250], and this was made possible by the Japanese exporters' low capacity utilization rate.[251]

7.90. Japan's main argument before us is that the Japanese exporters focused on a different market segment at higher prices and had no incentive to compete with the large volume of lower-priced third-country imports, even if the anti-dumping duties were lifted.[252] Japan cites the fact that Japanese prices would remain substantially higher than third-country imports and domestic like products[253], as well as the fact that the low-priced third-country imports already commanded a much larger market share than Japanese imports.[254] For Japan, the KIA failed to adequately examine whether the presence of this large volume of low-priced third-country imports in the Korean market would disincentivize an increase in the Japanese volume, particularly since Japanese imports would remain higher-priced regardless of whether the anti-dumping duties were lifted.[255]

7.91. According to Korea, it was reasonable to assume that the volume of Japanese imports would increase upon lifting the anti-dumping duties.[256] This was because, when compared with the situation that prevailed prior to the imposition of the duties, the volume of Japanese imports had been suppressed and their price had been inflated as a result of the application of the duties.[257] Thus, the

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[247] Japan's first written submission, paras. 151, 166, and 171-172; second written submission, paras. 336 and 355-359.

[248] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 22 (emphasis added). See also OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.

[249] Japanese exporters' opinion regarding injuries, (Exhibit JPN-10.b (BCI)), pp. 16-17 and 24-25; Japanese exporters' opinion regarding applicants' rebuttal, (Exhibit JPN-13.b (BCI)), pp. 7-8; and Japanese exporters' post-hearing opinion, (Exhibit JPN-16.b (BCI)), pp. 4-6. We note that the Japanese exporters referred mostly to low-priced general-purpose steel in this regard. We understand this to have been in response to the applicants' contention that "from Japan, there has only been importation of special-purpose steel and other products excluded from anti-dumping. Accordingly, with the termination of the anti-dumping measures, the importation of *steel grade 304 and other general-purpose type stainless steel bars* is anticipated to increase". (Application, (Exhibit JPN-4.b), p. 11 (emphasis added)).

[250] Application, (Exhibit JPN-4.b), pp. 21, 41, and 48; Rebuttal opinion of the applicants, (Exhibit JPN-11.b), pp. 4-5; and Applicants' statement of opinion after the public hearing, (Exhibit JPN 15-b), p. 1.

[251] Application, (Exhibit JPN-4.b), p. 15; Rebuttal opinion of the applicants, (Exhibit JPN-11.b), p. 3; and Applicants' statement of opinion after the public hearing, (Exhibit JPN 15-b), pp. 13-14.

[252] Japan's second written submission, paras. 336 and 359; first written submission, para. 171.

[253] Japan's second written submission, para. 358 (cross-referencing section III.C.1, particularly paras. 190-197); first written submission, para. 172 (cross-referencing para. 160). See also response to Panel question No. 15, para. 85.

[254] Japan's second written submission, paras. 303-304, 355, and 358; first written submission, paras. 161 and 172 (cross-referencing paras. 160(a)-(b)). See also response to Panel question No. 6(d), para. 41.

[255] Japan's second written submission, paras. 336 and 355; first written submission, paras. 161-162 and 172. See also response to Panel question No. 30, para. 181.

[256] Korea's first written submission, paras. 249-250; second written submission, paras. 182-183; and response to Panel question No. 64(c)(v).

[257] Korea's first written submission, paras. 249-250; second written submission, paras. 182-183; and response to Panel question No. 64(c)(v).

anti-dumping duties were exerting a remedial effect, and it was probable that the lifting of the duties would remove that remedial effect which would, in turn, lead to a resumption of higher volumes of Japanese imports.[258] Korea also argues that various other findings by the KIA show that the Korean market would remain attractive to, and be targeted by, the Japanese exporters[259], and that the KIA adequately examined and dismissed the Japanese exporters' argument that they could not compete on price with third-country imports.[260] Additionally, Korea refers to a determination by the United States International Trade Commission (USITC) to support its argument that the KIA properly concluded that the Japanese exporters would increase exports into the Korean market.[261]

7.92. We accept Korea's general proposition that, if the anti-dumping duties are exerting a remedial effect, it may be reasonable to consider that the removal of the duties would lead to a return of the situation that prevailed prior to their application, for instance a higher volume of imports. However, such an approach must have a factual basis.[262] In the present case, we understand that the factual basis for finding an increase in Japanese imports was, *inter alia*[263], predicated on a Japanese pricing level that would remain almost [[***]] higher in 2015 than the pricing level of domestic like products and third-country imports.[264] As we understand it, Japan's basic contention is that the KIA failed to address how Japanese imports into Korea would increase despite remaining at this significantly higher pricing level, particularly given the large presence of lower-priced imports from third countries in the Korean market that may disincentive such an increase.[265] Although Japan makes reference at times to the alleged distinction between general-purpose steel and special steel in relation to its contention on this point, we do not understand its contention to hinge upon that distinction. Rather, we understand Japan's contention on this point to concern the product under investigation generally.[266] For instance, Japan states: "[i]ncreasing volumes of lower priced third country imports created a disincentive for increased Japanese exports, particularly of general-purpose steel products".[267] As this example illustrates, Japan's reference to general-purpose steel in this connection is subsidiary to its broader contention that the differing price levels should have been examined and accounted for when determining whether Japanese imports would increase.[268] We therefore reject Korea's contention that "this 'incentive' argument was based on the unsubstantiated assertion that the Japanese producers had shifted away from general purpose steel".[269]

[258] Korea's first written submission, paras. 249-250; second written submission, paras. 182-183; and response to Panel question No. 64(c)(v).

[259] Korea's first written submission, paras. 242, 245, 247, 253, 255, and 279; second written submission, paras. 226-227 and 240.

[260] Korea's responses to Panel question Nos. 6(b)(iii) and 16(v); second written submission, paras. 80-81 and 234; and first written submission, paras. 272 and 280. We note that, according to Korea, these considerations of the KIA were on an "*arguendo*" basis to the extent they pertained to general-purpose versus special steel.

[261] Korea's second written submission, para. 226.

[262] While we accept that the forward-looking analysis under Article 11.3 calls for a certain degree of speculation as to the likelihood of future events (Korea's first written submission, para. 256), we agree with the Appellate Body that an authority's determination must nonetheless rest upon a *factual* foundation. (Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 178; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 234-235).

[263] We note that Korea presents other bases for which the KIA reasonably found imports would increase (e.g. Korea's first written submission, paras. 240, 247, and 252-253). We address these, to the extent relevant and not already assessed in this section, as part of our discussion of the totality of evidence in section 7.5.3.4 below.

[264] The KIA found that "[o]nce the anti-dumping measures are terminated, it is predicted that *a deep fall in the price of the dumped imports (△ [[***]]% for Japanese products) … will lead to a growth in exports to Korea*." (OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67 (emphasis added)). As explained earlier (see paras. 7.71-7.72 and fns 183, 212, and 234 above), we consider that the "deep fall in the price" of Japanese products referred to in this finding relates to the deduction of KRW [[***]] from the average 2015 Japanese resale price of KRW [[***]]. A deduction of KRW [[***]] would still leave the Japanese price at [[***]], which is almost [[***]] higher than third-country imports and domestic like products. We focus on the 2015 prices because these were the prices explicitly referred to by the KIA when evaluating the consequences of the Japanese price drop. (OTI's final report, (Exhibit KOR-5.c (BCI)) p. 63; see fn 186 above).

[265] Japan's first written submission, paras. 171-172; second written submission, paras. 321, 336, and 358-359. See also response to Korea's question No. 12, paras. 32-35.

[266] Japan's second written submission, paras. 321 ("imports from Japan"), 336 ("Japanese imports"), and 358-359 ("Japanese products"/"Japanese imports"); first written submission, paras. 160-161 ("product under investigation"), 171 ("product under investigation"), and 172 ("product under investigation").

[267] Japan's second written submission, para. 355.

[268] See also Japan's first written submission, paras. 160-161 and 172; and second written submission, para. 357.

[269] Korea's comments on Japan's response to Korea's question No. 17, p. 38.

Japan's separate argument that the KIA failed to adequately account for the alleged distinction between general-purpose steel and special steel in its analysis of price and volume is addressed below in section 7.5.3.3.

7.93. We agree with Japan that a "substantial difference in the price levels" should be an "obvious and significant fact" to the authorities[270], particularly where the authorities rely on the premise that "price is one of the most important elements that affects purchaser choice".[271] We do not exclude the possibility that imports could increase despite remaining significantly more expensive. However, given the price-sensitive nature of the market[272], we agree with Japan that such an increase cannot simply be "assumed", but instead an authority's "unbiased and objective" evaluation of the facts concerning an increase in volume should account for different pricing levels.[273] We would thus expect to see an explanation in the KIA's determination of how the volume of Japanese imports would increase despite their prices remaining almost [[***]] higher in 2015 according to the KIA's own metric. We also dismiss Korea's contention that Japan's case is premised on a "possibility" of a lack of incentive or lack of competition due to price differences, and that "mere possibilities do not rise to the requisite standard of proof under WTO law".[274] This reflects a misunderstanding of Japan's case. Japan seeks to demonstrate that the KIA's failure to examine certain matters left alternative plausible explanations of the data unaddressed, which in turn calls into question the KIA's finding on this point.[275] Japan does not refer to possibilities in the sense of the likelihood or probability of an eventuality, but in the sense of matters that were, in its view, not adequately explored by the KIA and thus left unaddressed. Moreover, Japan is not requesting us to consider possibilities in the sense of conducting a *de novo* review of the facts and reaching the factual finding that it would have preferred.

7.94. 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, and hence to whether the Japanese exporters lacked an incentive to compete with the third-country imports.[276] This is because, according to Korea, all relevant producers could, and did, produce the same range of product types and models, and given the made-to-order nature of the market and the high adaptability of production facilities, all relevant producers competed over the same demand.[277] For Korea, therefore, the KIA's finding on the competitive relationship amongst SSB products rendered the "price gap" or "price differential" irrelevant.[278]

7.95. We cannot accept that the "price gap" or "price differential" is irrelevant. The KIA's determination rested on the premise that price was the most important factor in purchasing decisions. Moreover, the KIA's finding on the competitive relationship amongst SSB products encompassed its finding from earlier investigations that "consumers prefer low-priced products".[279] Furthermore, the relevant finding of the KIA is that the drop in Japanese *prices* would lead to an increase in imports.[280] The Japanese pricing level upon the removal of the anti-dumping duties was thus central to the KIA's finding. We reject Korea's argument on this point.

[270] Japan's second written submission, para. 151.
[271] Japan's response to Panel question No. 64(c), paras. 329-320; second written submission, para. 194.
[272] See paras. 7.65, 7.67, 7.73, and 7.76 above; Japan's second written submission, paras. 194-195; and response to Panel question No. 15, para. 85.
[273] Japan's opening statement at the second meeting of the Panel, paras. 28-29; second written submission, para. 194; and responses to Panel question No. 19(b), para. 108, and No. 64(c), paras. 329-330.
[274] Korea's comments on Japan's responses to Korea's question, "General Observations" p. 2, and No. 12, pp. 26-27; first written submission, para. 278.
[275] Japan's second written submission, para. 31; opening statement at the second meeting of the Panel, para. 33; and comments on Korea's common response to Panel questions after the second meeting with the Panel, paras. 2-3.
[276] Korea's second written submission, paras. 233-237.
[277] Korea's second written submission, para. 99 and fn 233 (referring to Korea's responses to Panel question Nos. 19, 20(f), and 40); responses to Panel question Nos. 6(d) and 29(ii).
[278] Korea's second written submission, para. 237 and fn 233; responses to Panel question Nos. 6(d), 19(a)(ii), 19(b)(ii), and 20(f)(iii).
[279] See paras. 7.73 and 7.76 above.
[280] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67: "[o]nce the anti-dumping measures are terminated, it is predicted that a *deep fall in the price* of the dumped imports (△ [[***]]% for Japanese products) … will lead to a growth in exports to Korea". (emphasis added)

7.96. Korea also explains that, contrary to Japan's argument, the KIA did indeed consider the impact of third-country imports as part of examining whether lifting the anti-dumping duties would be likely to lead to a recurrence of injury.[281] The KIA found that the volume and market share of these imports remained stable over the POR, and that their declining price trend was not dissimilar to the trends for the dumped imports and domestic like products.[282] According to Korea, none of these indicators called into question the KIA's likelihood-of-injury finding.[283] We agree with Japan, however, that this assessment of relative *trends* does not address the actual *difference* in pricing levels between the third-country imports and the Japanese imports, including upon the lifting of the anti-dumping duties.[284] The KIA's assessment of third-country imports thus fails to address Japan's point that "the higher priced imports from Japan may not be able to compete with the lower priced third country imports, even if the anti-dumping duty were to expire".[285]

7.97. Korea points out that the KIA found that Japanese imports commanded a price premium over Indian and Chinese imports. According to Korea, this explains the price differential between products of different origin.[286] We accept that the price premium commanded by Japanese products might be capable of explaining how a higher price could lead to an increase in imports despite the price-sensitive nature of the market. However, we are unable to discern such an explanation in the KIA's determination. The determination does not provide any indication of the magnitude or nature of the price premium commanded by Japanese imports, and we are therefore unwilling to speculate as to whether an almost [[***]] price differential falls within the bounds of that premium.[287] Moreover, the plain text of the KIA's determination provides no basis for considering that the KIA relied on the existence of the price premium to explain how an almost [[***]] higher price would lead to an increase in imports despite the price-sensitive nature of the market.[288] The absence of any analysis of the magnitude or nature of the price premium, together with the absence of any explicit indication that the KIA was relying on the price premium in this way, mean that we have no grounds for accepting Korea's rebuttal on this point. Rather, we agree with Japan that Korea's rebuttal on this point goes beyond the analysis undertaken by the KIA, and would amount to *ex post* reasoning.[289]

7.98. Korea also argues that Japan's submission concerning the lack of incentives to increase exports was never substantiated by the Japanese exporters during the underlying review.[290] We need not express a view on the extent to which the Japanese exporters substantiated their assertion that they could not compete with low-priced imports from third countries in the Korean market and therefore had no incentive to increase imports even if the anti-dumping duties were lifted. Japan's case before us is based not only on the Japanese exporters' assertions during the sunset review, but more broadly on the failure of the KIA to properly address and reconcile its *own* factual findings in this regard.[291] These include the following factual findings concerning the respective starting points of the Japanese imports if the anti-dumping duties were lifted and the third-country imports.[292] The average Japanese resale price in 2015 would remain almost [[***]] higher than the

[281] Korea's first written submission, paras. 289 and 301-303; second written submission, para. 250.
[282] Korea's first written submission, paras. 259-260, 280, 290-292, and 304; opening statement at the first meeting of the Panel, para. 64; and second written submission, paras. 228, 230, and 250.
[283] Korea's opening statement at the first meeting of the Panel, para. 64; first written submission, paras. 260, 280, and 303; and second written submission, paras. 228, 230, and 250.
[284] Japan's second written submission, paras. 320-321 and 360.
[285] Japan's second written submission, para. 321. See also response to Korea's question No. 12, para. 32.
[286] Korea's second written submission, paras. 80-81, 178, and 237, and fn 233; response to Panel question No. 19(c)(iii); and comments on Japan's response to Korea's question No. 12, p. 28.
[287] The relevant passage of the determination is limited to the following: "within the same steel grade, Korean and Japanese products have high credibility in quality and Indian and Chinese products have high price competitiveness". (OTI's final report, (Exhibit KOR-5.c (BCI)), p. 55).
[288] The plain text of the relevant finding is extracted at para. 7.74 above.
[289] Japan's second written submission, paras. 195-196.
[290] Korea's response to Panel question No. 16(i). See also first written submission, para. 278; second written submission, para. 231; and comments on Japan's response to Korea's question No. 12, p. 28.
[291] Japan's first written submission, paras. 160-162 and 172; second written submission, paras. 190-191, 198, 303, 336, 358, 360, 388, and 390; responses to Panel question No. 19(c), paras. 113-114, and No. 34, paras. 196-197; and opening statement at the first meeting of the Panel, paras. 40-42.
[292] We understand that Japan did not refer to the specific figures in its first written submission because it did not have access to unredacted versions of the relevant documents. (Japan's second written submission, para. 189). Japan did, however, refer to the relevant aspects of the KIA's findings in its first written

domestic price, whereas the average third-country resale price would be [[***]] lower than the domestic price.[293] The market share of Japanese imports in the Korean market would be [[***]], whereas the market share of third-country imports would be [[***]].[294] Additionally, the KIA found that third-country imports were already exerting a degree of downward pressure on the price of domestic like products during the POR.[295] In these respects, the starting points for the Japanese imports and the third-country imports upon the lifting of the anti-dumping duties would be different.

7.99. We must also recall that, while price was not the only factor, the KIA considered it to be the most important factor in purchasing decisions, with consumers preferring lower prices.[296] Against that background, we agree with Japan that the existence of third-party imports whose prices were at levels *lower* than domestic like products and which occupied [[***]] of market share represents a substantial source of price pressure in the Korean market.[297] We would expect an "unbiased and objective" evaluation of the facts on this point to account for the possibility that the large presence of low-priced third-country imports might therefore prevent an increase in the volume of Japanese imports into the price-sensitive Korean market, particularly where the Japanese price would still be almost [[***]] higher and represent just [[***]] of the market upon the lifting of the anti-dumping duties.

7.100. But Korea has not indicated to us that the KIA took the differing starting points of the Japanese imports and third-country imports into account when determining that the volume of Japanese imports would increase upon the lifting of the anti-dumping duties. On the contrary, Korea's explanation for how the KIA took the third-country imports into account pertained to the stability of their volume and market share during the POR, together with the comparative similarity in comparative price decreases.[298] Korea rejected the relevance of the actual price difference between Japanese imports and third-country imports.[299] None of Korea's responses to questions from the Panel concerning whether and how the KIA's determination addressed the proposition that low-priced third-country imports created a disincentive for Japanese exporters to increase their volumes indicated that the KIA did, in fact, take these differing starting points into account.[300] Rather, Korea appeared to reject the premise that the Japanese imports might be uncompetitive with third-country imports due to their higher price levels.[301] We are unable to discern from any aspect of the determination that the KIA took these differing starting points (discussed above) into account when finding that the drop in Japanese prices arising from the expiry of the anti-dumping duties would lead to an increase in imports.

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submission, namely the increase in the volume and market share of third-country imports, the differences in prices between the product under investigation and the third-country imports, and the existing adverse impact caused by the increased third-country imports, and described these as "conflicting findings by the [KIA]". (Japan's first written submission, para. 160). Japan then referred to the specific figures, at first instance, in its oral statement at the first substantive meeting of the Panel at para. 40. (See also second written submission, paras. 198, 304-305, 390, and 395).

[293] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 63.

[294] OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 35 and 54.

[295] OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 39, 50-51, and 54 (albeit exhibiting less downward price pressure during the POR than that caused by the fall in raw material costs); KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 14. We note that the applicants did not describe the Japanese imports as a source of price pressure during the POR. (Application, (Exhibit JPN-4.b), pp. 14-15 and 25-26; Minutes of public hearing (24 November 2016), (Exhibit KOR-19.b (BCI)), pp. 10, 20, and 32-33).

[296] See paras. 7.73 and 7.76 above.

[297] Japan's second written submission, paras. 304-305, 319-321, 360, and 395. Not only is this apparent from various aspects of the KIA's determination (OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 39, 50-51, and 54; KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 14), but the applicants themselves recognized as much in their application to initiate the review. (Application, (Exhibit JPN-4.b), pp. 25-26 and fn 2). Indeed, the applicants stated that this source of price pressure should be dealt with through a new anti-dumping investigation: "[i]t is true that the domestic industry is being injured by products from other countries, such as China. However, current injury to the domestic industry caused by these products from other countries is a problem that should be considered by a new original investigation." (Applicants' statement of opinion after the public hearing, (Exhibit JPN-15.b), p. 15).

[298] Korea's first written submission, paras. 259-260, 267, 280, 290-292, and 303-304; opening statement at the first meeting of the Panel, para. 64; and second written submission, paras. 228, 230, 245, and 250.

[299] Korea's second written submission, paras. 234-236.

[300] Korea's responses to Panel question Nos. 6(d), 16, 22(c), 67(e), and 77.

[301] Korea's response to Panel question No. 16(v); comments on Japan's response to Korea's question No. 12, pp. 26-27.

7.101. Rather, according to Korea, other factual findings by the KIA showed that there would be a capacity and demand for Japanese exporters to increase their imports into Korea upon the removal of the anti-dumping duties.[302] In particular, according to Korea, Japanese exporters were already importing considerable and increasing volumes during the POR, and this indicated clear demand in Korea for Japanese products and showed that the Korean market remained attractive to the Japanese exporters despite the application of the duties.[303] Other indicators also showed the Korean market was a target for the Japanese exporters, such as the increasing ratio of Japanese exports being shipped to Korea and the application of anti-dumping duties by the United States and the European Union.[304] Moreover, according to Korea, the Japanese exporters had increased their production volume and made investments in production facilities whilst also experiencing low capacity utilization, which supported the finding that exports to Korea would increase if the anti-dumping duties were lifted.[305]

7.102. We accept that these factors can be relevant and useful in establishing that, upon lifting the anti-dumping duties, the exporters would have an interest in, and ability to, increase exports.[306] However, both parties accept that there must be demand in a market for sales to take place.[307] As Japan points out, consumers would need to have an increased demand for Japanese imports if their volume were to increase in the Korean market, whereas the KIA's determination rested on the premise that price is the most important aspect of consumers' purchasing decisions.[308] None of the factors identified above by Korea explain why there would be additional demand on the part of consumers in the Korean market for Japanese imports that would still remain significantly more expensive upon lifting the anti-dumping duties. It is worth reiterating that the KIA's finding of an expansion in Japanese imports was made *on the basis of* a Japanese pricing level that would remain almost [[***]] more expensive[309], and not on the basis of some lower pricing level or the pursuit of a more aggressive pricing strategy by the Japanese exporters in response to additional pressures to export to Korea. We note that Korea also appears to refer to the continued dumping by the Japanese producers, and the fact that they had absorbed the duties and increased imports, as additional grounds indicating an increase in Japanese volumes upon the lifting of the anti-dumping duties.[310] However, we again reiterate that the KIA's determination on the increase in Japanese volumes rests upon a deduction of an amount representing the anti-dumping duty from the average Japanese resale price.[311] It does not rest upon some other pricing level arising from a different circumstance, such as a greater degree of duty absorption or a higher level of dumping than that otherwise observed during the POR. To rely on such *ex post* reasoning to uphold the KIA's determination would effectively lead the Panel to engage in a *de novo* review.

7.103. Thus, none of the factors identified by Korea address the question of how Japanese imports would increase despite remaining significantly higher-priced in the context of a price-sensitive market in which large volumes of lower-priced imports were already present. We agree with Japan that, in light of the particular factual context in the present case, a consideration of factors on the

[302] Korea's opening statement at the first meeting of the Panel, paras. 50-53, 56, and 61; first written submission, paras. 279-281; and second written submission, paras. 226-227, 231, and 240-241.
[303] Korea's comments on Japan's responses to Korea's question No. 16, p. 35, and No. 21, p. 44; second written submission, paras. 128 and 226; and first written submission, paras. 242, 255, and 279.
[304] Korea's first written submission, paras. 245, 253, and 281; second written submission, paras. 226-227.
[305] Korea's first written submission, paras. 247, 253-254, and 279; second written submission, paras. 226-227.
[306] For the avoidance of doubt, this does not imply that we express a view on Japan's arguments that these factors involve impermissible *ex post* reasoning, or were improperly relied upon by the KIA. We make this remark on an *arguendo* basis, in the abstract.
[307] Korea's response to Panel question No. 100, para. 175; Japan's second written submission, para. 357.
[308] Japan's responses to Panel question No. 19(b), para. 108, No. 19(c), para. 113, No. 30, paras. 180-181, and No. 64(c), paras. 329-330; second written submission, para. 194.
[309] Korea's second written submission, para. 124 and fn 130; response to Panel question No. 69. See also paras. 7.71-7.72 and 7.92, and fns 233 and 235 above.
[310] Korea's second written submission, paras. 26, 29, and 128; comments on Japan's responses to Korea's question No. 16, pp. 35-36; and No. 21, p. 44.
[311] See fns 211 and 233 above.

supply side alone would be insufficient to demonstrate that Japanese imports would increase without any additional explanation or analysis.[312]

7.104. Finally, Korea contends that the reasonableness of the KIA's finding that Japanese imports would increase was "confirmed by the parallel sunset review by the USITC on SSBs imported from Japan".[313] We decline to take this USITC determination into account to "confirm the reasonableness" of the KIA's finding on this point.[314] It post-dates the KIA's third sunset review, and therefore was not part of the record of investigation and did not form part of the KIA's finding that the Japanese price drop would lead to an increase in imports. Accordingly, it does not form part of the relevant "facts" on which we can base our assessment under Article 17.5(ii) of the Anti-Dumping Agreement. To find otherwise could lead the Panel into a *de novo* review on the basis of record evidence that was not before the KIA. We do, however, make some observations regarding this USITC determination in section 7.5.5 below.

7.105. In summary, Japan has demonstrated that there is an internal tension in the KIA's finding that the drop in Japanese prices arising from the removal of the anti-dumping duties would lead to an increase in Japanese imports into the Korean market. This tension arises from the KIA's finding being premised on (a) the understanding that price was the most important factor in purchasing decisions, and (b) the fact that Japanese prices would still be almost [[***]] higher than others upon the removal of the duties in 2015. The significance of this tension is magnified by the fact that a large volume of low-priced imports from third countries was already present and exerting price pressure in the Korean market. In particular, upon the lifting of the anti-dumping duties, the KIA's findings indicate that Japanese imports would represent [[***]] of market share and be priced almost [[***]] higher than domestic like products, whereas third-country imports would represent [[***]] of market share and be priced [[***]] lower than domestic prices. By failing to address how the significantly higher-priced Japanese imports could increase in this context, the KIA's determination failed to resolve the aforementioned tension in its own findings, and accordingly, it does not reflect an "unbiased and objective" evaluation of the facts on this point. We address whether the KIA's failure in this regard rises to the level of a violation of Article 11.3 of the Anti-Dumping Agreement in section 7.5.3.4 below.

7.5.3.3 Whether the KIA erred by failing to account for different product mixes in assessing the impact of the Japanese price drop

7.106. Japan contends that the KIA erred by failing to account for differences in the respective countries' product mixes when concluding that domestic price competitiveness would weaken and Japanese imports would increase upon the lifting of the anti-dumping duties and the resulting drop in Japanese prices.[315] Specifically, Japan argues that the KIA failed to account for the differentiated effects that general-purpose steel and special steel would have on Korea's domestic industry, despite the fact that Japanese imports were mostly comprised of special steel and domestic like products were mostly comprised of general-purpose steel.[316]

7.107. Korea responds that the KIA did indeed examine the Japanese exporters' "product mix argument" on the basis of a distinction between general-purpose steel and special steel, and found that Japan continued to export similar levels of both steel types during the POR.[317] For Korea, the suggestion that Japan's only likely export increase would be in the special steel segment was contradicted by official customs data.[318] In any event, Korea argues that the KIA rejected this alleged distinction because SSBs "all form one consolidated group of like products".[319] Korea also emphasizes that the Japanese exporters never submitted grade-specific pricing data that would have enabled the kind of grade-specific analysis for which Japan now seeks to fault the KIA.[320]

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[312] Japan's comments on Korea's common response to Panel questions after the second meeting with the Panel, paras. 12-13. See also first written submission, para. 171; and second written submission, paras. 172-174 and 398.
[313] Korea's second written submission, para. 226.
[314] Korea's comments on Japan's response to Panel question No. 92, p. 16.
[315] Japan's first written submission, paras. 164-167; second written submission, paras. 350 and 352.
[316] Japan's first written submission, paras. 164-167; second written submission, para. 350.
[317] Korea's first written submission, paras. 261 and 272; second written submission, para. 126.
[318] Korea's first written submission, para. 274.
[319] Korea's first written submission, para. 273. See also second written submission, para. 231.
[320] Korea's comments on Japan's response to Korea's question No. 13, pp. 29-30.

7.108. 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.[321] 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[322] 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".[323] 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.[324]

7.109. 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.

7.5.3.4 Whether the KIA's error in assessing the impact of the Japanese price drop constitutes a violation of Article 11.3 of the Anti-Dumping Agreement

7.110. In sections 7.5.3.1 and 7.5.3.2, we found that Japan has demonstrated the following conclusion by the KIA lacks an "unbiased and objective" evaluation of the facts:

> 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.[325]

7.111. Korea contends that determinations based on multiple factors do not fail merely because there is a deficiency in one of those factors.[326] Rather, the determination must be upheld if there is a sufficient factual basis remaining despite the deficiency. According to Korea, all of the factors relied on by the KIA in the present case provided a sufficient factual basis for reasonably concluding that the expiry of the anti-dumping duties would likely lead to the recurrence of injury.[327] Korea provides the following summary of the overall likelihood-of-injury determination:

> The conclusion of the Korean authorities can be summarized as follows: dumping continued at margins of 66% from Japan. In the meantime, the volume and market

[321] See paras. 7.73-7.74 and 7.76 above.
[322] Korea's response to the Panel's Article 13 of the DSU information request, (Exhibit KOR-41.b (BCI)). We reject Japan's objection that this document does not contain record evidence. (Japan's second written submission, para. 193). This information request included the following instruction: "[i]n providing the information in the format requested in Appendix 1, please only use data/evidence that was on the record of investigation and was available to the Korean investigating authorities for the purposes of its sunset review." Japan has not demonstrated that Korea failed to follow this instruction in providing the requested data. Although Japan contested whether this material was on the record – an objection that we reject – it did not contest the accuracy of this evidence. Both the Japanese exporters and the applicants adopted the position that Japanese general-purpose steel was not in price competition with general-purpose steel from other sources in the Korean market. (Japanese exporters' opinion regarding injuries, (Exhibit JPN-10.b (BCI)), p. 12; Application, (Exhibit JPN-4.b), pp. 5-26).
[323] Application, (Exhibit JPN-4.b), p. 15.
[324] Korea's second written submission, paras. 59 and 79. We agree with Korea on the lack of a correlation in that regard.
[325] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 22 (emphasis added). See also OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.
[326] See, e.g. Korea's comments on Japan's responses to Korea's question "General Observations", p. 1; opening statement at the second meeting of the Panel, paras. 16, 25-26, and 44-45; and response to Panel question No. 98, para. 143.
[327] Korea's response to Panel question No. 98, paras. 143 and 154; second written submission, paras. 26-37.

> share of the dumped imports in general and from Japan in particular increased at the end of the POR, but stayed low and in any case well below their volume and market share before the imposition of the measure. There was significant spare production capacity in all three investigated countries, including Japan, given the relatively low capacity utilization. In addition, exporting producers were making additional investments in production facilities. The prices of dumped imports would necessarily drop after the removal of the duties and would exhort further price pressure on domestic prices. Key markets such as the EU and the U.S. remain protected through trade remedy measures on SSBs, which meant that the Korean market would be attractive if duties were removed. Furthermore, despite the protection, the domestic industry's recovery in the POR was still fragile as witnessed by a number of injury indicators trending negatively. All of this supported the reasonable conclusion that removal of the duties would likely lead to a continuation of dumping and a recurrence of injury.[328]

7.112. The KIA's analysis of the consequences of the drop in Japanese prices upon the expiry of the anti-dumping duties comprised an intermediate finding in support of the likelihood-of-injury determination. Korea recognizes this, but states that "[w]hereas current price trends may be an intermediary factor in this analysis, they do not answer the ultimate question"[329], and "no investigating authority can humanly draw a 'future price effect' based on the POR-bound pricing data".[330] For instance, the "prevailing price matrix among the products is destined to shuffle" upon the removal of the anti-dumping duties[331], and there could be more sales of price-competitive models that had been previously hindered by the duties.[332] Thus, we understand Korea to contend that the KIA's intermediate finding on the consequences of the drop in Japanese prices upon the expiry of the anti-dumping duties was not dispositive to the likelihood-of-injury determination.

7.113. Japan, on the other hand, draws a link between the KIA's analysis of the consequences of the drop in Japanese prices and the KIA's likelihood-of-injury determination that "[i]t is highly likely that once the anti-dumping measures are terminated, a drop in the price of the product under investigation and an increase in imports will again cause material injury to the domestic industry".[333] For Japan, both contain the same "logical leap" and "fundamentally flawed" reasoning.[334] Japan emphasizes the point that, if the Japanese exporters lacked incentives to increase volumes due to their inability to compete on price with third-country imports, then the KIA's remaining findings on the supply side relating to production capacity, export capacity, and import controls by other countries, cannot support the likelihood-of-injury determination.[335]

7.114. We agree with Korea that the KIA's error concerns an intermediate finding and will only result in a violation of Article 11.3 if it invalidates the KIA's final conclusion on the likelihood of injury. In determining whether an intermediate finding invalidates a final conclusion, we find useful the Appellate Body's guidance that:

> [T]here may be cases in which certain intermediate findings may be so central to the ultimate conclusion of an investigating authority that an error at an intermediate stage of reasoning may invalidate the final conclusion. Indeed, an evaluation of the significance of the different factors considered by an investigating authority is at the heart of the assessment a panel must make.[336]

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[328] Korea's second written submission, para. 29 (fns omitted). See also responses to Panel question No. 98, paras. 152-155; and No. 6(c)(iv).
[329] Korea's second written submission, para. 185.
[330] Korea's response to Panel question No. 19(a)(i).
[331] Korea's response to Panel question No. 19(a)(i).
[332] Korea's comments on Japan's responses to Korea's question No. 2, p. 8, and No. 4, p. 12.
[333] Japan's first written submission, paras. 159, 162, and 170 (referring to OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67).
[334] Japan's first written submission, paras. 159-162 and 170-172.
[335] Japan's comments on Korea's common response to Panel questions after the second meeting with the Panel, paras. 11-14; first written submission, para. 171; and second written submission, paras. 172-174, 357, and 398.
[336] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 135. See also ibid. paras. 131-134.

7.115. We are therefore called upon to ascertain the significance of the intermediate finding at issue to the KIA's likelihood-of-injury determination, and in particular, whether it is so central that it invalidates the final conclusion. The KIA's likelihood-of-injury determination provides:

> Taking the circumstances into consideration as a whole, the Commission finds that it 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.[337]

7.116. It is clear from the plain text of this final conclusion that the consequences of "a drop in the price of the dumped imports" was central. It is also clear from the "Overall Evaluation" section (in which this extract appears) that the reference to "a drop in the price of the dumped imports" in this conclusion pertains to the intermediate finding that immediately precedes it, namely "[w]here 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".[338] This intermediate finding, in turn, drew upon the analysis of Japan's projected price drop upon the removal of the anti-dumping duties.[339] Our understanding in this regard accords with Korea's description of the structure and flow of the KIA's findings.[340]

7.117. In view of the structure and flow of the KIA's findings that led to the likelihood-of-injury determination, we consider that the KIA's failure to undertake an "unbiased and objective" evaluation of the facts on the consequences of the drop in Japanese prices invalidates this determination and gives rise to a violation of Article 11.3 of the Anti-Dumping Agreement.

7.118. Our conclusion is not altered by the reference to "an increase in the volume of the dumped imports" in the overall determination extracted above. It is not apparent to us that the KIA found this to be capable of alone supporting the likelihood-of-injury determination, nor that this is necessarily independent of the "drop in the price of the dumped imports".[341] Indeed, our examination in section 7.5.3.2 revealed that the KIA erred in considering that Japanese volumes would expand as a result of the drop in Japanese prices upon the removal of the anti-dumping duties. In that section, we considered other factors referred to by the KIA that could explain the increase in imports. Based on our reading of the KIA's determination in light of the record evidence, none of these factors established how there would be additional demand on the part of consumers in the Korean market for Japanese imports that would still remain almost [[***]] more expensive upon lifting the anti-dumping duties. To that extent, we agree with Japan that "without sufficient incentives, the Japanese Respondents would not utilize the unused production capacity (or convert the production facilities for other products) in order to produce more SSB to increase their exports to Korea".[342]

7.119. As we understand it, Japan made one single claim concerning the price and volume effects that was comprised of multiple arguments and various alleged errors.[343] We note that a panel has

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[337] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 23. See also OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.

[338] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 22 (emphasis added). See also OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.

[339] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 21.

[340] Korea's response to Panel question No. 6(c)(iv). See also first written submission, paras. 100-103; and second written submission, paras. 29 and 159-160. By structure and flow, we mean the various stepping stones and the sequence of logical progression between and within the relevant sections of the determination.

[341] Korea's first written submission, paras. 101-103. See also response to Panel question No. 40(iv): "Korea submits that the 'effect of import volume of products' almost necessarily includes the products' effect on prices."

[342] Japan's comments on Korea's common response to Panel questions after the second meeting with the Panel, para. 13. For the avoidance of doubt, we do not suggest that identifying "incentives" is a legal requirement under Article 11.3. (Korea's comments on Japan's response to Korea's question No. 17, p. 38). Rather, the significance of this matter in the present case arises from the KIA itself placing significance on whether the Japanese exporters had "*inducements* to expand their exports to Korea" (OTI's final report, (Exhibit KOR-5.c (BCI)) p. 67 (emphasis added)), and its reliance on the premise that price is the most important factor in consumers' purchasing decisions with consumers preferring low-priced products (see paras. 7.73 and 7.76 above).

[343] Japan's first written submission, para. 7; second written submission, paras. 168 and 584(c).

"the discretion 'to address only those arguments it deems necessary to resolve a particular claim'".[344] In light of our finding on the grounds for Japan's price and volume effects claim as addressed in this section, it is unnecessary for the prompt and effective resolution of the dispute to proceed to address Japan's various other arguments in support of its claim in this regard. To the extent that these other arguments themselves constitute separate "claims" or standalone allegations of error, we exercise judicial economy over them for the same reasons.

7.120. Finally, we need not express a view on Korea's contention regarding the limitations of POR-bound pricing data in projecting the future consequences of lifting of anti-dumping duties. The text of the KIA's determination is unambiguous on this point. The KIA's assessment of the consequences of the drop in Japanese prices upon the removal of the anti-dumping duties was premised on a certain pricing level. This pricing level was derived by deducting an amount representing the anti-dumping duty from the average Japanese resale sale price *during the POR* (specifically, during 2015).[345] It would be improper for us to now second-guess the KIA and find that only "limited" or "indicative" value ought to be placed on that assessment.[346] The KIA's determination does not address whether only "limited" or "indicative" value should be placed on that assessment; indeed the structure and flow of the KIA's determination suggest the contrary.

7.5.4 Japan's claim under Article 11.3 of the Anti-Dumping Agreement concerning other potential injury factors

7.121. Japan claims that the KIA erred by finding that the expiry of the anti-dumping duties would likely lead to a recurrence of injury without referring to three other factors that could instead explain the likely recurrence of injury.[347] These three factors include the impact of the large volume of low-priced imports from third countries, the cost of raw materials, and the weak demand in the domestic and export markets.[348]

7.122. Korea responds that a consideration of "other factors" is not legally required under Article 11.3 of the Anti-Dumping Agreement, but in any case, "it is plainly clear from the published reports that other factors, including third-country imports, were *considered* and, in fact, *found* not to undermine a finding that there was a likelihood of recurrence of injury if the duties expired".[349]

7.123. We need not address Japan's claim insofar as it relates to the impact of the third-country imports. We have already accepted Japan's position that the large presence of low-priced third-country imports represented a substantial source of price pressure in the Korean market, and the KIA failed to account for the possibility that these imports might therefore prevent an increase in Japanese imports upon the expiry of the anti-dumping duties. This contributed to our finding that the KIA acted inconsistently with Article 11.3 in its assessment of the consequences of the drop in Japanese prices upon the expiry of the anti-dumping duties.[350] It is unnecessary for the prompt and effective resolution of the dispute to reach an additional finding concerning the KIA's treatment of the impact of the third-country imports.

7.124. With respect to the other two factors, we do not consider that Japan has established a *prima facie* case of inconsistency with Article 11.3 of the Anti-Dumping Agreement. Japan's case is limited to pointing out that these were recognized by the KIA as injury factors affecting the Korean domestic industry during the POR, without attempting to explain *how* those specific injury factors would sever or diminish the link between lifting the anti-dumping duties and the likelihood that this would lead

[344] Appellate Body Reports, *EC – Fasteners (China)*, para. 511; *EC – Poultry*, para. 135; and *India – Solar Cells*, para. 5.15.
[345] See paras. 7.71-7.72 and 7.92 and fns 185 and 233 above. We note that, in its first written submission, Korea stated that "*current* market conditions are relevant as a factual basis to draw reasoned conclusions regarding likely *future* market conditions", and one of the factors considered by the KIA in this regard was "the outlook on the volume of imports and price levels of the dumped imports if duties were removed". (Korea's first written submission, paras. 239-240 (emphasis original)).
[346] Panel Report, *China – GOES*, para. 7.542 and fn 522; Appellate Body Report, *Japan – DRAMs (Korea)*, para. 135.
[347] Japan's response to Panel question No. 73, para. 358; first written submission, para. 177; and second written submission, para. 305.
[348] Japan's first written submission, para. 177.
[349] Korea's second written submission, para. 250. (emphasis original)
[350] See paras. 7.105 and 7.117 above.

to a recurrence of injury as part of the forward-looking analysis of a sunset review.[351] We also consider it noteworthy that, as Japan concedes, neither of these factors was raised or substantiated by the Japanese exporters during the sunset review as matters that could sever or diminish the link between lifting the anti-dumping duties and the likelihood-of-injury.[352] Indeed, in the absence of any explanation or evidence to the contrary, one might expect the cost of raw materials and weak demand to affect the Japanese imports and domestic like products in similar ways in the Korean market. It is thus not obvious to us why the KIA should have treated these factors as potentially severing or diminishing the link between lifting the anti-dumping duties and the likelihood-of-injury, and Japan has not demonstrated otherwise.[353] Specifically, Japan has not attempted to explain *how* those factors would sever or diminish that link.

7.125. 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.

7.5.5 Japan's claims concerning capacity utilization

7.5.5.1 Japan's claim under Article 11.3 of the Anti-Dumping Agreement concerning capacity utilization

7.126. The KIA found that "the utilization rate in 2015 was [[***]]% for Japan … which shows that they have sufficient additional production capacity and room for exports".[354] Japan claims that this finding is inconsistent with Article 11.3 of the Anti-Dumping Agreement because the direct evidence submitted by the Japanese exporters on their production capacity was disregarded, without justification, in favour of the production capacity data of the ISSF.[355]

7.127. Korea responds that there was no basis to prefer the Japanese exporters' production capacity figures over the ISSF data.[356] According to Korea, the Japanese exporters' figures were flawed because the calculation methodologies varied between the exporters and changed during the review, and because the exporters refused to provide any underlying data that would have enabled verification.[357] By contrast, Korea explains that the ISSF is a reputable and reliable international institution, and its data was collected from its members (including the Japanese exporters), national steel associations, overseas market research agencies, publicly-available information, and from "basic knowledge of the industry".[358]

7.128. We begin by evaluating Japan's contention that the ISSF data was flawed due to its product scope.[359] We then turn to Japan's contention that the Japanese exporters complied with the

[351] Japan's first written submission, paras. 187-188; second written submission, paras. 307-308.
[352] Japan's response to Panel question No. 74, para. 360.
[353] We note that Korea contends that these factors "only confirmed that the domestic industry remained in a vulnerable position, further supporting the finding of a likelihood of recurrence of injury if the duties expired". (Korea's first written submission, para. 305). In view of our conclusion in this section, we need not reach a finding on that contention. We would agree, however, with the panel in *Ukraine – Ammonium Nitrate* that a likelihood-of-injury analysis can entail a consideration of the current state of the domestic industry. (Panel Report, *Ukraine – Ammonium Nitrate*, paras. 7.181-7.182).
[354] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 22. See also OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.
[355] Japan's first written submission, paras. 6 and 120; second written submission, paras. 6, 176, and 401.
[356] Korea's first written submission, paras. 197-198 and 217-227; second written submission, paras. 190 and 194-195.
[357] Korea's first written submission, paras. 215-217, 220, 226, and 349-352; second written submission, para. 269; responses to Panel question No. 92, paras. 18, 39, and 52, No. 94, paras. 64-67, 74, and 79, and No. 95, paras. 89-90 and 92.
[358] Korea's first written submission, paras. 199-201; second written submission, paras. 133, 191-192, 195, and 259; and responses to Panel question No. 94, para. 69, and No. 96, paras. 116-117.
[359] Japan's first written submission, paras. 122-123, 126, 145, and 256-257 (the latter in the context of "facts available"); second written submission, paras. 402-403 (point (ii)) 415-417, and 424; responses to Panel question No. 51, para. 306(ii), No. 92, para. 13, No. 97, paras. 40-42, and No. 98, paras. 47-48;

KIA's initial request for production capacity data, but were deprived of an adequate opportunity to respond to the KIA's subsequent concerns.[360]

7.129. It is common ground amongst the parties that the product scope of the ISSF data encompassed not only the "product under investigation", but also "excluded products"[361] and stainless steel sections.[362] The ISSF data indicated that the three Japanese exporters' production capacity for stainless steel bars and sections was [[***]] tonnes, with a total of [[***]] for Japan as a whole[363], whereas the Japanese exporters' own figures indicated that their production capacity for the "product under investigation" ([[***]]) was [[***]] tonnes.[364] According to Korea, this broader product scope of the ISSF data was one of the reasons for which it was preferred over the Japanese exporters' figures.[365] Whereas the Japanese exporters' figures pertained to the "product under investigation"[366], Korea explains that the KIA preferred a broader product scope which would additionally encompass "the overall capacity of the production facilit[ies] that can be readily allocated to produce SSB products upon demand"[367], i.e. "secondary processing as a whole".[368] However, Japan contends that the KIA was wrong to use a data-set with a product scope that extended beyond the "product under investigation".[369] Japan seems to suggest that authorities must always take the "product under investigation" as the starting point when determining the capacity utilization rate for exporters in a likelihood-of-injury assessment under Article 11.3.[370] This is because production capacity data on the "product under investigation" will be more "relevant"[371], whereas using "overbroad data" covering other products will be "distortive and unreliable".[372]

comments on Korea's response to Japan's question after the second meeting with the Panel No. 1, para. 218; and response to Korea's question No. 10, para. 27 (point (ii)).

[360] Japan's first written submission, paras. 121, 137, and 237 (the latter in the context of "facts available") second written submission, paras. 416, 418, and 424; responses to Panel question No. 92, paras. 5, 9-10, and 12, No. 95, paras. 28-29 and 35, and No. 99, paras. 51-53; comments on Korea's response to Panel question No. 92, paras. 29 and 39; and responses to Korea's question No. 9, paras. 23-25, No. 19, paras. 57-59, and No. 27, paras. 81 and 84.

[361] These comprised SSBs that were removed from the scope of the original investigation and the subsequent reviews, and hence were not subject to anti-dumping duties, because the KIA found that the Korean domestic industry did not possess the manufacturing capability to produce those products. (OTI's final report, (Exhibit KOR-5.c (BCI)), p. 3 and fn 5).

[362] Korea's first written submission, paras. 189 and 193; Korea's responses to Panel question Nos. 44 and 57; Japan's response to Panel question No. 97, para. 41; Japan's comments on Korea's response to Panel question No. 92, para. 31; and Japan's second written submission, para. 404 (albeit suggesting that Korea changed its explanation in this regard during the Panel proceedings).

[363] ISSF statistics, (Exhibit KOR-20.b (BCI)).

[364] See paras. 7.136-7.137 below.

[365] Korea's second written submission, paras. 221-222; responses to Panel question No. 52(b), No. 54, No. 92, paras. 16-19, No. 95, paras. 92 and 95, No. 96, para. 117, and No. 99, para. 156.

[366] [[***]]. (See paras. 7.136-7.137 below).

[367] Korea's response to Panel question No. 44.

[368] Korea's comments on Japan's response to Panel question No. 92, p. 13.

[369] See, e.g. Japan's first written submission, paras. 122-123, 126, and 145; second written submission, paras. 402-403 (point (ii)) and 415-417; responses to Panel question No. 51, para. 306(ii); and No. 97, paras. 40-42; comments on Korea's response to Japan's question after the second meeting with the Panel No. 1, para. 218; and response to Korea's question No. 10, para. 27 (point (ii)).

[370] Japan's response to Korea's question No. 19, paras. 57-59: "[i]f the investigating authorities wish to expand the scope of the products that are used as a basis for calculating production capacity, they *must* explain their logic for doing so. … The authority *must assess at least*: (i) whether it is in fact technically feasible to shift from production of the product under investigation to production of those other models or products, and (ii) whether there is in fact any commercial incentive to make such a shift" (emphasis added). For Japan, authorities may *only* expand the product scope beyond the "product under investigation" under Article 11.3 upon examining of technical feasibility and commercial incentives for switching production from other products to the "product under investigation". See also Japan's response to Panel question No. 98, paras. 47-48; and comments on Korea's responses to Panel question No. 92, para. 30, No. 98, para. 86, and No. 99, paras. 96-97 and 101.

[371] Japan's first written submission, para. 145; second written submission, para. 417; and response to Panel question No. 51, para. 306(ii).

[372] Japan's response to Panel question No. 97, paras. 40-41. See also Japan's first written submission, paras. 128 and 145; second written submission, paras. 401-403; and comments on Korea's response to Panel question No. 93, para. 51.

7.130. We disagree with Japan. The text of Article 11.3 of the Anti-Dumping Agreement is silent on the appropriate methodology for determining capacity utilization rates for exporters[373] in sunset reviews. Instead, we agree with Korea that "in a sunset review, a relevant consideration for the likelihood-of-injury determination is to identify the total production capacity that *could be used* to produce the product under investigation if the anti-dumping measure is removed, and not just the production capacity of that particular product in the POR".[374] Depending on the circumstances of a given sunset review, including the nature of the product at issue, it seems reasonable that an authority may examine "what *total capacity* is available in the subject countries that could be used for exporting the product under investigation should the anti-dumping measure expire", as Korea explains.[375] Such an examination would accord with the counterfactual and forward-looking analysis of a sunset review.[376]

7.131. We accept Japan's point that an authority's capacity utilization determination, including the parameters used for its product scope, must have a factual basis.[377] However, this does not mean that authorities are legally required under Article 11.3 to examine the technical feasibility and commercial incentives for exporters to switch production to other product lines before permissibly relying on a product scope broader than the "product under investigation" when determining those exporters' production capacity.[378] Such an analysis might assist an authority in generating a sufficient factual basis and providing a reasoned and adequate explanation for its capacity utilization determination, but it is not prescribed as a matter of law by Article 11.3.

7.132. Thus, to the extent that Japan seeks to fault the KIA under Article 11.3 simply because the KIA relied on a broader product scope than the "product under investigation" when determining Japan's capacity utilization rate, we reject it.[379] However, we agree with Japan that it would be improper for an authority to determine a capacity utilization rate based on a broader product scope without informing the interested parties of the parameters of that scope and without affording them an opportunity to comment or submit data based on those parameters.[380] This is particularly so if the interested parties were requested earlier in the review to provide capacity utilization data based on a different product coverage, e.g. limited to the "product under investigation". There is nothing improper *per se* with an authority adjusting its preferred parameters for the capacity utilization assessment during a review, but as we have said, we would expect the authority to inform the interested parties and afford an adequate opportunity to comment or submit revised data. A failure to do so could fall short of the "appropriate degree of diligence" required of investigating authorities in conducting a "review" under Article 11.3 of the Anti-Dumping Agreement.[381] Indeed, we cannot see how an authority's evaluation of the facts can be "unbiased and objective" if the authority rejects the data submitted by the interested parties for failing to comport with certain new parameters of which they were not informed.[382]

[373] For the avoidance of doubt, we do not express a view on whether an exporter-specific methodology or an aggregate country-wide methodology is preferable under Article 11.3. Nor do we seek to suggest that a determination of capacity utilization rates is a necessary facet of sunset reviews under Article 11.3.

[374] Korea's response to Panel question No. 98, para. 133. (emphasis original)

[375] Korea's response to Panel question No. 98, para. 150. (emphasis original)

[376] Korea's second written submission, para. 221; response to Panel question No. 92, para. 19.

[377] Japan's response to Korea's question No. 19, paras. 58-59; response to Panel question No. 98, paras. 45-48; and comments on Korea's response to Panel question No. 98, para. 86.

[378] To the extent that this is Japan's argument (Japan's response to Korea's question No. 19, paras. 57-59), we reject it.

[379] We note that Japan also contests whether the KIA conducted an "objective examination" in the particular circumstances of the present sunset for relying upon a broader product scope (see, e.g. Japan's second written submission, para. 419; response to Panel question No. 92, paras. 14-18; comments on Korea's response to Panel question No. 92, para. 34). In view of our ultimate conclusion in this section, we do not consider it necessary for the prompt and effective resolution of the dispute to address those contentions.

[380] See, e.g. Japan's responses to Panel question No. 99, paras. 51-52, and No. 105, para. 84; and second written submission, para. 424.

[381] Both parties agree with the Appellate Body's proposition (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111), that authorities are required to act with an "appropriate degree of diligence" in arriving at a "reasoned and adequate explanation" for the likelihood-of-injury determination. (Korea's second written submission, para. 87; Japan's second written submission, para. 73).

[382] We believe this to accord with Korea's statement that, when confronted with "inconsistent and unsubstantiated replies", the "only obligation [on authorities] is to make sure that the respondents are aware of the concerns and can address them if they want". (Korea's response to Panel question No. 102, para. 183).

7.133. With those considerations in mind, we turn now to Japan's contention that the Japanese exporters complied with the KIA's initial request for production capacity data, but were deprived of an adequate opportunity to respond to the KIA's subsequent concerns, particularly in view of a lack of clarity over the data-scope that was allegedly sought.[383] The parties disagree upon the substance and timing of what was conveyed by the KIA to the Japanese exporters regarding the KIA's preferred parameters for the capacity utilization determination. There are four contested interactions between the Japanese exporters and the KIA in this regard. We address each in turn.

7.134. First, Japan contends that the initial questionnaire sent to the Japanese exporters dated 3 June 2016 specified that the production capacity data should pertain to the product under investigation, which was defined explicitly by the KIA in a way that omitted the "excluded products" and other stainless steel products e.g. sections.[384] Korea contends that this initial questionnaire was a "dumping questionnaire" sent by the "Dumping Investigation Division" as distinct from the injury proceeding in the sunset review.[385] According to Korea, this questionnaire was "not the [KIA's] initial information request for the production capacity for its injury proceeding".[386] For Korea, it is therefore not the proper "starting point" of the "dialogue" between the Japanese exporters and the KIA on this matter, which instead commenced on 1 September 2016 as reflected in the "Official Log of Investigation on Injury".[387] Korea states that "the Panel must not conflate the two separate proceedings in arriving at its findings"[388], and "warns the Panel against placing undue weight on the initial dumping questionnaire issued by the Dumping Investigation Division".[389]

7.135. We cannot reconcile Korea's contention with the plain text of the KIA's determination. In the likelihood-of-injury section, the KIA's determination relies explicitly on the Japanese exporters' responses to the 3 June 2016 questionnaire when referencing their submitted production capacity and capacity utilization data.[390] The notion that the Japanese exporters' responses to the 3 June 2016 questionnaire have "no direct bearing" upon the KIA's likelihood-of-injury determination is therefore plainly contradicted by the determination itself.[391] Japan also makes the point that the KIA never conveyed to the Japanese exporters that their response to the request for production capacity and capacity utilization data in the 3 June 2016 questionnaire would not be used for the KIA's likelihood-of-injury assessment.[392] Rather, the Japanese exporters understood the subsequent 21 September 2016 inquiries – the first received from the KIA's Injury Investigation Division[393] – to be "*supplementary* questionnaires".[394] The Official Log of the KIA's Injury Investigation Division similarly describes the 21 September 2016 inquiries as requests for "*additional* supplementation".[395] This additional context indicates that the 3 June 2016 questionnaire was

[383] Japan's first written submission, paras. 121, 137, and 237 (the latter in the context of "facts available"); second written submission, paras. 416, 418, and 424; responses to Panel question No. 92, paras. 5, 9-10, and 12, No. 95, paras. 28-29 and 35, and No. 99, paras. 51-53; comments on Korea's response to Panel question No. 92, paras. 29 and 39; and responses to Korea's question No. 9, paras. 23-25, No. 19, paras. 57-59, and No. 27, paras. 81 and 84.

[384] Japan's response to Panel question No. 92, para. 2 (referring to Guideline on the scope of the product under investigation, (Exhibit JPN-41.b), pp. 1-2).

[385] Korea's response to Panel question No. 92, paras. 22-27 (referring to Sanyo questionnaire response, (Exhibit JPN-7.b (BCI)), p. 1).

[386] Korea's response to Panel question No. 92, para. 26. (emphasis omitted)

[387] Korea's response to Panel question No. 92, paras. 29-33 (referring to Official log of investigation, (Exhibit KOR-27.b (BCI)), p. 2 (emphasis omitted)). See also ibid. No. 95, paras. 100-103 and 107.

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

[389] Korea's comments on Japan's response to Panel question No. 92, p. 9. (emphasis omitted)

[390] OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 58 and 87 and fn 80.

[391] Korea's response to Panel question No. 95, para. 100.

[392] Japan's comments on Korea's response to Panel question No. 92, para. 19.

[393] Korea's responses to Panel question No. 92, paras. 28-31, and No. 95, paras. 100-103 and 107-110.

[394] Japanese exporters' submission of opinion dated 7 November 2016, (Exhibit KOR-25.b (BCI)), p. 1. (emphasis added)

[395] Official log of investigation, (Exhibit KOR-27.b (BCI)), p. 1 (emphasis added). The KIA's meeting minutes also described these as "[a]dditional inquiries". (Minutes of meeting dated 21 September 2016, (Exhibit KOR-26.b (BCI)), p. 1). The KIA later described the 21 September 2016 inquiry as an "additional" inquiry that sought to verify data that had already been provided by the Japanese producers, which likewise contradicts the notion that the 21 September 2016 inquiry represented the KIA's first data request for the injury assessment. (KTC's submission of review to MOSF, (Exhibit KOR-48.b (BCI)), p. 8). We note that Japan objects to our consideration of exhibit KOR-48.b because, *inter alia*, it was not disclosed to the interested parties and the final determination was not amended by this document. (Japan's response to Panel question No. 95, paras. 33-35). We reject Japan's objection in this regard. This document clearly describes part of the

treated as an initial information request of relevance to the injury proceeding. We therefore reject Korea's contention and proceed on the basis that the 3 June 2016 questionnaire represents the KIA's initial request for information from the Japanese exporters for production capacity and capacity utilization data, including for the purposes of its likelihood-of-injury assessment.

7.136. The three Japanese exporters submitted individual responses to the 3 June 2016 questionnaire. The questionnaire was clear in setting the "[p]roduct under [i]nvestigation" as the product scope for the requested data concerning capacity utilization.[396] As we understand it, this product scope was not intended to cover the "excluded products" or other stainless steel products.[397] Two of the Japanese exporters submitted figures that were, according to their explanation, limited to the "product under investigation".[398] One of the Japanese exporters, Aichi Steel Corporation (Aichi), submitted separate figures for stainless steel flat bar and stainless steel round bar[399], and stated in the section of the questionnaire concerning the product code that [[***]].[400] Thus, Aichi's data comprised both the "product under investigation" and [[***]], which corresponded to two different figures in its questionnaire response.[401]

7.137. Following these individual questionnaire responses in July 2016, the Japanese exporters made a joint submission to the KIA on 1 September 2016. They aggregated the figures from their individual responses to provide joint figures for their combined annual production capacity and annual production volume in this submission, together with an aggregated capacity utilization rate. The joint production capacity figure was [[***]] and the yearly aggregated capacity utilization rates for 2012-2015 were [[***]], [[***]], [[***]], and [[***]].[402] The Japanese exporters explained that "[o]nly the product under investigation is counted" in these figures, and clarified that "[t]he products excluded from the anti-dumping measures are excluded".[403] This explanation was, however, inaccurate with respect to Aichi's data, which covered both the "product under investigation" and [[***]] as per its earlier individual questionnaire response. Japan explains that this was an "inadvertent mistake" that the Japanese exporters subsequently corrected in their submission of 20 January 2017[404], in which they stated that their aggregated figure included the Aichi's production capacity for [[***]].[405]

7.138. We turn now to the second contested interaction. It concerns the inquiries made by the KIA to the Japanese exporters at a meeting on 21 September 2016.[406] These were oral inquiries and the evidence before us on their substance is contained in a summary in the KIA's minutes of the meeting and an entry in the KIA Injury Investigation Division's Official Log, together with a follow-up email on 21 September 2016 from the counsel of the Japanese exporters to the Japanese exporters in which the counsel (and consequently, the Japanese exporters) memorialized their understanding of

KIA's analysis as it moved towards deciding whether to continue imposing anti-dumping measures. We are thus not precluded from considering this document, though we note its probative value in these proceedings may vary between differing contexts.

[396] See, e.g. Sanyo questionnaire response, (Exhibit JPN-7.b (BCI)), pp. 6-7. The questionnaire did not appear to prescribe explicitly what Korea describes as the "source" of the requested data (Korea's comments on Japan's responses to Panel question No. 93, pp. 18-19, and No. 106, pp. 48 and 50), e.g. peeling facilities or others, but the questionnaire did request the exporters to "[p]lease explain your method to calculate the production capacity and the Capacity Utilization Rate" (e.g. Sanyo questionnaire response, (Exhibit JPN-7.b (BCI)), pp. 6-7). The concepts of "source" (or allocation method) and "scope" were not clearly delineated by the parties during these proceedings and we understand them to be interrelated, insofar as parameters on the "scope" of production capacity data can inform the "source" chosen, and parameters on the "source" for the production capacity data can inform the "scope" being considered. Nonetheless, our evaluation in this section is cognisant of Korea's distinction in this regard. We address Korea's specific contentions about the alleged inconsistencies in the "source" of the Japanese exporters' production capacity figures at paras. 7.159 and 7.164 below.

[397] Japan's response to Panel question No. 92, para. 2 (referring to Guideline on the Scope of the product under investigation, (Exhibit JPN-41.b), pp. 1-2).

[398] Sanyo questionnaire response, (Exhibit JPN-7.b (BCI)), p. 7; Daido questionnaire response, (Exhibit JPN-9.b (BCI)), annex D-3.

[399] Aichi questionnaire response, (Exhibit JPN-8.b (BCI)), annex D-3.1.

[400] Aichi questionnaire response, (Exhibit JPN-8.b (BCI)), annex C-2.1.

[401] Japan's response to Panel question No. 106, para. 86.

[402] Japanese exporters' opinion regarding injuries, (Exhibit JPN-10.b (BCI)), p. 15.

[403] Japanese exporters' opinion regarding injuries, (Exhibit JPN-10.b (BCI)), p. 15.

[404] Japan's comments on Korea's response to Panel question No. 92, paras. 25-26; response to Panel question No. 106, para. 89.

[405] Japanese exporters' response to KTC's additional inquiries, (Exhibit JPN-17.b (BCI)), p. 1.

[406] Korea's response to Panel question No. 92, para. 31.

what had been requested.[407] This follow-up email also indicates the Japanese exporters' understanding that "[a]lthough there were multiple questions, [the KIA] said that these will be sent later by official letter".[408] There is no evidence on the record to indicate that the inquiries were subsequently sent in writing by the KIA. While this email was for internal use and not sent to the KIA, it appears to have been sent shortly after the meeting on the same date, and the understanding of the KIA's inquiries reflected therein accords with the understanding reflected in the Japanese exporters' subsequent joint submission of 7 November 2016.[409] There is no record evidence before us to indicate that the Japanese exporters' understanding of the KIA's inquiries as reflected in that joint submission was subsequently corrected or clarified by the KIA.[410]

7.139. According to Korea, the aforementioned evidence of the KIA's oral inquiries of 21 September 2016 demonstrates that:

> [T]he Korean authorities specifically requested, *inter alia*, (i) the *specific materials* that supports the Japanese respondents' unsubstantiated allegation that their capacity utilization is [[***]]% or higher; (ii) the *production capacity* of each facility (the aggregated amount of which constituting the overall production capacity); (iii) *proportion* of each steel product that are being produced by the production facilities against their overall production, etc.[411]

7.140. Korea argues that "it is noteworthy that the Japanese respondents confirmed the request from the Korean authorities by rephrasing these admittedly 'supplementary' questions in their written response dated 7 November 2016".[412] Korea states that, in "defiance" of these inquiries, the Japanese exporters "did not provide at all data on the overall capacity of their peeling machines, production and proportion of each SSB product and non-SSB product, or any supporting material to allow the Korean authorities to verify".[413] Korea describes the KIA's intention as having been to "obtain the overall production capacity of the Japanese respondents' production facilities, and the proportion of each steel product (including covered, excluded, and non-SSB products) produced by the facilities against the facilities' overall production".[414] Korea also explains that the KIA's inquiries of 21 September 2016 were intended to obtain "raw data" to verify the overall peeling capacity of the Japanese exporters and the accuracy and reasonableness of their allocation method with respect to their submitted production capacity and capacity utilization figures.[415]

7.141. Japan disputes this characterization of the substance of the KIA's inquiries of 21 September 2016. According to Japan, the KIA "did not make clear the alleged premise that the production capacity of other products can be converted to that of product under investigation when making the relevant inquiries", and never clearly indicated that the production capacity data should cover a product scope beyond the "product under investigation", contrary to the KIA's 3 June 2016 questionnaire.[416] According to Japan, the KIA's 21 September 2016 inquiries sought "only the '[v]olume of production' (rather than production capacity) of the excluded products and other steel products", and the Japanese exporters "did not recognize that the [KIA] were inquiring about data regarding excluded products" for production capacity.[417] Japan also disputes Korea's contention that

[407] Minutes of meeting dated 21 September 2016, (Exhibit KOR-26.b (BCI)), p. 1 (entitled "Summary of Opinions of Respondent (Counsel)"); Official log of investigation, (Exhibit KOR-27.b (BCI)), p. 2; and Email reporting the meeting dated 21 September 2016, (Exhibit JPN-30.b (BCI)), pp. 1-2. See also Korea's response to Panel question No. 92, paras. 37-38.

[408] Email reporting the meeting dated 21 September 2016, (Exhibit JPN-30.b (BCI)), pp. 1-2.

[409] Japanese exporters' submission of opinion dated 7 November 2016, (Exhibit KOR-25.b (BCI)), p. 1.

[410] Japan's response to Panel question No. 50, para. 275; Korea's response to Panel question No. 92, paras. 12 and 32.

[411] Korea's comments on Japan's response to Panel question No. 92, p. 10 (emphasis original). Korea also refers to a document prepared by the KIA seven months after this interaction as "confirm[ing]" its understanding of the substance of the KIA's inquires of 21 September 2016. (KTC's submission of review to MOSF, (Exhibit KOR-48.b (BCI)), p. 8). Given the timing and nature of this document, we do not understand it to constitute direct evidence of the substance of the KIA's inquiries, and consider its probative value to be limited in that regard.

[412] Korea's response to Panel question No. 92, para. 38. (fn omitted)

[413] Korea's response to Panel question No. 92, para. 39.

[414] Korea's comments on Japan's response to Panel question No. 92, p. 9.

[415] Korea's response to Panel question No. 95, paras. 87-90, 92-93, 95, 97, 99, and 103.

[416] Japan's comments on Korea's response to Panel question No. 92, paras. 39-42; response to Panel question No. 92, paras. 6-7.

[417] Japan's response to Panel question No. 92, paras. 7 and 10.

the KIA's inquiries included a request for "raw data" that "would have allowed the [KIA] to verify any reported figure by the Japanese respondents concerning their total capacity allegedly allocated to the covered products"[418], and emphasizes that the KIA did not convey to the Japanese exporters that it had concerns about the reliability or product scope of the submitted figures.[419]

7.142. We have reviewed the evidence on the substance of the KIA's inquiries of 21 September 2016, and we agree with Japan. The KIA's meeting minutes describes the inquiries as follows:

> Specific data must be presented with respect to the "capacity utilization is equal to or higher than [[***]]%."
>
> Status of the (new) installation of the facilities for peeling processes, and the production capacity of each facility should be provided
>
> Volume of production and proportion of each steel grade (STS, carbon steel, etc.) constituting the total capacity utilization
>
> Volume of production and proportion of each item of STS grade (dumped imports, excluded goods)
>
> Status of annual production and volume of exports of the excluded goods[.][420]

7.143. The KIA's Official Log entry regarding these inquiries states:

> Requested additional supplementation: Cases of WTO decisions, specific details of the capacity utilization of more than [[***]]%, difference in the volume of exports and imports[.][421]

7.144. The 7 November 2016 joint submission containing the Japanese exporters' understanding of the substance of these inquiries states:

> 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 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.[422]

7.145. None of these pieces of evidence demonstrate that the KIA conveyed to the Japanese exporters that it had redefined its preferred product scope for the capacity utilization rate as extending beyond the "product under investigation", nor that the Japanese exporters' understanding in that regard was incorrect. The KIA appears to have requested the production capacity of each peeling facility, but it is not apparent that the KIA was now interested in a different product scope to that previously conveyed in the 3 June 2016 questionnaire, nor is it discernible that raw data was sought to verify the overall peeling capacity of the Japanese exporters and the accuracy of their allocation method with respect to production capacity. This is simply not apparent from the plain text of these pieces of evidence, nor can such a request be reasonably inferred from their plain text. We further note that the Japanese exporters' understanding of the inquiry as reflected in their 7 November 2016 joint submission makes no mention of the "overall" or "total" capacity of peeling facilities, nor of requests for "raw data" to verify their "total capacity allegedly allocated to the

[418] Japan's comments on Korea's responses to Panel question No. 92, paras. 41-44, and No. 95, para. 70; response to Panel question No. 95, paras. 27-31.
[419] Japan's response to Panel question No. 95, paras. 29-30; comments on Korea's response to Panel question No. 92, paras. 29 and 38-44.
[420] Minutes of meeting dated 21 September 2016, (Exhibit KOR-26.b (BCI)), p. 1.
[421] Official log of investigation, (Exhibit KOR-27.b (BCI)), p. 1.
[422] Japanese exporters' submission of opinion dated 7 November 2016, (Exhibit KOR-25.b (BCI)), p. 1. As mentioned earlier, this is substantively equivalent to their understanding as reflected in: Email reporting the meeting dated 21 September 2016, (Exhibit JPN-30.b (BCI)), p. 1.

covered products … and how (and if) such capacity was allocated to SSBs".[423] Rather, the first two inquiries (as extracted immediately above) concern "products *other than* stainless steel" and thus cannot be said to convey that the intended product scope encompassed the "excluded products" and stainless steel sections in addition to the "product under investigation". The third inquiry concerns the somewhat distinct issue of the "respective proportions of special steel and general-purpose steel out of stainless steel" and again cannot be said to convey a different product scope to that requested by the KIA in the 3 June 2016 dumping questionnaire. The Japanese exporters' response to these inquiries indicates that they continued to operate on the understanding that the "dumped imports" (i.e. the "product under investigation") formed the basis for determining production capacity, as had been conveyed by the KIA in the 3 June 2016 dumping questionnaire, and as indicated in table 3 of the written opinion to which this inquiry refers.[424] There is no record evidence before us indicating that the KIA subsequently clarified that its inquiries of 21 September 2016 had instead been intended to cover a broader product scope and to obtain data on "the overall capacity of their peeling machines, production and proportion of each SSB product and non-SSB product, [and] any supporting material to allow the Korean authorities to verify".[425]

7.146. We turn now to the third contested interaction, which pertains to the substance of the KIA's inquiries of 24 and 30 November 2016. Korea contends that on 24 November 2016 "there was the public hearing, in which the Japanese respondents were specifically asked to provide outstanding data concerning, among others, production capacity and utilization", and that on 30 November 2016 the KIA "clarified" this information request in a telephone call, namely that the exporters should "provide the outstanding information, as indicated during the public hearing, namely the data on production capacity and utilization of all facilities 'capable' of producing SSBs".[426] Korea indicates that this information request was "for the complete peeling capacity of the Japanese respondents, which was the relevant capacity data that could be used to produce the covered SSB products", although we also note Korea's subsequent clarification that the KIA was seeking "the capacity of the secondary processing as a whole, as opposed to the capacity of the peeling process only".[427]

7.147. According to Japan, the evidence on the substance of the KIA's inquiries of 24 and 30 November 2016 makes "no specific reference to excluded products and other steel products"[428], and the plain text of the Official Log entry suggests that the inquiries were susceptible to varying understandings.[429]

7.148. We have reviewed the evidence on the substance of the KIA's inquiries of 24 and 30 November 2016. While the KIA did make a request for "data on production capacity and capacity utilization" at the public hearing[430], the inquiry is formulated in imprecise terms and the KIA seems to have requested that the capacity utilization data on the "dumped imports" be "differentiated" from the "products not covered" i.e. the excluded products.[431] According to an entry in the KIA's Official Log, in a subsequent telephone call on 30 November 2016 the KIA instructed the Japanese producers "to submit the materials requested by the commissioners at the public hearing" and "[e]xplained that the materials requested by the standing commissioners in particular relate to the production capacity and capacity utilization including the production capacity of production facilities capable of manufacturing STS bars".[432] Again, this evidence on the substance of the inquiries suggests that they were somewhat imprecise. Korea focuses on the term "capable" in the KIA's Official Log entry for this telephone call, and also suggests that the KIA was requesting data for "all" facilities[433], which Korea characterizes as a request for the "Japanese respondents' total

[423] Korea's response to Panel question No. 95, paras. 87-88.
[424] Japanese exporters' submission of opinion dated 7 November 2016, (Exhibit KOR-25.b (BCI)), p. 1 ("Status of Respondents Production of Dumped Imports"). We note that the Japanese exporters provided figures concerning both the "product under investigation" *and* "excluded products" where they understood this to have been requested by the KIA. (Ibid, p. 5).
[425] Korea's response to Panel question No. 92, para. 39.
[426] Korea's response to Panel question No. 92, para. 42.
[427] Korea's response to Panel question No. 92, para. 48; comments on Japan's response to Panel question No. 92, pp. 12-13.
[428] Japan's response to Panel question No. 92, para. 11.
[429] Japan's comments on Korea's response to Panel question No. 92, para. 47; response to Korea's question No. 27(iii), para. 82.
[430] Minutes of public hearing (24 November 2016), (Exhibit KOR-19.b (BCI)), pp. 35-36.
[431] Minutes of public hearing (24 November 2016), (Exhibit KOR-19.b (BCI)), p. 30.
[432] Official log of investigation, (Exhibit KOR-27.b (BCI)), p. 5.
[433] Korea's responses to Panel question No. 92 para. 42, and No. 95, para. 104; second written submission, para. 211.

peeling capacity and underlying raw data".[434] Given its lack of precision, we are unwilling to read additional words and meaning into this evidence that are not apparent on its face.

7.149. Moreover, as mentioned, the KIA appears to have requested that the relevant data concerning the "dumped imports" be "differentiated" from the "excluded products"[435], which would appear to accord with the KIA's approach in its 3 June 2016 questionnaire that set the "[p]roduct under [i]nvestigation" as the basis for the requested data concerning capacity utilization.[436] We also consider it noteworthy that there is an absence in this evidence of any express mention that the KIA had redefined its preferred parameters for the capacity utilization rate as extending beyond the "product under investigation". Further, it is noteworthy that this evidence does not indicate that the KIA conveyed to the Japanese exporters that their submission of production capacity figures, for which "[o]nly the product under investigation is counted"[437], were based on incorrect parameters and did not constitute data.

7.150. Korea contended that the parameters for production capacity in the information requests conveyed through the "dialogue" between the KIA and the Japanese exporters beginning in September 2016 were "exactly the same" as those conveyed to the applicants in their written injury questionnaire.[438] We have reviewed the injury questionnaire issued to the applicants in writing. It provides a counterpoint to the lack of precision in the documentary evidence before us concerning what was conveyed to the Japanese exporters in the so-called dialogue of oral exchanges. In particular, the injury questionnaire issued to the applicants in writing shows the tables that they were requested to complete, including yearly breakdowns for production capacity, production volume, self-consumption, change rates, and capacity utilization, as well as facility breakdowns of capacity utilization covering flux, average diameter, hours per day, production days per year, daily production volume, steel bar production, and SUS production.[439] The questionnaire sent by the KIA to the applicants provided the explicit guidance that "if the production facility for domestic like products can be used to produce products other than the dumped imports, provide specific grounds for calculation of each production capacity".[440] It further requested the applicants to (a) "provide the methods to estimate the potential production days or months in light of non-operating days or maintenance periods"; (b) "describe the planned periods and production capacities of the facilities to be added or reduced" if "your company is planning to build up or downsize facilities for domestic like products"; and (c) "[d]escribe whether your company's capacity utilization is optimum compared to average capacity utilization in the same industry".[441] Thus, the level of precision with which the KIA expressed its requests for the applicants' capacity utilization information stands in contrast with the documentary evidence surveyed above on the substance of the KIA's oral requests for the Japanese exporters' capacity utilization information. For instance, Korea focuses on the KIA's apparent use of terms like "capable" and "specific data" in this documentary evidence of the oral dialogue with the Japanese exporters, but these terms are far less precise than the detailed written request issued to the applicants. Our comparison between the KIA's written information request to the applicants and the evidence on the KIA's oral information requests to the Japanese exporters confirms our decision not to read additional words and meaning into the documentary evidence of the oral dialogue that are not apparent on its face.

7.151. We turn now to the fourth contested interaction, which pertains to the substance of the KIA's inquiries of 11 January 2017. These were oral inquiries made at a meeting. The only evidence before us on their substance is the KIA's Official Log entry for this meeting, which states:

> Requested the submission of supplemental materials (by 20 January)[.] Status of peeling machines and production capacity of each peeling machine; detailed grounds for the calculation of production capacity; annual and daily volume of

[434] Korea's response to Panel question No. 95, para. 110.
[435] Minutes of public hearing (24 November 2016), (Exhibit KOR-19.b (BCI)), p. 30.
[436] See, e.g. Sanyo questionnaire response, (Exhibit JPN-7.b (BCI)), pp. 6-7. 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.
[437] Japanese exporters' opinion regarding injuries, (Exhibit JPN-10.b (BCI)), p. 15. As we have mentioned earlier, the Japanese exporters' explanation was incorrect on this point regarding Aichi's data.
[438] Korea's comments on Japan's comments on the Interim Report, p. 22; comments on the Interim Report, para. 91; and response to Panel question No. 95, paras. 91-95.
[439] Injury questionnaire response, (Exhibit KOR-72.b (BCI)), p. 12.
[440] Injury questionnaire response, (Exhibit KOR-72.b (BCI)), p. 12.
[441] Injury questionnaire response, (Exhibit KOR-72.b (BCI)), p. 13.

> production and end-term inventory of the dumped imports; status of classification of special steel types[.][442]

7.152. Korea characterizes this as a request "for the Japanese respondents' total peeling capacity and underlying raw data", but explains that "the Japanese respondents again provided the same capacity number on the covered and excluded SSBs with no underlying data".[443] With respect to the reference to the "production capacity of each peeling machine", Korea states that this meant "all" peeling machines[444], and this request was "obviously to obtain, again, the Japanese respondents' overall production capacity, as each peeling machine's production capacity should collectively add up to the overall production or peeling capacity of the Japanese respondents".[445] Korea notes that the Japanese exporters "themselves argued and provided the reasons as to why 'peeling capacities' must be used as the production capacity"[446], and therefore "in order to confirm whether and how the respondents had allocated their peeling capacity to the covered SSBs, the Korean authorities requested information on their total peeling capacity".[447]

7.153. Japan contends that "there was no specific reference to excluded products and other steel products" in these inquiries.[448] On the contrary, the reference to the "dumped imports" in this evidence "again indicates that the focus was on the product under investigation", and "[n]othing in the phrase 'dumped imports' would give the Japanese Respondents any reason to believe the authorities were asking about anything other than the product under investigation".[449] With respect to the reference to the "production capacity of each peeling machine", Japan states that the Japanese exporters "understood that the product scope for the data concerning peeling machines is the product under investigation" and had not been instructed otherwise by the KIA.[450]

7.154. We have reviewed the evidence on the substance of the KIA's inquiries of 11 January 2017. In its prior submission dated 8 December 2016, the Japanese exporters had contended that "the production capacity of the peeling process is the production capacity of the *product under investigation* in this case".[451] Korea indicates that the KIA's inquiries of 11 January 2017 regarding the "production capacity of each peeling machine" followed on from the Japanese exporters' contention on this point.[452] We recall that, pursuant to Korea's understanding, "[t]he only obligation [on authorities] is to make sure that the respondents are aware of the concerns and can address them if they want".[453] Nothing in the Official Log entry for the 11 January 2017 meeting suggests to us that the KIA made sure that the Japanese exporters were aware of the concern that "what mattered for the [KIA] … was such reasonably convertible capacity upon removal of the duties and *not the capacity currently and specifically allocated to the covered SSB products in the POR*".[454] Specifically, there is no indication in the available evidence that the KIA sought to correct the Japanese exporters' reliance on the peeling process production capacity for the "product under investigation" in particular. If 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

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[442] Official log of investigation, (Exhibit KOR-27.b (BCI)), p. 6.
[443] Korea's response to Panel question No. 95, paras. 105-106 and 110. See also ibid. No. 92, paras. 47-48.
[444] Korea's response to Panel question No. 92, para. 47.
[445] Korea's response to Panel question No. 95, para. 224.
[446] Korea's response to Panel question No. 95, para. 223.
[447] Korea's comments on Japan's response to Panel question No. 105, pp. 44-45.
[448] Japan's response to Panel question No. 92, para. 11.
[449] Japan's response to Panel question No. 92, para. 11.
[450] Japan's response to Panel question No. 105, paras. 83-84; comments on Korea's response to Panel question No. 105, paras. 180-181.
[451] Japanese exporters' post-hearing opinion, (Exhibit JPN-16.b (BCI)), pp. 1-2 (emphasis added). We observe that the Japanese exporters made certain confusing remarks regarding the coverage of the "excluded products" in their production capacity data in the 8 December 2016 submission. What is clear, however, is that they were operating on the basis that the production capacity of the "product under investigation" was the preferred parameter, as reflected in their description of the question being asked and the subsequent responses. (Ibid. pp. 1-3). It is also clear that they were not operating on the understanding that the production capacity of other stainless steel products should be covered, nor that the preferred parameter comprised "the overall capacity of the production facilit[ies] that can be readily allocated to produce SSB products upon demand". (Korea's response to Panel question No. 44).
[452] Korea's comments on Japan's response to Panel question No. 105, pp. 44-45; response to Panel question No. 105, paras. 221-223.
[453] Korea's response to Panel question No. 102, para. 183.
[454] Korea's response to Panel question No. 105, para. 225. (emphasis added)

as the exporters might expect the production volume data and the production capacity data to have corresponding product scopes.[455]

7.155. Subsequent to the 11 January 2017 inquiries, the KIA released the OTI's revised interim report. Korea seems to suggest that, upon seeing that the KIA had opted for the ISSF production capacity data with a broader product scope, the Japanese exporters could have submitted "an updated number for the updated scope (i.e., allocated to both the covered and excluded products)".[456] Japan rejects Korea's suggestion that the Japanese exporters could have submitted updated data at that point because they were never made aware of the broader product scope and persisted in their understanding "that the product scope of the required production capacity was the product under investigation".[457]

7.156. We have reviewed the version of the OTI's revised interim report that was made available to the Japanese exporters.[458] The KIA explicitly cited the Japanese exporters' individual responses to production capacity portion of the 3 June 2016 questionnaire but refrained from mentioning that their figures had been rejected due to an incorrect product scope and a failure to provide raw data.[459] We recognize that there are some elements from which it could be divined that the KIA had opted for a different product scope for the production capacity data *vis-à-vis* what the KIA had specified in the 3 June 2016 questionnaire.[460] However, we see nothing in Article 11.3, nor in the Anti-Dumping Agreement more generally, that suggests that interested parties are expected to engage in back-calculations and inferential reasoning, or piece together a puzzle, to derive the parameters of the data and verifying material that an authority is seeking. Indeed, in general terms, Korea itself makes the point that: "[c]learly, all likelihood-of-injury analysis by the KTC or OTI was conducted on the basis of the covered products" and "[p]roducts 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".[461] In light of this general approach and understanding in the KIA's likelihood-of-injury determination, we would expect the KIA to instruct the interested parties directly and clearly where it intended to deviate from that approach, including at an appropriate stage in the review such that the interested parties could respond accordingly. With these considerations in mind, we accept Japan's point that the OTI's revised interim report did not adequately convey to the Japanese exporters the data and materials which Korea now explains were sought by the KIA such that the Japanese exporters were made "aware of the concerns and [could] address them if they want".[462]

7.157. Korea argues that, regardless of any issues concerning the Japanese exporters' submissions, the only question before us is whether "it was unreasonable to rely on the ISSF data"[463], which Korea contends "was objectively more appropriate for Korea's determination as it contained Japanese macro data".[464] Japan responds that, as evidence of country-wide production capacity, the Japanese exporters' data was the most probative[465], and the ISSF data was not the most reliable since it was "not tailor-made for the sunset review at issue".[466] We find Korea's distinction between the company-specific figures of the Japanese exporters and the country-wide ("macro") figures of the

[455] 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. In view of our ultimate conclusion in this section, we need not express a view in the abstract on the parties' arguments and rebuttals concerning the requisite degree of alignment under Article 11.3 between the product scope of the numerator and the product scope of the denominator when an authority decides to generate a capacity utilization rate for likelihood-of-injury assessments in sunset reviews.

[456] Korea's response to Panel question No. 94, para. 83. See also Korea's response to Panel question No. 97, para. 127; and second written submission, paras. 211-212 (in which the revised interim report is listed amongst the "continuous and detailed requests made by the [KIA] for the complete and accurate data").

[457] Japan's comments on Korea's response to Panel question No. 97, para. 80.

[458] OTI's revised interim report, (Exhibit JPN-1.b).

[459] OTI's revised interim report, (Exhibit JPN-1.b), p. 39 and fn 54.

[460] OTI's revised interim report, (Exhibit JPN-1.b), fns 48 and 49.

[461] Korea's response to Panel question No. 9(a)(i).

[462] Korea's response to Panel question No. 102, para. 183.

[463] Korea's second written submission, para. 137. See also Korea's comments on Japan's response to Panel question No. 96, p. 26.

[464] Korea's first written submission, paras. 203, 205, and 224.

[465] Japan's responses to Korea's question No. 6, para. 17, and No. 22, para. 65.

[466] Japan's comments on Korea's response to Panel question No. 93, para. 51; response to Korea's question No. 10, paras. 27-28.

ISSF unconvincing in the circumstances of the present case. The three Japanese exporters that submitted figures on their production capacity represented [[***]] of the ISSF's country-wide production capacity data, and the ISSF structured its data in a company-specific way.[467] Moreover, Korea's description of the ISSF data as being the "starting point" does not accord with the KIA's own description of its approach, in which it examined the Japanese exporters' data, found it to be lacking, and then "*[u]nder such circumstances*, the investigating authorities reviewed the data from the ISSF and used it".[468]

7.158. At this juncture, it is useful to summarize our evaluation thus far. We consider that the 3 June 2016 questionnaire represents the KIA's initial request for information from the Japanese exporters for production capacity and capacity utilization data, including for the purposes of its likelihood-of-injury assessment. This questionnaire was clear in setting the "[p]roduct under [i]nvestigation" as the preferred product scope for the requested data concerning capacity utilization. Ultimately, the KIA preferred a broader product scope encompassing the "excluded products" and certain other products with a view to identifying "the overall capacity of the production facilit[ies] that can be readily allocated to produce SSB products upon demand"[469], i.e. "secondary processing as a whole".[470] Korea also explains that "[f]or SSB production capacities, given the high-adaptability of the SSB production facilities, the data must be specific and detailed enough to allow verification of the accuracy, veracity, reliability, and reasonableness of the submitter's allocation method".[471] Thus, according to Korea, the KIA also required "supporting materials that would have allowed the [KIA] to verify any reported figure by the Japanese respondents concerning their total capacity allegedly allocated to the covered products … and how (and if) such capacity was allocated to SSBs" in order to "corroborate[] the accuracy and reasonableness of the reported production capacity figure".[472] Korea's position is that "[d]uring the review, the [KIA] posed several supplemental questions to the Japanese respondents for their data on production capacity covering *not only the product under investigation*, *but also their total secondary processing capacity*"[473], together with the raw data that would have allowed verification.[474] We reject this position because the evidence on the substance of the KIA's inquiries of 21 September 2016, 24 and 30 November 2016, and 11 January 2017, as well as the OTI's revised interim report, do not sustain the proposition that such requests were made. Rather, based on the available evidence, we agree with Japan[475] that, after responding to the 3 June questionnaire (which specified that the production capacity data should pertain to the "product under investigation"), the Japanese exporters were not made aware that, in Korea's words, "what mattered for the [KIA] … was such reasonably convertible capacity upon removal of the duties and *not the capacity currently and specifically allocated to the covered SSB products in the POR*".[476]

7.159. Contrary to Korea's argument[477], therefore, we cannot fault the Japanese exporters for failing to submit data and materials of which they were not made aware based on the available evidence before us. However, with respect to the figures that the Japanese exporters did in fact provide, Korea additionally argues that they contained inconsistencies, inaccuracies, and mistakes

[467] ISSF statistics, (Exhibit KOR-20.b (BCI)).
[468] KTC's submission of review to MOSF, (Exhibit KOR-48.b (BCI)), p. 9. (emphasis added)
[469] Korea's response to Panel question No. 44. See also responses to Panel question No. 54 and No. 92, para. 19; and comments on Japan's response to Panel question No. 92, p. 9.
[470] Korea's comments on Japan's response to Panel question No. 92, p. 13. See also Korea's second written submission, paras. 221-222; and response to Panel question No. 54.
[471] Korea's response to Panel question No. 95, para. 90; comments on Japan's response to Panel question No. 92, p. 12.
[472] Korea's response to Panel question No. 95, paras. 87 and 89.
[473] Korea's response to Panel question No. 95, para. 89 (emphasis added). See also Korea's responses to Panel question Nos. 50(a) and 50(b)(iii); No. 92, paras. 48-49; and second written submission, paras. 210-212.
[474] Korea's response to Panel question No. 95, paras. 110-111; second written submission, paras. 211-212.
[475] Japan's second written submission, paras. 416, 418, and 424, and fn 502; responses to Panel question No. 92, paras. 5, 9-10, and 12, No. 95, paras. 28-29 and 35, and No. 99, paras. 51-53; comments on Korea's response to Panel question No. 92, paras. 29 and 39; and responses to Korea's question No. 9, paras. 23-24, and No. 27, paras. 81 and 84.
[476] Korea's response to Panel question No. 105, para. 225. (emphasis added)
[477] Korea's responses to Panel question No. 50(b)(i), No. 53, No. 92, para. 39, and No. 95, para. 95; comments on Japan's response to Panel question No. 106, p. 50; second written submission, paras. 194 and 211-212; and comments on Japan's response to Korea's question No. 19, p. 41.

which called into question the credibility and reliability of the Japanese exporters' submissions.[478] The discrepancies identified by Korea include differing calculation methodologies amongst the Japanese exporters, shifting calculation methodologies during the review, and changing explanations of the product scope of the submitted production capacity figure of [[***]] tonnes.[479] Korea states that the KIA "properly assessed the submissions of the Japanese respondents, identified inconsistencies, and reached adequate and reasoned conclusions about the lack of reliability of the information provided given these inconsistencies".[480] For Korea, "if respondents provide inconsistent and unsubstantiated replies, the authorities are entitled to draw certain conclusions about the reliability of the information provided without having to seek to resolve these inconsistencies in order to make the case of the respondents".[481] In that regard, Korea asserts that the existence of these inconsistencies demonstrates that the KIA was not legally required to engage further with the "unsubstantiated numerical allegations" in the Japanese exporters' data[482], and accordingly, Japan has failed to meet its burden of proof that the KIA acted inconsistently with Article 11.3 by rejecting the Japanese exporters' data.[483]

7.160. We address, in turn, each of the three general types of errors identified by Korea.[484] Our examination involves considering the parties' arguments and the underlying exhibits to ascertain whether an "unbiased and objective" investigating authority could have reached the conclusion that these errors undermined the reliability and credibility of the Japanese exporters' submissions, such that the authority would have no need to engage further with those submissions in conducting its review under Article 11.3.

7.161. First, Korea points out that the Japanese exporters' description of the product scope of their production capacity data varied despite continuously submitting the same figure.[485] According to Japan, the discrepancy was an inadvertent error that arose from how the three Japanese exporters aggregated the figures from their individual questionnaire responses, and corrected the error in their 20 January 2017 submission.[486] Japan also notes that the KIA never raised questions or concerns about this matter during the review.[487] We have set out relevant background above at paragraphs 7.136-7.137. It is clear that the discrepancy emerged upon the Japanese

[478] Korea's first written submission, paras. 214-219 and 227; second written submission, paras. 194, 212, and 214; responses to Panel question Nos. 52(a) and 52(b)(ii), No. 92, para. 44, No. 94, paras. 76-81 and 84, No. 97, paras. 123 and 126, and No. 102, paras. 179 and 182-183; comments on Japan's responses to Korea's question No. 6, pp. 16-17, No. 22, p. 46, No. 29, p. 61, and No. 30, p. 66; and comments on Japan's responses to Panel question "General Observations", p. 4, question No. 94, pp. 20-21, and No. 98, pp. 30-32. Korea contended that, even if the KIA did fail to provide the underlying rationale of its inquiries to the Japanese exporters, this did not justify their constant failure to provide the information specifically requested by the KIA. (Korea's comments on Japan's response to Korea's question No. 19, p. 41).

[479] See, e.g. Korea's first written submission, paras. 324-332; second written submission, para. 194; and responses to Panel question No. 94, paras. 76-81, and No. 95, paras. 96-97.

[480] Korea's comments on Japan's response to Panel question No. 102, p. 39.

[481] Korea's response to Panel question No. 102, para. 183.

[482] Korea stated that (a) "the relevant law and accepted practice provide that only substantiated arguments may require an examination and response by investigating authorities" (Korea's comments on Japan's response to Korea's question No. 10, p. 23); (b) there does not exist a "legal requirement going beyond reaching a reasonable conclusion of the accuracy and reliability of the information provided as part of its totality of the evidence before it" (Korea's response to Panel question No. 102, para. 180); and (c) the "authorities properly assessed that these *inconsistencies* existed and reached reasonable conclusions about the lack of reliability of the information provided given these inconsistencies". (Ibid. para. 179 (emphasis original)). See also Korea's responses to Panel question No. 92, paras. 44 and 46, No. 94, para. 78, No. 97, paras. 121-123, No. 100, paras. 170-172, and No. 102, paras. 179-180 and 182-184; comments on Japan's responses to Korea's question No. 10, p. 23, No. 11, p. 24, No. 19, p. 41, No. 27(iii), pp. 55-56, and No. 29, pp. 61-62; and comments on Japan's responses to Panel question "General Observations", pp. 4-5, question No. 93, pp. 17-18, No. 94, p. 22, and No. 97, p. 28. See generally Korea's response to Panel question No. 3(a).

[483] Korea's comments on Japan's responses to Panel question "General Observations", p. 5, question No. 95, pp. 24-25, No. 97, p. 28, and No. 106, pp. 46-47; comments on Japan's response to Korea's question No. 10, p. 23.

[484] See e.g. Korea's response to Panel question No. 94, paras. 76-81.

[485] Korea's responses to Panel question No. 92, paras. 44-46, and No. 94, paras. 67 and 78; comments on Japan's responses to Panel question No. 92, p. 16, No. 93, p. 18, No. 95, p. 24, and No. 106, pp. 46-50; and comments on Japan's response to Korea's question No. 27(iii), pp. 55-56.

[486] Japan's response to Panel question No. 106, paras. 86-87; comments on Korea's response to Panel question No. 92, paras. 25-26.

[487] Japan's response to Panel question No. 106, para. 90; comments on Korea's response to Panel question No. 92, para. 27.

exporters' aggregation of their figures, and they ultimately provided an accurate description of their intended product scope in the 20 January 2017 submission. Accordingly, we do not accept that an "unbiased and objective" investigating authority could conclude that this discrepancy undermined the overall credibility and reliability of the production capacity figures submitted by the Japanese exporters, such that the authority could decline to engage with them.

7.162. Second, Korea points out that the Japanese exporters' description of their methodologies for calculating their capacity utilization was inconsistent during the review, whilst continuously submitting the same figure.[488] Japan responds that the matters cited by Korea pertain to an "inadvertent mistake" or a "slight clarif[ication] [of an] explanation" and have no meaningful implications[489], and moreover, the KIA never expressed concern over these "minor discrepancies".[490] From our review of the parties' arguments and the underlying exhibits, we cannot see how an "unbiased and objective" investigating authority could find that the matters raised by Korea undermined the overall credibility and reliability of the Japanese exporters' production capacity figures such that the authority could decline to engage with them. With respect to Daido Steel Corporation (Daido)'s alleged shift from relying on [[***]] to "peeling" as the basis for its production capacity calculation[491], it is apparent that the Japanese exporters considered peeling to be the final stage in the secondary processing for the product under investigation.[492] Thus, we agree with Japan that there is no inherent tension between these descriptions.[493] With respect to Aichi's shift from referencing the [[***]] process to the [[***]] process, Korea is correct to point out the discrepancy and Japan concedes that this change represented an "inadvertent mistake". This mistake went uncorrected by the Japanese exporters, but equally, nothing before us suggests that the KIA inquired into this discrepancy. We cannot see how an "unbiased and objective" investigating authority could conclude that the mere existence of this kind of shortcoming in an interested party's submission would warrant its immediate rejection as unreliable.[494] We accept Korea's point that Aichi was including a [[***]][495], but the Japanese exporters explained in their submission of 20 January 2017 that Aichi's data included [[***]].[496]

7.163. Third, Korea points out that the Japanese exporters' description of their methodologies for calculating their capacity utilization were different from one another, despite peeling being a "defined stage of manufacturing".[497] Japan does not dispute that the process of manufacturing SSBs is standardized, but contends that the "the specific details of the secondary processing method may vary from company to company", which in turn explains the differences between the Japanese exporters' submissions.[498] It is apparent that, whilst the KIA requested the Japanese exporters to specify their calculation methodology in their individual responses to the 3 June 2016 questionnaire, it did not specify or request a *uniform* methodology at that juncture or subsequently during the

[488] Korea's first written submission, paras. 217 and 330-332; opening statement at the first meeting of the Panel, para. 44; responses to Panel question No. 50(b)(ii) and No. 94, paras. 76-77, 80, and 84-85; and comments on Japan's responses to Panel question No. 95, p. 24, and No. 106, pp. 48-50.

[489] Japan's second written submission, paras. 428-429; response to Panel question No. 50, para. 292; and comments on Korea's response to Panel question No. 94, paras. 59-61 and 63-65.

[490] Japan's response to Panel question No. 50, para. 292; comments on Korea's response to Panel question No. 94, para. 65.

[491] Korea's first written submission, paras. 217 and 330; opening statement at the first meeting of the Panel, para. 44; and responses to Panel question No. 50(b)(ii), and No. 94, para. 77.

[492] Japanese exporters' post-hearing opinion, (Exhibit JPN-16.b (BCI)), pp. 1-2.

[493] Japan's second written submission, para. 428; comments on Korea's response to Panel question No. 94, para. 60.

[494] It is well established that investigating authorities have a duty to seek out relevant information and to evaluate it in an objective manner. (Appellate Body Report, U*S – Anti-Dumping and Countervailing Duties (China)*, para. 344 (referring to Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 199; and *US – Wheat Gluten*, para. 53)). The present shortcoming is more akin to a typographical or clerical error than an analytical mistake. We also distinguish the present shortcoming from instances where interested parties' arguments are unsubstantiated or irrelevant, such that only limited or indeed no substantive consideration may be warranted. To dismiss the whole of an interested party's submissions on the basis of such an "inadvertent mistake" would be to fail to meet the duty to seek relevant information and assess it in an objective manner.

[495] Korea's response to Panel question No. 94, para. 77.

[496] Japanese exporters' response to KTC's additional inquiries, (Exhibit JPN-17.b (BCI)), p. 1.

[497] Korea's first written submission, paras. 216 and 220; second written submission, paras. 146-148; and response to Panel question No. 94, paras. 65-66, 74, 76, and 79-81.

[498] Japan's first written submission, para. 129; second written submission, paras. 425 and 478-482.

review.[499] Korea explains that this was unnecessary because the standardized nature of the peeling process meant that there can be no differences.[500] That may be the case, but there is no evidence before us indicating that, prior to the revised interim report, the KIA communicated this understanding to the Japanese exporters or conveyed its concerns regarding the use of differing calculation methodologies.[501] Thus, the KIA did not inquire as to whether the apparent differences were meaningful and reflected actual discrepancies amongst the Japanese exporters' respective approaches, or whether they were based on the same standardized approach but expressed in different terminology or tailored to the particular circumstances of each exporter. Subsequent to the revised interim report, it is not apparent to us whether or how the KIA took account[502] of the Japanese exporters' explanation[503] that the differences were a function of company-specific factors. Thus, there is no evidence to suggest that the KIA investigated whether these differences were meaningful. Moreover, the KIA neither specified a uniform methodology, nor conveyed concerns about these differences prior to the revised interim report. In these circumstances, we cannot see how an "unbiased and objective" investigating authority could conclude that these differing calculation methodologies would necessarily call into question the reliability and credibility of the Japanese exporters' submissions.

7.164. In summary, we do not consider that the mistakes, inconsistencies, and inaccuracies identified by Korea in the Japanese exporters' submissions – individually or taken together – could have led an "unbiased and objective" investigating authority to find that the overall reliability of the Japanese exporters' submissions was undermined such that no further consideration or engagement would be warranted. Rather, after having specified in the the 3 June 2016 questionnaire that the "[p]roduct under [i]nvestigation" was the preferred product scope for the requested data concerning capacity utilization, we consider that the KIA had a duty to make the Japanese exporters aware of the perceived shortcomings in their responses, such as conveying that the KIA's chosen parameters had changed, that the Japanese exporters' figures were based on an incorrect set of parameters, or that "raw data" was required to verify their allocation method.

7.165. Finally, Korea submits that the "Japanese respondents committed mistakes *in virtually every submission* made to the Korean authorities", which "suggests that the mistakes were not inadvertent".[504] According to Korea, this indicates that the Japanese exporters' participation in the sunset review had not been in good faith.[505] Korea requests the Panel to avoid an outcome that would reward the unfaithful participation of interested parties in investigations and reviews, particularly in view of the adverse systemic implications of such an outcome.[506]

[499] Korea's response to Panel question No. 94, paras. 64 and 66; comments on Japan's response to Panel question No. 94, p. 21: "there was simply no need for the Korean authorities to define a reporting methodology other than to request the respondents' peeling data".

[500] Korea's response to Panel question No. 94, para. 66; comments on Japan's response to Panel question No. 94, p. 21.

[501] Specifically, we are unable to ascertain any reference to a concern over the apparent differences in calculation methodologies in the KIA's inquiries of 21 September 2016, 24 and 30 November 2016, and 17 January 2017. (See paras. 7.137-7.155 above; see also Japan's comments on Korea's response to Panel question No. 94, para. 66).

[502] None of the KIA's subsequent analyses address the matter of whether there might be company-specific reasons for variations in calculation methodologies. Rather, they simply state that "the stainless steel bar manufacturing process cannot be different from one another", without examining whether variations amongst the standardized process are possible and applicable in the present review. (OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 57-58 and 87; KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 19; and KTC's submission of review to MOSF, (Exhibit KOR-48.b (BCI)), p. 8).

[503] For the description of their company-specific approaches, see Japanese exporters' response to KTC's additional inquiries, (Exhibit JPN-17.b (BCI)), pp. 1-2. For their explanation that the differences are a function of company-specific factors, see Japanese exporters' opinion regarding OTI's revised interim report, (Exhibit JPN-18.b), p. 1.

[504] Korea's comments on Japan's response to Panel question No. 106, p. 49. (emphasis original)

[505] Korea referred to the Japanese exporters' "blatantly unfaithful participation in the underlying review" (Korea's comments on Japan's response to Panel question No. 106, p. 49). See also Korea's comments on Japan's response to Panel question "General Observations", p. 4; comments on Japan's response to Panel question No. 92, p. 16; and comments on Japan's response to Panel question No. 106, p. 49.

[506] Korea "warn[ed] 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" (Korea's comments on Japan's response to Panel question No. 106, p. 51 (emphasis original)).

7.166. As a matter of principle, we consider that, when confronted with evidence that an interested party is acting in bad faith through e.g. manipulating or falsifying data, wilfully mischaracterizing data, or abusively drawing out an investigation, an authority is not precluded from drawing adverse inferences from those procedural circumstances. Such inferences may be drawn in the context of an authority's recourse to the "facts available".[507] Such inferences may also be drawn in other contexts when an authority is considering the reliability of certain evidence.[508] We therefore accept Korea's premise that an authority's engagement with, and consideration of, the submissions of an interested party can be attenuated by adverse inferences drawn from evidence of that party's "blatantly unfaithful participation" and bad faith conduct in an investigation.[509]

7.167. However, it is not for *panels* in WTO dispute settlement to draw adverse inferences from such procedural circumstances as part of a process of weighing the reliability and probative value of the evidence presented in underlying investigations. As Korea explained to the Panel regarding certain evidence, "[t]he Panel is not the trier of fact in this dispute and is not to determine whether it would have given the same weight or have adopted the same reading as the authorities based on these facts".[510] Instead, pursuant to Article 17.6(i) of the Anti-Dumping Agreement, the authorities' determination is the lens through which panels examine factual matters. Korea has not drawn our attention to anything in the KIA's determination, nor any contemporaneous record material, indicating that the KIA found there to be bad faith conduct on the part of the Japanese exporters which, in turn, informed its evaluation of the facts.[511] We note that the KIA referred to a lack of cooperation by the Japanese exporters in the dumping phase, as well as the submission of "*edited* data on production capacity" and a failure to provide "objective and reliable material" supporting their submissions on production capacity.[512] However, these references do not indicate a finding of bad faith or anything analogous. Given the seriousness of such an allegation, we would expect to see clear and unambiguous evidence of a finding of bad faith in the determination or other contemporaneous documents.

7.168. Korea also argues that Japan was acting in bad faith in the present WTO proceedings.[513] This is a serious allegation. According to Korea, Japan made certain misleading arguments and misrepresentations of facts before the Panel.[514] Korea suggested that Japan's misrepresentations did not appear to be inadvertent[515], and characterized certain aspects of Japan's case as a "hoax".[516] Korea requests the Panel to avoid an outcome that would result in Japan's misrepresentations being rewarded in the dispute.[517]

7.169. We have carefully reviewed Korea's allegations on this matter. The only evidence that Korea offers for Japan's alleged bad faith participation in the present proceedings concerns Japan's reliance

[507] See, e.g. Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.468-4.469.

[508] There may be circumstances where the conditions for having recourse to Article 6.8 are not satisfied, but where the procedural circumstances of an interested party's conduct clearly calls into question that party's reliability. As the Appellate Body has recognized, the principle of good faith in international law informs the provisions of the Anti-Dumping Agreement. (Appellate Body Report, *US – Hot Rolled Steel*, para. 101).

[509] Korea's comments on Japan's responses to Panel question "General Observations", p. 4, question No. 106, pp. 50-51.

[510] Korea's response to Panel question No. 66(i).

[511] See, e.g. Korea's response to Panel question No. 11(iii)-(v); comments on Japan's response to Panel question No. 106, pp. 50-51.

[512] KTC's submission of review to MOSF, (Exhibit KOR-48.b (BCI)), p. 8 (emphasis added); KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 19.

[513] See, e.g. Korea's comments on Japan's responses to Panel question "General Observations", pp. 4-5; question No. 92, pp. 13-14, No. 106, p. 51; and comments on Japan's response to Korea's question No. 29, p. 61. For Korea, "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". (Korea's comments on Japan's response to Panel question No. 92, p. 16). For a detailed discussion of Korea's arguments on this point, see Annex A-3 (Interim Review), paras. 2.141-2.168.

[514] Korea stated that it was a "frequent approach by Japan in this dispute" to "intentionally mislead the Panel". (Korea's comments on Japan's response to Korea's question No. 29, p. 61). With respect to its production capacity claim in particular, Japan had "resort[ed] to a misrepresentation of facts" (Korea's comments on Japan's response to Panel question No. 106, p. 50), submitted "incredibly misleading" arguments (Korea's comments on Japan's response to Panel question No. 92, p. 12), and adopted a "crafty repackaging" of certain events (Korea's comments on Japan's response to Panel question No. 106, p. 49).

[515] Korea's comments on Japan's response to Panel question No. 92, p. 13.

[516] Korea's response to Panel question No. 11. Korea also referred to aspects of Japan's case as a "disingenuous cover-up". (Korea's comments on Japan's response to Korea's question No. 29, p. 61).

[517] Korea's comments on Japan's response to Korea's question No. 29, p. 64.

on aspects of the submissions by the Japanese exporters in the underlying proceedings that contained inaccuracies, inconsistencies, and mistakes.[518] Japan has provided explanations for these apparent discrepancies in light of the attendant procedural and evidentiary background of the review.[519] We have examined those explanations.[520] We see nothing in them to suggest that Japan is engaging in these proceedings in bad faith.[521] We note that, with respect to the allegation of a "hoax", Korea clarified that it has a "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".[522] In our view, advancing allegations of bad faith as part of an adversarial "advocacy effort" or litigation technique in WTO dispute settlement would not accord with Article 3.10 of the DSU[523], nor would it assist in facilitating the fair, prompt, and effective resolution of the actual matter in dispute.[524]

7.170. We make a further observation of relevance to whether Japan's initiation of the present proceedings is in bad faith due to the "blatantly unfaithful participation" of the Japanese exporters in the underlying review, as evidenced by inconsistencies, mistakes, and inaccuracies in aspects of their submissions. In particular, we recall that Korea relied on the USITC's sunset review of SSBs from Japan and other countries, which post-dates the KIA's sunset review but had a partially-overlapping POR, in support of aspects of its case.[525] Korea also relied on the USITC's sunset review in support of its assertion that the Japanese exporters had engaged in bad faith.[526] As we explained earlier, this exhibit post-dates the KIA's determination and did not form

[518] Korea's comments on Japan's responses to Panel question "General Observations", pp. 4-5; question No. 92, p. 16, and No. 106, pp. 46-47 and 49-51; comments on Japan's response to Korea's question No. 29, p. 61.

[519] See, e.g. Japan's first written submission, para. 129; second written submission, paras. 222, 228-234, 425, 428-429, and 478-482; responses to Panel question No. 16, paras. 88-93, No. 21(a) paras. 122-125, No. 50, para. 292, No. 101, paras. 59-63, and No. 106, paras. 86-87 and 90; response to Korea's question No. 29, paras. 88-95; and comments on Korea's responses to Panel question No. 92, paras. 25-26, No. 94, paras. 59-61 and 63-65, and No. 103, paras. 149-151 and 158-165.

[520] With respect to a number of the production capacity-related matters, see paras. 7.159-7.164 above. For other matters, such as alleged discrepancies relating to export volumes of differing grades of steel, we reviewed those matters for present purposes solely through the prism of whether the nature and substance of Japan's explanations support the Korea's allegation of bad faith, and *not* through the prism of whether those explanations have probative value in terms of an inconsistency with Article 11.3 or whether they have been discharged through Korea's rebuttals. For that reason, we do not consider it necessary to engage in an expansive discussion of those matters in this Report for present purposes.

[521] Our review took account of the premise that "Members act in good faith in the context of dispute settlement proceedings", and we were "unwilling to assume possible malfeasance in the absence of evidence to that effect". (Panel Report, *EC – Bed Linen*, para. 6.216). In view of their nature, the threshold for proving such allegations is high, and the mere existence of an inconsistency would be ordinarily insufficient to demonstrate this. (Ibid. paras. 6.215-6.216).

[522] Korea's response to Panel question No. 11(i).

[523] Article 3.10 of the DSU provides, in relevant part: "[i]t is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute."

[524] Appellate Body Report, *US – FSC*, para. 166. See also A. D. Mitchell, *Legal Principles in WTO Disputes* (Cambridge University Press, 2008), pp. 120-125.

[525] See para. 7.104 above.

[526] Korea alleged that "the Japanese respondents' arguments and numerical allegations submitted to the Korean authorities are *squarely contradicted by their own later submitted facts and assertions* before the USITC that Korea remains their top three (3) export market despite the longstanding anti-dumping measure, and that the Japanese respondents focus on Asian market including the Korean market (but not the U.S. market)". (Korea's comments on Japan's responses to Panel question No. 92, pp. 15-16 (emphasis added), and No. 120, pp. 70-71; response to Panel question No. 103, paras. 215-216; and comments on Japan's responses to Korea's question No. 16, p. 35, No. 17, pp. 38-39, and No. 21, p. 44). However, the passage of the USITC's determination cited by Korea does *not* indicate that the Japanese exporters "assert[ed]" that they would focus on the Korean SSB market despite Korea's anti-dumping duties. It simply states, without attribution to the Japanese exporters' actual submissions, that Japan's exports of SSBs had a "regional focus" and "Korea was one of the Japanese industry's top three export markets during the POR despite the existence of long-standing antidumping duties on exports of some Japanese stainless steel bar to Korea". (USITC's fourth review into stainless steel bar, (Exhibit JPN-28.a), p. 42 and fn 256). To put that in perspective, in the present sunset review the Japanese exporters also submitted data showing that Korea was a top three export destination in 2015 (Japanese exporters' opinion regarding injuries, (Exhibit JPN-10.b (BCI)), p. 16), but submitted that Thailand was a much greater focus for Japanese exporters than the Korean market based on export volumes (Japanese exporters' opinion regarding injuries,

part of the KIA's establishment and evaluation of the facts pursuant to Article 17.5(ii) of the Anti-Dumping Agreement. It would thus be improper for us to consider the USITC's determination in relation to the consistency of the KIA's determination with Article 11.3.

7.171. However, Article 17.5(ii) does not apply to Korea's allegation that Japan is acting in bad faith in *these* proceedings. Since Korea has referred to the USITC determination in relation to the Japanese exporters' alleged bad faith[527], and given the Japanese exporters' alleged bad faith forms the basis of Korea's allegation of bad faith against Japan in the present proceedings, we examine the USITC determination for the sole purpose of assessing Korea's allegation against Japan.

7.172. The Japanese exporters presented similar cases to the USITC's sunset review and to the KIA's third sunset review on a number of points of relevance to these Panel proceedings. Far from corroborating Korea's assertion that the Japanese exporters were engaging in bad faith, the USITC accepted significant aspects of the position advanced by the Japanese exporters that had been rejected or ignored by the KIA. These include, for instance, that: (a) the "Japanese industry has limited ability to increase its production of stainless steel bar as its capacity utilization rate exceeded 92 percent"[528]; (b) "[average unit values] for Japan's shipments to all markets were notably higher than the [average unit values] for shipments by other subject countries, which supports the Japanese producers' contentions that their industry generally focuses on higher-value stainless steel bar products"[529]; and (c) "the Japanese industry has no incentive to ship large volumes of aggressively priced subject product into the U.S. market".[530] Similarly, the Japanese exporters submitted to the KIA that their overarching focus was on "satisfying domestic demand within Japan"[531], and the USITC likewise accepted that "[t]he Japanese stainless steel bar industry has a clear and increasing focus on serving its domestic market".[532] Of course, such differences between the respective authorities' findings on these points do not themselves call into question the KIA's determination in the present proceedings. However, if Japan was truly acting in bad faith by initiating the present proceedings in the manner alleged by Korea, one might expect to see another investigating authority – and one whose determinations are cited and tracked by the KIA[533] – harbouring similar concerns about the credibility of the same Japanese exporters' case. We would certainly not expect to see another authority affirming key aspects of those exporters' case in its own partially-overlapping sunset review of a similar product.

7.173. Korea has not demonstrated that the KIA found that the Japanese exporters acted in bad faith in the underlying review, nor that Japan is acting in bad faith in pursuing its case in the present proceedings.

7.174. We conclude that the KIA's evaluation of the facts leading to its intermediate finding that "the utilization rate in 2015 was [[***]]% for Japan … which shows that they have sufficient additional production capacity and room for exports"[534] was not "unbiased and objective". This is

(Exhibit JPN-10.b (BCI)), p. 16; Japanese exporters' post-hearing opinion, (Exhibit JPN-16.b (BCI)), pp. 3-4; Minutes of public hearing (24 November 2016), (Exhibit KOR-19.b (BCI)), p. 29). Korea acknowledged, without disputing, that Thailand was indeed the Japanese exporters' main export focus during the POR. (Korea's second written submission, para. 80).

[527] Korea's comments on Japan's responses to Panel question No. 92, pp. 15-16, and No. 120, pp. 70-71; response to Panel question No. 103, paras. 215-216; comments on Japan's responses to Korea's question No. 16, p. 35, No. 17, pp. 38-39, and No. 21, p. 44.

[528] USITC's fourth review into stainless steel bar, (Exhibit JPN-28.a), p. 43. By contrast, the KIA rejected the Japanese exporters' submitted capacity utilization rate of over [[***]] in 2015 in favour of a [[***]] rate calculated on the basis of ISSF and Japan's Stainless Steel Association (JSSA) data. (OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 57-58).

[529] USITC's fourth review into stainless steel bar, (Exhibit JPN-28.a), pp. 43-44. By contrast, Korea explains that the KIA did not find the proposition that the Japanese exporters were focused on high value-added SSB products to be relevant or substantiated. (Korea's responses to Panel question No. 16, and No. 22(c)).

[530] USITC's fourth review into stainless steel bar, (Exhibit JPN-28.a), p. 45. By contrast, Korea explained that the KIA found the Japanese exporters' contention about the alleged lack of incentives to compete with low-priced competitors to be unsubstantiated. (See, e.g. Korea's response to Panel question No. 16; second written submission, para. 231).

[531] Japanese exporters' post-hearing opinion, (Exhibit JPN-16.b (BCI)), p. 6.

[532] USITC's fourth review into stainless steel bar, (Exhibit JPN-28.a), p. 42.

[533] Korea's first written submission, paras. 67 and 369; response to Japan's question after the second meeting with the Panel No. 1, para. 13.

[534] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 22. See also OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.

because the KIA rejected the figures submitted by the Japanese exporters for failing to comply with certain parameters of which they were not properly informed. In this regard, we recall that authorities are required under Article 11.3 to act with the "appropriate degree of diligence" in conducting their "review", and must discharge their "duty to seek out relevant information and to evaluate it in an objective manner" through "an *active* rather than a passive decision-making role".[535] For the avoidance of doubt, we do not take the view that "just because the Japanese respondents provided some numerical allegation, these numbers must be accepted as genuine, and the burden automatically shifts to the investigating authority to disprove the veracity of these numbers in order to reject these numbers".[536] Rather, our conclusion turns on three factors that are particular to the circumstances of this case: (a) the Japanese exporters were initially told by the KIA that the "product under investigation" was the preferred product scope for the requested data concerning capacity utilization, and they submitted figures in response; (b) the KIA's determination opted for a broader product scope to determine Japan's capacity utilization rate; and (c) the evidence before us does not demonstrate that the KIA conveyed to the Japanese exporters that the preferred parameters had changed, that their submitted capacity utilization figures were based on incorrect parameters, or that requisite "raw data" was lacking, which in turn deprived the Japanese exporters of the opportunity to resubmit their figures (and "raw data") or comment on the preferred parameters.

7.175. It remains for us to determine whether the KIA's error in this regard rises to the level of a violation of Article 11.3 of the Anti-Dumping Agreement. Korea contends that the KIA's production capacity finding of [[***]] tonnes for the Japanese SSB industry was "only one of many intermediate findings supporting the ultimate likelihood-of-injury determination", and indeed, was not the only finding supporting the conclusion that the Japanese exporters had "sufficient room for exports".[537] For instance, the KIA referred to the Japanese exporters' continued investments in their facilities and that they had the possibility of increasing production via outsourcing.[538] Korea also contends that "even assuming for the sake of argument" that the Japanese exporters' [[***]]% capacity utilization rate were "legitimate", the KIA found that such a figure would represent "spare capacity to produce up to [[***]] tons of the covered product in 2015, which amounted to [[***]]% of the total domestic sales of the like domestic product".[539] Against that background, Korea contends that any flaw in the KIA's use of a production capacity figure of [[***]] tonnes does not invalidate the finding that the Japanese exporters had sufficient room to expand exports, nor does it invalidate the overall likelihood-of-injury determination, which was also based on a series of other factors.[540]

7.176. According to Japan, the KIA's decision to use the ISSF's production capacity data and its resulting finding on the capacity utilization rate of the Japanese exporters was a "cornerstone" of the overall determination.[541] It led to the finding that the Japanese exporters have sufficient "unused production capacity and unused export capacity", which in turn led to the finding that "the import volume … [of] the product under investigation [is] highly likely to expand", which in turn led to the KIA's conclusion that "it is highly likely that once the anti-dumping measures are terminated, a drop in the price of the product under investigation and an increase in imports will again cause material injury to the domestic industry".[542] Regarding Korea's argument that, even based on the Japanese exporters' own figures, there would be "more than enough spare capacity" because they would still have [[***]] tonnes of additional production capacity in 2015 amounting to around [[***]] of the total domestic Korean sales, Japan contends that these alleged facts were not raised or assessed in the review and hence the Panel would engage in a *de novo* review by reaching a finding on that basis.[543] Japan also contends that the KIA failed to examine and ascertain whether there was an incentive for the Japanese exporters to use this [[***]] tonnes of capacity to produce the "product

[535] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 111 and 199. (emphasis added)
[536] Korea's comments on Japan's response to Panel question "General Observations", p. 5. (emphasis omitted)
[537] Korea's comments on Japan's response to Korea's question No. 4, pp. 13-14. See also first written submission, paras. 194-195 and 211; and second written submission, paras. 197 and 209.
[538] Korea's comments on Japan's response to Korea's question No. 4, pp. 13-14.
[539] Korea's response to Panel question No. 98, para. 141.
[540] Korea's response to Panel question No. 98, paras. 141-143 and 149; comments on Japan's responses to Korea's question No. 4, pp. 13-14, and No. 22, p. 46; and comments on Japan's responses to Panel question No. 98, p. 31, and No. 99, p. 34.
[541] Japan's first written submission, para. 120.
[542] Japan's first written submission, para. 119 (quoting KTC's final resolution, (Exhibit JPN-2.b), p. 19; see also ibid, p. 17).
[543] Japan's comments on Korea's response to Panel question No. 98, para. 94.

under investigation" (as opposed to other products) and ship it to Korea (as opposed to other sources of domestic or international demand).[544]

7.177. In light of the parties' arguments, we are called upon to ascertain the significance of the intermediate finding at issue to the KIA's overall likelihood-of-injury determination, and in particular, whether it is so central that it invalidates the overall determination.[545] We note Korea's point that precision is not required in quantifying matters like capacity utilization rates in sunset reviews, but as Korea itself recognizes, the key point of contention concerns a capacity utilization rate of [[***]] versus a rate of [[***]] – this kind of difference falls outside the bounds of objections about degrees of precision. In the section of the OTI's final report entitled "Comprehensive Review regarding Likelihood of Continuance or Recurrence of Injuries to the Domestic Industry", the KIA finds in relevant part:

> - Considering that stainless steel bars from Japan, India and Spain have sufficient room and inducements to expand their exports to Korea on the following grounds, it is highly likely that injuries to the domestic industry will recur once the anti-dumping measures are terminated:
>
> - According to ISSF, the production capacity of the countries subject to investigation was [[***]] tons … for Japan … and the capacity utilization in 2015 was [[***]]% … for Japan … which proves that they have sufficient room for exports.[546]

7.178. Based on the plain text of this intermediate finding, it is clear that the ISSF's production capacity figure of [[***]] tonnes and the capacity utilization rate of [[***]] were the central facts that "prove[d] that they have sufficient room for exports". There is no reference in this section to other elements of "proof" for this finding. The KIA's analysis in an earlier passage does reveal that, based on the Japanese exporters' figures, there would be [[***]] tonnes of additional production capacity[547], which accounts for [[***]] of the domestic Korean sales.[548] However, the KIA proceeded to reject the Japanese exporters' figures from which the [[***]] tonnes figure was derived, and did not reach a finding of "sufficient additional production capacity and room for exports" on the basis of those figures.[549] Thus, we agree with Japan that to rely on those figures in order to justify the KIA's determination would be tantamount to conducting a *de novo* review.

7.179. We accept that, in the intermediate section entitled "Production and Export Capacity of the Countries Supplying Dumped Imports", the KIA augmented its reliance on the ISSF production capacity data and the capacity utilization of [[***]] with a reference to the Japanese SSB industry having "continued to make investments in facilities" upon concluding that there were "sufficient room for exports".[550] However, nothing in the KIA's determination suggests that it considered the continued investments alone to be sufficient to support the intermediate finding of "sufficient room for exports".[551] Rather, as extracted above, the subsequent "Comprehensive Review" omits any mention of that factor. Likewise, the ability to "outsource" is mentioned in reference 6 in the confidential annex to the OTI's final report, but there is no indication that the KIA considered that this alone, or together with the continued investments, would substantiate the intermediate finding at issue.[552]

7.180. Thus, the KIA's error in its evaluation of the facts leading to its intermediate finding that "the utilization rate in 2015 was [[***]]% for Japan … which shows that they have sufficient

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[544] Japan's response to Korea's question No. 21, paras. 61 and 63.
[545] See para. 7.114 above.
[546] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67. See also KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 22.
[547] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 19; OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 58, tables 34 and 35.
[548] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 19.
[549] KTC's final resolution, (Exhibit KOR-4.b (BCI)), pp. 19-20; OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 58 and 87.
[550] OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 59.
[551] Panel Report, *China – GOES*, para. 7.542 and fn 522; Appellate Body Report, *Japan – DRAMs (Korea)*, para. 135.
[552] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 87. See also Korea's second written submission, paras. 149 and 197.

additional production capacity and room for exports"[553] is not rendered immaterial by reason of the other considerations identified by Korea.

7.181. We turn now to whether this error is so central that it invalidates the KIA's final conclusion encapsulating its overall likelihood-of-injury determination. This final conclusion provides:

> Taking the circumstances into consideration as a whole, the Commission finds that it 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.[554]

7.182. As we understand it, the *ability* for Japanese exports to "increase in volume", as reflected in this conclusion, is premised on the intermediate finding that there was "sufficient room for exports" due to Japan's additional production capacity and capacity utilization rate.[555] The intermediate finding is thus central to the KIA's final conclusion; together with a "drop in the price", an "increase in the volume" is one of the two interrelated pillars of the final conclusion. Given that we concluded that the intermediate finding of "sufficient room for exports" was deficient, and given its centrality to the final conclusion, we consider that this deficiency necessarily invalidates the KIA's overall likelihood-of-injury determination.

7.183. Accordingly, we consider that the KIA's failure to undertake an "unbiased and objective" evaluation of the facts leading to its intermediate finding that "the utilization rate in 2015 was [[***]]% for Japan … which shows that they have sufficient additional production capacity and room for exports" invalidates the KIA's overall likelihood-of-injury determination and gives rise to a violation of Article 11.3 of the Anti-Dumping Agreement. In light of this finding, it is unnecessary for the prompt and effective resolution of the dispute to address Japan's various other arguments in support of its claim under Article 11.3 of the Anti-Dumping Agreement pertaining to production capacity and capacity utilization, nor Korea's rebuttals on those points. We recall that a panel has "the discretion to address only those arguments it deems necessary to resolve a particular claim".[556]

7.5.5.2 Japan's claim under Article 6.8 of the Anti-Dumping Agreement concerning capacity utilization

7.184. Japan claims that the KIA acted inconsistently with Articles 6.8 and 11.4 and paragraphs 3 and 7 of Annex II to the Anti-Dumping Agreement by erroneously having recourse to the "facts available" to determine the production and export capacity of the Japanese exporters.[557] Article 11.4 of the Anti-Dumping Agreement provides that the provisions of Article 6 regarding evidence and procedure shall apply to sunset reviews. In this connection, both parties accept that Article 6.8 and Annex II apply to sunset reviews under Article 11.3 by virtue of Article 11.4, and we therefore understand Japan's claim under Article 11.4 to operate in tandem with Article 6.8 and Annex II as the legal basis for Japan's "facts available"-related claims.[558] We primarily examine Japan's claim through the prism of Article 6.8 and Annex II since these aspects contain the substantive disciplines at issue, but in view of the structure and relationship between Articles 11.3, 11.4, and 6.8 and Annex II, we consider that any violation of Article 6.8 and Annex II in respect of a sunset review

[553] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 22. See also OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.
[554] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 23. See also OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.
[555] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67. We also note Korea's explanations on this point: "[t]he KTC's 'Overall Evaluation' finds that the low capacity utilization of the subject countries will highly likely to lead to increase in volume of the dumped imports to *displace* the market share of the domestic products upon removal of the anti-dumping measure, and the resulting decrease in price of the dumped imports will *weaken* the price competitiveness of the like domestic products". (Korea's response to Panel question No. 6(c)(iv) (emphasis original)). See also Korea's first written submission, paras. 188 and 198; second written submission, para. 149; comments on Japan's response to Panel question No. 100, p. 36; and responses to Panel question No. 6(a), and No. 100, paras. 174-177.
[556] Appellate Body Reports, *EC – Fasteners (China)*, para. 511; *EC – Poultry*, para. 135; and *India – Solar Cells*, para. 5.15.
[557] Japan's first written submission, paras. 195 and 271-272.
[558] Japan's first written submission, paras. 213 and 274; Korea's first written submission, paras. 5, 53, and 312.

would likewise give rise to a violation of Article 11.4 because it provides the legal basis for which Article 6.8 and Annex II apply to sunset reviews. As an initial matter, Korea contends that the KIA did not have recourse to the "facts available" with respect to production and export capacity of the Japanese exporters, which would remove the premise of Japan's claim.[559] In particular, Korea contends that the Japanese exporters' production capacity data did not qualify as "'necessary' information" under Article 6.8.[560] Rather, according to Korea, the KIA sought country-wide (not exporter-specific) data, and moreover, nothing in Article 11.3 suggests that production capacity data is "necessary" in a sunset review.[561] Thus, the KIA did not exercise discretion to invoke the "facts available" on this matter, in contrast to other aspects of the sunset review in which it did have explicit recourse to the "facts available".[562]

7.185. We begin by considering the initial matter of whether the KIA had recourse to the "facts available" on this point, before turning to the substance of the parties' arguments and rebuttals under Articles 6.8 and 11.4 and paragraphs 3 and 7 of Annex II if necessary. From our understanding, it is uncontested between the parties that Article 6.8 pertains only to information that satisfies certain criteria.[563] In particular, it pertains only to "necessary information". We understand "necessary information" to mean information that is missing from the record and is possessed by an interested party, and that has been therefore requested by the authorities.[564] This is because Article 6.8 applies (*inter alia*) "[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information". Moreover, we understand that "necessary information" relates to information that the authorities require in order to make such determinations.[565] This is because, when the applicable conditions are satisfied, the authorities are permitted under Article 6.8 to make "determinations, affirmative or negative … on the basis of the facts available".

7.186. Beyond those contextual elements of Article 6.8, there is no explicit guidance in the Anti-Dumping Agreement as to what comprises "necessary information". Rather, what is "necessary" will depend upon the nature of the assessment being undertaken by the authorities and the circumstances of a given investigation. In that regard, we accept Korea's point that Article 11.3 of the Anti-Dumping Agreement does not specify that information on capacity utilization is "necessary" for sunset reviews[566], and we accept that authorities have latitude under Article 11.3 to develop approaches and methodologies for determining whether the expiry of anti-dumping duties would be likely to lead to a recurrence of material injury.[567] However, in the sunset review at issue in these proceedings, we consider that information on capacity utilization was clearly "necessary" in light of the approach adopted by the KIA for undertaking its likelihood-of-injury assessment.[568]

7.187. The parties argue over the nature and source of what can comprise "necessary information" for determining capacity utilization rates in sunset reviews. For instance, they dispute whether the "necessary information" should be country-wide or exporter-specific, and whether it need be "primary" information or can encompass "secondary" materials.[569] As we understand it, the KIA's preferred methodology for determining a capacity utilization rate was initially premised, with respect to the denominator, on the production capacity data concerning the "product under investigation". The questionnaires issued by the KIA to the Japanese exporters early in the review requested production capacity data for the purposes of deriving a capacity utilization rate, and

[559] Korea's responses to Panel question Nos. 78(b) and 78(c). See also Korea's first written submission, paras. 341-344.
[560] Korea's first written submission, para. 340.
[561] Korea's first written submission, paras. 338 and 340.
[562] Korea's responses to Panel question Nos. 78(b) and 78(c). See also Korea's first written submission, paras. 341-344.
[563] Japan's response to Korea's question No. 7, para. 19; Korea's comments on Japan's response to Korea's question No. 7, p. 18.
[564] Panel Reports, *EC – Salmon (Norway)*, para. 7.343; *Korea – Certain Paper*, paras. 7.43-7.44.
[565] Panel Reports, *EC – Salmon (Norway)*, para. 7.343; *Korea – Certain Paper*, paras. 7.43-7.44; Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.
[566] Korea's comments on Japan's response to Korea's question No. 6, p. 17.
[567] Korea's second written submission, para. 214.
[568] See paras. 7.177-7.182 above.
[569] Japan's second written submission, paras. 453-457 and 460-461; responses to Korea's question No. 5, paras. 15-16, No. 6, paras. 17-18, and No. 7, paras. 19-20; Korea's first written submission, para. 340; second written submission, paras. 214 and 256; and comments on Japan's responses to Panel question No. 5, p. 15, No. 6, pp. 16-17, and No. 7, p. 18.

specified that this data pertain to the "product under investigation".[570] The covering letter indicated that "questionnaire responses constitute a critical part of antidumping reviews, particularly with regard to dumping margin computation", and therefore the "non-filing or late filing of questionnaire responses, inadequate or incomplete responses, and a lack of verification will inevitably lead to the use of facts available and may result in a less favourable dumping margin than if the respondents fully cooperate".[571] Thus, the KIA conveyed to the Japanese exporters that a failure to provide the information requested in the questionnaire, which included production capacity data for the "product under investigation", would inevitably lead to the use of the facts available. Although the KIA emphasized the importance of information on dumping margins, the plain text of this covering letter indicates that its comment in this regard related to the information requested in the questionnaire generally, and not only to dumping margin determinations. Moreover, we recall our finding earlier that this questionnaire was not limited to dumping, but also comprised the KIA's initial information request for production capacity data for the purposes of its injury investigation.[572]

7.188. Initially, therefore, what was missing from the record – and what was requested from the Japanese exporters – pertained to production capacity data for the "product under investigation". As set out in section 7.5.5.1, we understand the KIA to have subsequently changed its preferred parameters for the production capacity data as the denominator for determining Japan's capacity utilization rate. Thus, what was missing from the record and what the KIA required in order to ascertain a capacity utilization rate evolved during the review. We see nothing in the Anti-Dumping Agreement to prevent an authority from adjusting its parameters or methodology for "necessary information" during a review. However, an interested party could only be treated as failing to provide information under Article 6.8 if it is afforded the opportunity to respond to the new parameters or methodology, and to provide updated data where appropriate. If an interested party is not told of the new parameters or methodology, then it cannot plausibly be said to have "refuse[d] access to, or otherwise … not provide[d], the necessary information" under Article 6.8. This is particularly so with respect to something as basic and fundamental as the product scope of the data being sought, which forms the foundation of subsequent analyses undertaken, or inferences drawn, on the basis of that data.

7.189. Korea contends that information on Japan's production capacity was not missing from the record and therefore did not comprise "necessary information" under Article 6.8 because the KIA already possessed the ISSF's Japan-wide production capacity data.[573] We disagree. At the point in time at which the KIA sent the initial questionnaires to the Japanese exporters, it is clear from those questionnaires that the KIA's preferred methodology – and what the KIA warned would result in recourse to the facts available if not provided – concerned production capacity data on the "product under investigation".[574] The ISSF's production capacity data does not pertain to the "product under investigation", but rather to a broader product scope encompassing excluded products and other stainless steel products. Thus, the presence of the ISSF data on the record at the time the initial questionnaires were sent to the Japanese exporters would not demonstrate that the relevant information was already on the record, and hence not "missing" or "necessary information" in the sense of Article 6.8. It would only be later in the review, once the KIA had opted for a broader product scope, that the ISSF data would accord with the KIA's preferred parameters for the "necessary information".

7.190. As already noted, a contested parameter for what was "necessary" relates to whether the information at issue needed to be country-wide before qualifying as "necessary", or whether exporter-specific data could be considered to be "necessary" despite being alone insufficient to generate a Japan-wide capacity utilization rate. Korea, in particular, contends that producer-specific data could not be "necessary" information in the context of a likelihood-of-injury determination in which the authorities seek to examine, as one of many factors, the availability of excess production and export capacity in a country of export as a whole.[575] In our view, in the circumstances of the present case, such a distinction between country-wide and exporter-specific data is essentially irrelevant for the following reasons. The ISSF data relied upon by the KIA is an aggregation of company-specific figures, and the Japanese exporters comprised [[***]] of Japan's production

[570] See paras. 7.134-7.137 above.
[571] Guideline on the scope of the product under investigation, (Exhibit JPN-41.b), internal p. 3.
[572] See para. 7.136 above.
[573] Korea's first written submission, paras. 338-345; comments on Japan's response to Korea's question No. 7, p. 18.
[574] Guideline on the scope of the product under investigation, (Exhibit JPN-41.b).
[575] Korea's first written submission, para. 339.

capacity in the ISSF data.[576] The figures submitted by both the Japanese exporters and the applicants during the review were premised on the assumption that the three Japanese exporters participating in the review comprised the overwhelming majority[577] – if not the total[578] – of the production capacity in question. Further, one of the KTC's Commissioners described "data on production capacity and capacity utilization" from the three participating Japanese exporters as "necessary" during the public hearing for the sunset review, and therefore asked them to provide that data.[579] Against this background, it is clear to us that the KIA could not generate a Japan-wide capacity utilization rate *without* the production capacity of the three participating Japanese exporters. We consequently disagree with Korea. We consider that, in the circumstances of the present sunset review, production capacity data from those exporters (regardless of the KIA's chosen methodology or preferred parameters for deriving that data) comprised "necessary information" under Article 6.8 of the Anti-Dumping Agreement for the purposes of determining Japan's capacity utilization rate.

7.191. Japan further argues that there was no indication that countrywide evidence was the "necessary" information sought by the KIA from the Japanese exporters.[580] We agree with Japan that it is relevant that the KIA sent each of the Japanese exporters a questionnaire early in the review requesting their respective company-specific production capacity data. The KIA further warned the Japanese exporters that a failure to respond to the questionnaire would result in recourse to the facts available[581], and then continually engaged with the Japanese exporters during the review on the matter of their production capacity after their initial response. This procedural context suggests that the Japanese exporters' production capacity data was viewed by the KIA as essential to arriving at a Japan-wide capacity utilization rate. It also suggests that the Japanese exporters were under the impression that their production capacity data comprised "necessary information" in the sense of Article 6.8. As Japan argues, in these circumstances it would have been reasonable for the Japanese exporters to assume that the KIA intended to aggregate the data from the individual responses received.[582] Moreover, the KIA's description of its own analytical process indicates that it examined the Japanese exporters' data, found it to be lacking, and then "*[u]nder such circumstances*, the investigating authorities reviewed the data from the ISSF and used it".[583] None of this context supports Korea's assertion that the ISSF data was always the starting point for the KIA, and that the Japanese exporters' data did not comprise "necessary information" in the eyes of the KIA. Again, if the ISSF data with its broader product scope were the "starting point", then it would be nonsensical to send a questionnaire to the Japanese exporters at the outset of the review requesting data with a narrower product scope.

7.192. We therefore find that the production capacity of the three participating Japanese exporters comprised "necessary information" under Article 6.8 of the Anti-Dumping Agreement for the purposes of determining Japan's capacity utilization rate. We recognize that the KIA's preferred parameters or methodology for obtaining that information evolved during the review, such that it ultimately preferred data on "their total production capacity that can reasonably be converted for producing the covered products upon removal of the duties" and "not the capacity currently and specifically allocated to the covered SSB products in the POR".[584] As we have stated, we see nothing in the Anti-Dumping Agreement to prevent an authority from adjusting its approach with respect to

[576] ISSF statistics, (Exhibit KOR-20.b (BCI)). See also Japan's second written submission, para. 420.
[577] Rebuttal opinion of the applicants, (Exhibit JPN-11.b), p. 3: the Korean domestic industry only provided capacity utilization data for the three participating Japanese producers, because they were the "main Japanese steel companies" in question.
[578] Japanese exporters' post-hearing opinion, (Exhibit JPN-16.b (BCI)), pp. 2-3.
[579] Minutes of public hearing (24 November 2016), (Exhibit KOR-19.b (BCI)), p. 36. Similarly, in its first written submission, Korea described an information request by the KIA from the three participating Japanese exporters for (*inter alia*) the "status of the (new) installation of the facilities for peeling processes, and the production capacity of each facility" as comprising "necessary information". (Korea's first written submission, para. 328 (referring to Minutes of meeting dated 21 September 2016, (Exhibit KOR-26.b (BCI)), p. 1)).
[580] Japan's second written submission, para. 455.
[581] As we have found above, the questionnaire was not limited to matters of dumping (see para. 7.135 above), nor is the plain text of the covering letter and its warning about the consequences of non-cooperation limited to matters of dumping (see para. 7.187 above).
[582] Japan's second written submission, para. 455.
[583] KTC's submission of review to MOSF, (Exhibit KOR-48.b (BCI)), p. 9. (emphasis added)
[584] Korea's response to Panel question No. 105, para. 225.

"necessary information" during a review, but an interested party cannot be said to have refused access to such "necessary information" if the new parameters are not properly communicated.

7.193. We turn now to whether the KIA had recourse to the "facts available" under Article 6.8 in respect of this "necessary information". Korea argues that the KIA never in fact exercised discretion to have recourse to the "facts available".[585] For other matters (e.g. dumping margins) Korea notes that the KIA explicitly invoked the "facts available" under Article 6.8 of the Anti-Dumping Agreement and under its domestic legislation.[586] In Japan's view, the KIA was obligated to comply with the requirements of Article 6.8 upon deciding not to rely on information from a primary source, i.e. the Japanese exporters' figures on their own production capacity.[587] According to Japan, the KIA "cannot circumvent the rules governing use of facts available by simply not explicitly declaring that they actually relied on facts available".[588]

7.194. We consider that the KIA did, in fact, have recourse to the "facts available" under Article 6.8. The evidence before us shows that the KIA rejected the Japanese exporters' figures because those exporters had "failed to cooperate with the investigation, by repeatedly ignoring the repeated requests of the KTC to submit materials and providing only edited data", including with respect to production capacity.[589] This rationale reflects one of the conditions under which an investigating authority may have recourse to the "facts available" under Article 6.8. Given that we consider that the information in question comprises "necessary information" under Article 6.8, we find that the KIA did, in fact, have recourse to the "facts available" when rejecting the Japanese exporters' production capacity figures due to a failure to cooperate.

7.195. We turn now to whether Japan has demonstrated that the KIA acted inconsistently with Article 6.8 by having recourse to the "facts available" in respect of the Japanese exporters' production capacity. Japan contends that "[u]nder the first sentence of Article 6.8 of the Anti-Dumping Agreement, an investigating authority is allowed to use facts available only when 'any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation'".[590] According to Japan, the KIA acted inconsistently with the first sentence of Article 6.8 because it had recourse to the "facts available" despite the Japanese exporters' having cooperated and complied with the KIA's information requests regarding their production capacity.[591] According to Korea, "every single condition for resorting to facts available under Article 6.8 of the Anti-Dumping Agreement has been met", as demonstrated by the Japanese exporters refusing "access to the necessary information by, for example, failing to respond to the dumping aspect of the review" and "wit[holding] various requested data by ignoring the clear instructions and requests".[592]

7.196. We have already found that the 3 June 2016 questionnaire represents the KIA's initial request for information from the Japanese exporters for production capacity and capacity utilization data, including for the purposes of its likelihood-of-injury assessment. We have also found that, after responding to the 3 June 2016 questionnaire (which specified that the production capacity data should pertain to the "product under investigation"), the Japanese exporters were not made aware that, in Korea's words, "what mattered for the [KIA] … was such reasonably convertible capacity upon removal of the duties and *not the capacity currently and specifically allocated to the covered SSB products in the POR*".[593] We consider that, if an authority has legitimate concerns regarding the information provided, it must take reasonable steps to investigate and clarify before it may permissibly have recourse to the "facts available".[594] We therefore agree with Japan that, although

[585] Korea's responses to Panel question Nos. 78(b) and 78(c). See also Korea's first written submission, paras. 341-344; and comments on Japan's response to Korea's question No. 8, pp. 19-20.
[586] Korea's responses to Panel question Nos. 78(b) and 78(c).
[587] Japan's response to Panel question No. 78(a), para. 368.
[588] Japan's response to Panel question No. 78(b), para. 370.
[589] KTC's submission of review to MOSF, (Exhibit KOR-48.b (BCI)), p. 8. See also KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 19: "there was no submission of other objective and reliable material to support the Respondents' argument" on production capacity.
[590] Japan's first written submission, para. 272.
[591] Japan's first written submission, paras. 273-274.
[592] Korea's first written submission, para. 346.
[593] Korea's response to Panel question No. 105, para. 225. (emphasis added)
[594] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.92 and fn 135 (referring to Appellate Body Report, *EU – PET (Pakistan)*, para. 5.130, in turn referring to Appellate Body Report, *US –*

"[a]n investigating authority has discretion to decide what information is needed to complete its investigation", "[i]t is not fair, or acting in good faith, to reject the Japanese Respondents' data based on an alleged failure to submit certain information when the [KIA] did not clarify what data should have been submitted".[595] In other words, since the KIA failed to adequately inform the Japanese exporters of its updated parameters for the "necessary information", the Japanese exporters cannot be said to have "not provide[d], or otherwise refuse[d] access to, necessary information" under Article 6.8. We therefore conclude that the KIA acted inconsistently with Article 6.8 by having recourse to the "facts available" in respect of Japan's production capacity. We recall that Japan made its claim under Article 6.8 in tandem with a claim under Article 11.4 of the Anti-Dumping Agreement, since Article 11.4 provides the legal basis for which Article 6.8 applied to sunset review at issue. In view of our findings in relation to Article 6.8, we likewise find that the KIA acted inconsistently with Article 11.4. In view of these findings, we consider it unnecessary for the prompt and effective resolution of the dispute to make findings on Japan's additional claims under paragraphs 3 and 7 of Annex II to the Anti-Dumping Agreement.

7.6 Confidentiality: Japan's claims under Article 6.5 of the Anti-Dumping Agreement

7.6.1 Introduction and legal standard

7.197. Japan claims that the KIA acted inconsistently with Articles 6.5 and 11.4 in respect of 102 specific instances in the documents where the KIA treated information as confidential without a showing of "good cause" having been made.[596] Japan identifies each of these instances in the annex attached to its first written submission.[597]

7.198. We begin our evaluation of Japan's claim with an overview of the legal standard for that provision. Article 11.4 of the Anti-Dumping Agreement provides that the provisions of Article 6 regarding evidence and procedure shall apply to sunset reviews. In this connection, both parties accept that Article 6.5 applies to sunset reviews under Article 11.3 by virtue of Article 11.4, and we therefore understand Articles 6.5 and 11.4 to operate in tandem as the legal basis for Japan's confidentiality-related claims.[598] We primarily examine Japan's claim through the prism of Article 6.5 since it contains the applicable substantive discipline, but in view of the structure and relationship between Articles 11.3, 11.4, and 6.5, we consider that any violation of Article 6.5 in respect of a sunset review would likewise give rise to a violation of Article 11.4 as the legal basis for which Article 6.5 applies to sunset review. Article 6.5 of the Anti-Dumping Agreement provides:

> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated

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Washing Machines, para. 5.268, in turn quoting Appellate Body Report, *US – Wheat Gluten*, paras. 53 and 55, which refers to Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 199; *US – Anti-Dumping and Countervailing Duties (China)*, para. 344; and Panel Report, *China – Broiler Products*, para. 7.261); Appellate Body Report, *US – Hot-Rolled Steel*, paras. 101-104.

[595] Japan's second written submission, para. 473.

[596] Japan's first written submission, paras. 328 and 337-339, and annex; second written submission, para. 546.

[597] Japan originally submitted the annex attached to its first written submission. (Japan's first written submission, pp. 145-165). Korea then prepared an exhibit containing an additional column containing its rebuttals to Japan's arguments in the annex. (Korea's response to Japan's Article 6.5.1 allegations, (Exhibit KOR-35)). Japan then prepared an exhibit containing a further column responding to Korea's rebuttals. (Japan's rebuttals to Exhibit KOR-35, (Exhibit JPN-39)). Korea then again prepared an exhibit responding to Japan's responses to its rebuttals. (Korea's response to Exhibit JPN-39, (Exhibit KOR-82 (BCI))). Japan then finally prepared an exhibit correcting certain errors made in the reproduction of Japan's arguments by Korea in Exhibit KOR-82 (BCI). (Japan's correction to Exhibit KOR-82, (Exhibit JPN-44)). Where arguments contained in the various iterations of the annex are made, we will refer to the exhibit where that argument was first made. Where an argument made initially in exhibit JPN-39 that was later incorrectly reproduced in exhibit KOR-82 (BCI), we will not refer to the clarifications of exhibit JPN-44 but take note of the errors made in exhibit KOR-82 (BCI) with respect to Nos. 38, 40, 45, 47, 48, 49, 68, 79, and 98-99.

[598] Korea's first written submission, paras. 5, 53, and 414; Japan's second written submission, para. 583(4).

> as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

7.199. According to this provision, confidential information shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it. This provision distinguishes between two types of confidential information (a) information that is "by nature" confidential, and (b) information "provided on a confidential basis". In practice, these two categories may overlap.[599]

7.200. Article 6.5 further provides that both information that is "by nature" confidential and information that is "provided on a confidential basis" shall be treated as confidential "upon good cause shown".[600] Article 6.5 does not define "good cause" or prescribe the manner in which it is "shown". Prior panels have found that the nature and the degree of the requirement to show good cause depends on the information concerned.[601] For information that is claimed to be "by nature" confidential, good cause may be shown by establishing that the information fits into the Article 6.5 (*chapeau*) description of such information.[602]

7.201. As noted above, Japan claims that Korea acted inconsistently with Article 6.5 in respect of 102 instances where the KIA treated information in the documents as confidential without a showing of "good cause" having been made.[603] In particular, Japan argues in relation to all 102 instances of confidential treatment identified in the annex that the KIA acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because:

a. the KIA granted confidential treatment to the information without a showing of good cause having been made by the applicants[604]; and

b. the KIA failed to specify "on what basis" the confidential treatment was afforded.[605]

7.202. Japan further argues that:

a. in relation to Nos. 14, 46, and 65 of the annex, the KIA could not have assessed good cause for confidential treatment as the source information was not disclosed[606];

b. in relation to Nos. 10, 15, 16, 19, 40, 44, and 45 of the annex, the KIA had no basis to treat this information confidentially as it was sourced from public databases[607];

c. in relation to Nos. 78-79, 81, 83, and 95-97, Korea has conceded that the information was already public, and therefore was inappropriate to be treated confidentially[608]; and

d. in relation to No. 61, Korea incorrectly relied upon an argument that there is no obligation for an authority to disclose information that has not been requested in justifying the KIA's confidential treatment of that information.[609]

7.203. Korea rejects Japan's argument that the KIA acted inconsistently with Article 6.5 of the Anti-Dumping Agreement.[610] We address each of Japan's arguments, and Korea's corresponding rebuttals, in turn below.

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[599] Appellate Body Report, *EC – Fasteners (China)*, para. 536.
[600] Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.37; *EC – Fasteners (China)*, para. 537; and Panel Reports, *Korea – Certain Paper*, para. 7.335; *Mexico – Steel Pipes and Tubes*, para. 7.378.
[601] Panel Reports, *Mexico – Steel Pipes and Tubes*, para. 7.378; *Korea – Certain Paper*, para. 7.335.
[602] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.378.
[603] Japan's first written submission, paras. 328 and 337-339.
[604] Japan's first written submission, paras. 337 and 339.
[605] Japan's first written submission, para. 339.
[606] Japan's first written submission, para. 339 and fn 414.
[607] Japan's first written submission, para. 339 and fn 415.
[608] Japan's second written submission, para. 562 and fn 767.
[609] Japan's second written submission, para. 563 and fn 773.
[610] Korea's first written submission, paras. 420-427.

7.6.2 Whether the KIA erred under Article 6.5 by granting confidential treatment without a showing of good cause having been made by the applicants

7.204. As noted above, Japan argues that, in all 102 specific instances identified in the annex, the KIA acted inconsistently with Article 6.5 by granting confidential treatment to the information without a showing of good cause having been made by the applicants.[611] Japan contends that this failure by the applicants to show good cause is established by the fact that "there is no explicit mention in any of [the documents] of a 'good cause' that would justify confidential treatment of the redacted information".[612] Korea does not dispute Japan's assertion that the documents do not contain any explicit reference to good cause. Korea responds, however, that the applicants were not required to provide explicit reasons to establish good cause.[613] Rather, Korea contends that good cause was shown through an established practice in Korean anti-dumping proceedings in which the submission of a document containing redacted information "implicitly asserts" that the redacted information falls into certain categories of confidential information set out in Korean law.[614] In view of Japan's argument and Korea's rebuttal, we understand the resolution to Japan's claim on this point to turn on whether the submitting party must show good cause under Article 6.5 through the provision of explicit reasons justifying confidential treatment.

7.205. As described by Korea, it is the established practice in Korean anti-dumping proceedings that good cause is shown through the submission of a redacted document that "implicitly asserts" that the redacted material falls under certain categories of confidential information established by Korea's Enforcement Rule of the Customs Act ("Enforcement Rule").[615] Article 15 of the Enforcement Rule sets out four relevant categories of information "subject to confidential treatment".[616] These confidential categories are (i) cost of production; (ii) accounting materials that have not been made public; (iii) name, address, and trade volume of the trade partners; and (iv) matters concerning the provider of confidential information.[617] The redacted documents submitted to the KIA are understood by the KIA to "implicitly assert[] that deleted information falls within" categories (i)-(iv) of the Enforcement Rule.[618] The documents are then checked by the KIA's investigators to confirm that the redacted information falls within categories (i)-(iv) of the Enforcement Rule.[619] Korea further asserts that the KIA specifically instructs interested parties to follow this practice.[620] Japan has not disputed Korea's characterization of these laws and practice or Korea's description of the KIA's system for protecting confidential information in anti-dumping proceedings. Nor has Japan challenged Korea's claim that this system and practice was understood by both the applicants and exporters in the proceedings at issue.[621] For the purpose of this analysis, then, we consider Korea's description to accurately represent the ordinary operation of the Enforcement Rule in Korean anti-dumping proceedings.

7.206. In this context, Japan argues that the KIA erred in granting confidential treatment to the information because "there is no explicit mention in any of [the] submissions of a 'good cause' that would justify confidential treatment of the redacted information".[622] Japan's argument is based on the premise that under Article 6.5 the party seeking confidential treatment is "required to furnish reasons justifying such treatment".[623] Japan's argument, however, is not supported by the text of

[611] Japan's first written submission, paras. 337 and 339.
[612] Japan's first written submission, para. 339.
[613] Korea's first written submission, paras. 421-422.
[614] Korea's first written submission, para. 422; second written submission, paras. 288-289.
[615] Korea's first written submission, para. 421.
[616] Article 15 of the Enforcement Rule of the Customs Act, (Exhibit KOR-34.b).
[617] Article 15 of the Enforcement Rule of the Customs Act, (Exhibit KOR-34.b). The Enforcement Rule also provides for a fifth category, being "other materials adequately deemed as confidential". (Article 15 of the Enforcement Rule of the Customs Act, (Exhibit KOR-34.b)). Korea acknowledges that a separate showing of good cause by the party submitting information would be required for confidential treatment on the basis of this category. (Korea's first written submission, para. 423).
[618] Korea's first written submission, para. 422; second written submission para. 290.
[619] Korea's first written submission, para. 423.
[620] Korea's response to Panel question No. 114, para. 236.
[621] Korea's first written submission, paras. 421-422; second written submission, para. 288.
[622] Japan's first written submission, para. 339.
[623] Japan's first written submission, para. 332 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 539, in turn quoted in Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.95 and Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.39, in turn referring to Appellate Body Report, *EC – Fasteners (China)*, para. 539).

Article 6.5.[624] Article 6.5 of the Anti-Dumping Agreement simply provides that "confidential information shall, upon good cause shown, be treated as such by the authorities". Article 6.5 does not specify the manner in which "good cause" is to be established. This lack of specificity necessarily means that the exact manner in which "good cause" should be established is not prescribed.[625] Accordingly, we do not consider that an "implicit assertion" of good cause through the submission of a redacted document in the context of the Enforcement Rule necessarily gives rise to an inconsistency with Article 6.5.[626] Rather, we agree with prior panels that the nature and the degree of the requirement to show good cause depends on the information concerned.[627] For some types of information, it may be self-evident that the information falls within one of the categories in the Enforcement Rule and that its disclosure would cause commercial harm.[628] For such information, an "implicit assertion" could well suffice.

7.207. In that regard, we recall that Japan has not challenged the Enforcement Rule on an "as such" basis. Instead, Japan accepts that "Article 15 of the Enforcement Rules of the Customs Act of Korea could potentially be applied in a manner that is consistent with Article 6.5".[629] Japan's concern is that the categories in the Enforcement Rule are "so general" that "merely indicating one of those categories may not be enough to show good cause under Article 6.5"[630], and therefore the lack of an explicit showing by the submitting party as to which category was being invoked and the lack of "a supplemental basis for good cause as to why such information should be regarded as confidential" amounts to an inconsistency with Article 6.5.[631]

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[624] Japan's first written submission, para. 332 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 539, in turn quoted in Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.95).

[625] As the panel in *EU – Footwear (China)* stated, "there is nothing in Article 6.5 which would require any particular form or means for showing good cause, or any particular type or degree of supporting evidence which must be provided" and "the nature of the showing that will be sufficient to satisfy the 'good cause' requirement will vary, depending on the nature of the information for which confidential treatment is sought". (Panel Report, *EU – Footwear (China)*, para. 7.728).

[626] The Appellate Body in *Korea – Pneumatic Valves (Japan)*, in response to a similar argument by Korea, stated that "[w]e doubt that an 'implicit' indication by way of redacting certain information from a submission would suffice for establishing such a showing of good cause". (Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.411). The Appellate Body added that, in its view, "the mere redaction of information does not establish, in and of itself, that such information falls within certain legal categories for confidential information, let alone that there is good cause for treating certain information as confidential". (Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.411). We do not disagree with the Appellate Body. Rather, we likewise "doubt" that, in certain circumstances, the mere act of redacting certain information will be sufficient to convey the category for which confidential treatment is being sought and whether protection is warranted. As we understand it, the Appellate Body's "doubt" signalled that panels should be particularly circumspect when confronted with allegations of "good cause" being "shown" through "implicit assertions". However, the Appellate Body was not confronted with an "as such" challenge to the KIA's system, and it is not apparent from our reading of the Appellate Body's findings that "implicit assertions" in the context of this system will always give rise to an inconsistency with Article 6.5. For some types of information, it will be self-evident that the information falls within one of the enumerated categories and would cause commercial harm if disclosed. Thus, whether such "implicit assertions" suffice depends on the information at issue in a given case.

[627] Panel Reports, *Mexico – Steel Pipes and Tubes*, para. 7.378; *Korea – Certain Paper*, para. 7.335; and *EU – Footwear (China)*, para. 7.728.

[628] See, by analogy, Appellate Body Report, *EC – Fasteners (China)*, para. 536.

[629] Japan's response to Panel question No. 110, para. 103. Japan also observes that the panel in *Korea – Pneumatic Valves (Japan)* found the Enforcement Rule to have "shortcomings". (Japan's second written submission, para. 554 (referring to Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.438)). However, Japan has not demonstrated how any such shortcomings manifested on a case-by-case basis with respect to the challenged pieces of information, and in the absence of an "as such" challenge, these alleged shortcomings do not alone provide a basis for a finding of inconsistency with Article 6.5.

[630] Japan's response to Panel question No. 110, para. 101; second written submission, paras. 548 and 554.

[631] Japan's response to Panel question No. 110, para. 102. To the extent Japan makes arguments regarding the role of the KIA in this regard, we address these in section 7.6.3. We note that Japan also considered that, even if the submitting party had explicitly invoked one of the categories, this would have been insufficient to show good cause because these categories "do not explain at all why certain information falls within 'confidential' information". (Japan's response to Panel question No. 109, paras. 98-99). However, Japan's argument fails to account for the *chapeau* of Article 15, which indicates that the categories cover materials that "infringe the interests of the provider" (Article 15 of the Enforcement Rules of the Customs Act, (Exhibit KOR-34.b)), and Japan has not explained why, for example, an interested party's "costs of

7.208. It may well be the case that, for a given piece of information, a submitting party needs to do more than "implicitly assert" through a redaction that it falls within a given category under the Enforcement Rule and warrants protection as confidential. However, in the absence of an "as such" challenge to the categories under the Enforcement Rule and the KIA's system for protecting confidential information, whether an "implicit assertion" falls short of the requirements of Article 6.5 can only be determined on the basis of a case-by-case evaluation of the piece of information concerned. But Japan's claim is not premised on a case-by-case demonstration that each piece of challenged information falls short of the requirements of Article 6.5 in the context of the Enforcement Rule and the KIA's system.[632] It is instead based on the cross-cutting premise that the submitting party must furnish explicit reasons at the time of submission for the confidential treatment of a given piece of information, and that the failure to do so gives rise to a violation of Article 6.5.[633] This premise is incorrect. As we have explained, the text of Article 6.5 is not so prescriptive that it excludes the possibility of a showing of "good cause" through an "implicit assertion" by the submission of a redacted document in the context of the Enforcement Rule and the KIA's system, depending of course on the particular information at issue.

7.209. Japan contends that it did not present a case-by-case demonstration of inconsistency with Article 6.5 for each piece of challenged information because it was unaware that Korea would rely upon a defence that the redactions reflected "implicit assertions" for good cause shown under the Enforcement Rule.[634] However, Japan's case has consistently rested on the incorrect legal premise that Article 6.5 requires the submitting party to furnish explicit reasons at the time of submission justifying the confidential treatment of a given piece of information.[635] As we understand it, a corollary of this legal premise is that "implicit assertions" of good cause shown by the submitting party can never suffice under Article 6.5.[636] Accordingly, we do not consider that Japan's failure to present a case-by-case demonstration of inconsistency in its first written submission can be cured by an inability to anticipate Korea's rebuttal that good cause was shown through "implicit assertions", or by the lack of publicly-available documentation as to the basis for which the submitting parties sought to show good cause.[637]

7.210. In summary, Japan has not sought to demonstrate, for each piece of challenged information, that the "implicit assertion" made by the applicants in the underlying review was insufficient to show "good cause" in the context of the Enforcement Rule and the KIA's system for protecting confidential information. Japan's case was instead premised on the incorrect understanding that Article 6.5 requires the submitting party to furnish explicit reasons at the time of submission justifying the confidential treatment of a given piece of information. Consequently, we consider that Japan has failed to establish a *prima facie* case that the absence of explicit reasons justifying confidential treatment accompanying the applicants' redacted documents gives rise to an inconsistency with Article 6.5.

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production", could "never" be "by nature" confidential. In any case, we recall that Japan has not challenged the Enforcement Rule and the KIA's system "as such", and accepts that "Article 15 of the Enforcement Rules of the Customs Act of Korea could potentially be applied in a manner that is consistent with Article 6.5". (Japan's response to Panel question No. 110, para. 103). Japan has not demonstrated how the potential for the Enforcement Rule and the KIA's system to be applied in a WTO-inconsistent manner alone establishes that the KIA's treatment of each piece of challenged information is inconsistent with Article 6.5.

[632] Japan's response to Panel question No. 109, paras. 94-95 and 99.

[633] Japan's first written submission, paras. 337-339; second written submission, para. 551; responses to Panel question No. 82, paras. 386-387 and 389, No. 83, paras. 390-391, No. 108, para. 93, No. 109, para. 97, No. 110, para. 102, No. 112, paras. 105-108, and No. 114, paras. 113-114; and comments on Korea's response to Panel question No. 107, para. 190.

[634] Japan's response to Panel question No. 109, paras. 95 and 99.

[635] See fn 633 above.

[636] Japan's second written submission, para. 550; responses to Panel question No. 109, para. 97, No. 112, paras. 107-108, and No. 114, paras. 113-114. With respect to the Appellate Body's observations in *Korea – Pneumatic Valves*, see fn 626 above.

[637] To the extent that Japan subsequently sought to submit item-specific reasons for which "good cause" was not shown (e.g. Japan's rebuttals to Exhibit KOR-35, (Exhibit JPN-39); and Japan's correction to Exhibit KOR-82, (Exhibit JPN-44), which appear primarily directed at Article 6.5.1 but potentially contain arguments relevant to Article 6.5), we observe that these were made in response to Korea's rebuttal, as opposed to forming the basis of Japan's original claim as set out in its first written submission. (Working Procedures, clause 3(1); see also Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79; and Panel Reports, *US – Washing Machines*, paras. 7.82-7.85; *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.101).

7.6.3 Whether the KIA failed to specify "on what basis" the confidential treatment was afforded

7.211. As noted above, Japan also argues that the KIA acted inconsistently with Article 6.5 because the KIA failed to specify "on what basis" the confidential treatment was afforded.[638] Japan contends that this is evidenced by the absence of any "specific indication, in the relevant documents on record" indicating "on what basis the [KIA] granted confidential treatment to such information".[639] Korea responds that Article 6.5 only requires that an authority "satisfy itself" as to whether good cause was shown.[640] In our understanding, the consequence of Korea's argument is 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.[641] In view of Japan's argument and Korea's rebuttal, we understand the resolution to Japan's claim on this point to turn on whether, in light of the KIA's system and the circumstances of the present case, the KIA was required under Article 6.5 to provide a report or other written evidence indicating on what basis good cause was granted.

7.212. We begin by addressing a number of interpretive questions arising from Japan's argument and Korea's rebuttal. Japan argues that KIA's failure to provide a report or some other written document evidencing "on what basis" confidential treatment was granted was inconsistent with Article 6.5.[642] In Japan's view, Article 6.5 provides that an authority must "objectively assess[] [the] facts introduced by the party seeking confidential treatment, must decide whether the confidential treatment should be granted, and must indicate such assessment in its published report or related supporting documents".[643] In our view, as noted at paragraph 7.206 above, Article 6.5 does not require the submitter of information to necessarily submit explicit reasons justifying the confidential treatment sought. Similarly, we see nothing in the text of Article 6.5 to support the proposition that it requires an authority, in all cases, to provide a report or other written evidence indicating the authority's assessment of good cause. Rather, Article 6.5 relevantly requires that information that is "by nature" confidential or "provided on a confidential basis" not be disclosed "upon good cause shown". We agree with the panel's observations in *Mexico – Steel Pipes and Tubes* that:

> [W]e do not consider that the obligations contained in Article 6.5 set forth exactly how an investigating authority should or must evaluate a request for confidential treatment[]. Nor do we consider that this provision sets forth how an investigating authority should or must indicate (explicitly or otherwise in the record of the investigation) how, and the extent to which, it assessed an applicant's assertion to conclude that "good cause" existed for the information to be treated as confidential within the meaning of Article 6.5[.][644]

7.213. As with the panel in *Mexico – Steel Pipes and Tubes*, we do not consider that Article 6.5 contains any strict requirement that an authority provide a written report evidencing its assessment. Rather, we consider that whether good cause has been shown in a given case must be determined by the facts of that particular case. The absence of any indication by the KIA evidencing its assessment of good cause is thus simply a fact that must be taken into account in determining whether Japan has established that the KIA failed to ensure "good cause shown", and whether Korea has effectively rebutted that case.

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[638] Japan's first written submission, para. 339. We note that Japan also argued that the KIA failed to objectively assess whether good cause had been shown by the applicants. As discussed at paragraph 7.206 above, that argument is based on the incorrect view that Article 6.5 assigns distinct roles to the submitter and the authority. We thus consider that this limb of Japan's argument fails.

[639] Japan's first written submission, para. 339.

[640] Korea's first written submission, paras. 426-427; second written submission, paras. 290 and 295.

[641] Korea's first written submission, para. 426.

[642] Japan's first written submission, para. 339; opening statement at the first meeting of the Panel, para. 81.

[643] Japan's response to Panel question No. 82, para. 389.

[644] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.393. The Panel in *Mexico – Steel Pipes and Tubes* upheld the confidential treatment of information under Article 6.5 despite the absence of any "explicit indication, on the part of [the authority], as to why it considered that the assertions of 'good cause' for confidential treatment of the information concerned were merited". (Ibid. para. 7.394).

7.214. However, we disagree with Korea's argument that an investigating authority need only "satisfy itself" that good cause is shown before treating information as confidential.[645] If an authority were only required to "satisfy itself" that good cause had been shown, there would be no basis for a panel to objectively assess compliance with Article 6.5.[646] In the absence of any textual or contextual support, we cannot endorse Korea's interpretation of Article 6.5 on this point.

7.215. We turn now to whether Japan has established that the KIA failed to specify "on what basis" good cause was shown for the pieces of information at issue. 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.[647] Japan responds that such compliance cannot be presumed as there was no specific indication in the documents on the record evidencing that the KIA complied with domestic laws or which of the Enforcement Rule's categories each item of information was found to fall under.[648]

7.216. It is undisputed that the KIA did not provide any indication as to "on what basis" good cause was shown for the items of information at issue. As we will explain, Japan has identified a range of instances that indicate that the KIA failed to adequately check the redacted information and ensure "good cause shown", in contrast to Korea's description of the way in which the KIA's system and practice would ordinarily operate.

7.217. First, Japan has identified a number of instances of information that is already publicly available and thus could not be "by nature" confidential.[649] Korea responded that these instances pertained to information that was not publicly available but is rather "commercially supplied by the KITA" and is thus consequently "by nature" confidential as its "disclosure of which would inevitably have a significantly adverse effect upon KITA".[650] While we accept that information that was commercially available only to a restricted group could be "by nature" confidential, Korea has not pointed to any evidence showing that the exporters or other members of the public were unable to reasonably access the same information through, e.g. purchasing it from the Korea International Trade Association (KITA). Additionally, we note that Korea appears to concede that the KITA data used for another exhibit was based entirely on data made public by the Korea Customs Service.[651]

7.218. Second, Japan has identified information (Nos. 14, 46, and 65) where the source material is not disclosed, and contends that, without the source material, the KIA would have been unable to verify that this information was not publicly available and hence confirm that "good cause" was "shown".[652] Korea responds that the KIA's confidential treatment of this information was consistent with its obligation not to disclose information upon good cause shown, and that there is no requirement under Article 6.5 to disclose the "source" of the information, nor was the information at issue "particularly relevant to the final determination".[653] In light of our review of the nature of the specific information at issue in Nos. 14, 46, and 65 – which was supplied by the applicants, but

[645] Korea's first written submission, para. 426; second written submission, paras. 290 and 295.

[646] Article 6.5 requires that an authority shall, "upon good cause shown", not disclose confidential information. The absence of any indication that Article 6.5 only requires an authority to "satisfy itself" indicates that this was not intended. The interpretation of Article 6.5 is further informed by the basic right of Members to request that a panel be composed to review other Members' compliance with the Anti-Dumping Agreement; this is part of the context in which we interpret Article 6.5. Such scrutiny requires that there be some basis to enable a panel to assess an authority's conformity or non-conformity with Article 6.5.

[647] Korea's first written submission, para. 426.

[648] Japan's first written submission, para. 339.

[649] Japan's first written submission, para. 339 and fn 415 (referring to Nos. 10, 15, 16, 19, 40, 44, and 45 of the annex). In relation to Nos. 10, 15, 16, 19, 40, 44, and 45 of the annex, Japan argues the information appears to be sourced from public databases and thus the KIA had no basis to presume it should be treated confidentially. (Japan's first written submission, para. 339 and fn 415).

[650] Korea's response to Japan's Article 6.5.1 allegations, (Exhibit KOR-35), Nos. 10, 15, 16, 19, 40, 44, and 45.

[651] Korea's response to Panel question No. 71 (discussing Import Clearance Matrix, (Exhibit KOR-43.b (BCI))). While there is no evidence before this Panel that would allow the Panel to infer that the source information for Nos. 10, 15, 16, 19, 40, 44, and 45 is non-proprietary public information from the Korea Customs Service, Korea has failed to clarify what information from KITA does originate from the Korea Customs Service.

[652] Japan's first written submission, para. 339 and fn 414 (referring to Nos. 14, 46, and 65). See also Japan's response to Panel question No. 113, paras. 109-111. We note that Japan added further items to its contention in this regard (see ibid. para. 112), but did so at a very late stage in these proceedings.

[653] Korea's comments on Japan's response to Panel question No. 113, p. 60.

does not pertain to the applicants' own operations – we cannot see how the KIA could have performed the alleged checks and confirmed, in the manner claimed by Korea, that there was indeed "good cause" for protecting those items as confidential without any understanding of their source or origins.

7.219. Third, Japan observes that Korea itself conceded that further materials had already been made public.[654] Having tacitly conceded that these items had "already been made public"[655] and that, for some of these items, that Japan "already has full access to the information"[656], Korea later asserted that it had described the information as "public" only in "the sense that [it] could be obtained by the relevant public such as members of the [Japan's Stainless Steel Association] or following payment".[657] We consider that Korea clearly acknowledged that Nos. 78-79, 81, 83, and 95-97 are public information. Korea's later attempts to clarify the meaning of "publicly available" were incomplete and unsupported by evidence.[658]

7.220. We also note that, in respect of one of the pieces of protected information, Korea suggested *arguendo* that the KIA would not have needed to disclose it because no request for disclosure was made by the exporters.[659] It is not clear to us whether the KIA itself relied on the premise that information for which confidential treatment was requested need only be disclosed if a request or challenge were made by another interested party. However, to the extent that this does indeed reflect an approach pursued the KIA in the review at issue, it would suggest that some information may have been presumptively protected as confidential unless an interested party explicitly challenged that designation or requested its disclosure. As Japan observed, such an approach would have no basis in Article 6.5[660], and would run counter to Korea's own arguments about the process of checks that the KIA would ordinarily undertake.

7.221. Our starting point in evaluating Japan's claim is to presume that the KIA abided by and implemented, in good faith, Korean laws, regulations, and policies regarding the treatment of confidential information. The existence of a series of items for which there are manifest inadequacies, however, means that in the review at issue we are unable to rely on a presumption that the KIA properly followed its system of checking implicit assertions against predetermined categories to ensure that there was "good cause shown". These inadequacies were present not just for a handful of items, but for a significant number of the redactions at issue. Therefore, 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 regarding this particular sunset review. The absence of any reference to the KIA's basis for protecting information as confidential in the record means that we have no other grounds to ascertain whether the KIA ensured that "good cause" was properly shown for each of the challenged pieces of information. We therefore find that the KIA acted inconsistently with

[654] Japan's second written submission, para. 562 and fn 767 (referring to Nos. 78-79, 81, 83, and 95-97). In relation to Nos. 78-79, 81, 83, and 95-97, Japan argues that that Korea has conceded that the information is already public, and therefore inappropriate to be treated confidentially. (Japan's second written submission, para. 562). Korea first stated in Exhibit KOR-35 accompanying the first written submissions that these items had "already been made public". (Korea's response to Japan's Article 6.5.1 allegations, (Exhibit KOR-35), Nos. 78-79, 81, 83, and 95-97). In respect of Nos. 79, 83, and 95-97, Korea additionally observed that Japan "already has full access to the information". (Korea's response to Japan's Article 6.5.1 allegations, (Exhibit KOR-35), Nos. 79, 83, and 95-97). Korea later asserted that it had described the information as "public" only in "the sense that [it] could be obtained by the relevant public such as members of the JSSA or following payment". (Korea's response to Panel question No. 108, para. 231; see also Korea's response to Exhibit JPN-39, (Exhibit KOR-82), Nos. 78-79, 81, 83, and 95-97). We consider that Korea clearly conceded that Nos. 78-79, 81, 83, and 95-97 are public information. Korea's later attempts to clarify the meaning of "publicly available" were incomplete and unsupported by evidence.

[655] Korea's response to Japan's Article 6.5.1 allegations, (Exhibit KOR-35), Nos. 78-79, 81, 83, and 95-97.

[656] Korea's response to Japan's Article 6.5.1 allegations, (Exhibit KOR-35), Nos. 79, 83, and 95-97.

[657] Korea's response to the Panel question No. 108, para. 231. See also Korea's response to Exhibit JPN-39, (Exhibit KOR-82), Nos. 78-79, 81, 83, and 95-97.

[658] While Korea contends that this information is "sold to subscribers subject to the condition that the information is not disclosed to the general public", we have no evidence before us to suggest that the "general public" could not reasonably become "subscribers" based on e.g. cost or other restrictions. (Korea's comments on Japan's response to Panel question No. 108, p. 52).

[659] Korea also indicated this information was "by nature" confidential. (Korea's response to Japan's Article 6.5.1 allegations, (Exhibit KOR-35), No. 61; Korea's response to Panel question No. 107, para. 228).

[660] See, e.g. Japan's second written submission, para. 563 (referring to Korea's response to Japan's Article 6.5.1 allegations, (Exhibit KOR-35), No. 61).

Article 6.5 by granting of confidential treatment to the 102 items identified in the annex. We recall that Japan made its claim under Article 6.5 in tandem with a claim under Article 11.4 of the Anti-Dumping Agreement, since Article 11.4 provides the legal basis for which Article 6.5 applied to the sunset review at issue. In view of our findings in relation to Article 6.5, we likewise find that the KIA acted inconsistently with Article 11.4.

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.

7.223. Given the above finding, we do not consider it necessary to consider Japan's other arguments with respect to Article 6.5. As we have already found that the KIA's confidential treatment of all 102 items of information at issue to be inconsistent with Article 6.5, it adds nothing further to consider Japan's arguments in relation to certain specific items.

7.7 Judicial economy

7.224. Japan makes a number of claims in addition to those considered above, namely that the KIA acted inconsistently with:

a. Article 11.3 of the Anti-Dumping Agreement by conducting a cumulative assessment of Indian and Japanese imports[661];

b. Article VI:6(a) of the GATT 1994 by its decision to continue levying anti-dumping duties[662];

c. Articles 6.9 and 11.4 of the Anti-Dumping Agreement by failing to properly disclose certain alleged "essential facts"[663];

d. Articles 12.2, 12.2.2, and 12.3 of the Anti-Dumping Agreement by failing to provide the Japanese exporters with a public notice stating the findings and all relevant information regarding matters of fact and law in sufficient detail[664]; and

e. Articles 6.5.1 and 11.4 of the Anti-Dumping Agreement in respect of 80 instances in the documents as identified in the annex.[665]

7.225. For the reasons set out below we consider it appropriate to exercise judicial economy with respect to these claims. We will first consider the principle of judicial economy, and then apply that principle to each of the claims listed above.[666]

7.226. It is well established that a panel need only address those claims that must be addressed in order to resolve the matter in issue in a dispute.[667] This principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute".[668] Thus, a "panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt

[661] Japan's first written submission, para. 91.
[662] Japan's first written submission, para. 193; second written submission, paras. 438-448.
[663] Japan's first written submission, para. 12.
[664] Japan's first written submission, para. 348.
[665] Japan's first written submission, paras. 328 and 340, and annex, pp. 145-165.
[666] We give a brief overview of each of Japan's claims and Korea's corresponding response. This is solely for the purpose of identifying the claim over which we are exercising judicial economy, and is not intended to be provide a comprehensive or fulsome account of the parties' respective arguments and rebuttals on each point.
[667] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 340.
[668] Appellate Body Reports, *Argentina – Import Measures*, para. 5.190 (quoting Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133). (emphasis on *Canada – Wheat Exports and Grain Imports*)

compliance by a Member with those recommendations and rulings".[669] However, for other claims – i.e. claims on which a finding is not necessary so as to allow for prompt compliance by the Member concerned – panels may exercise judicial economy.

7.227. In instances where a panel exercises judicial economy, it is required to explain its decision to decline to examine those claims.[670] While we explain below our exercise of judicial economy for each of Japan's claims listed in paragraph 7.224, we make the overarching point that findings on these claims would add nothing to the way in which Korea chooses to comply with the inconsistencies that we have already found in sections 7.5 and 7.6. The significance of this lies in our "objective assessment" under Article 11 of the DSU encompassing not only a duty to ensure a positive and effective resolution to the dispute, but also a *prompt* resolution in light of the magnitude and complexity of the matter to be resolved.[671] The DSU envisages that a balance is struck between providing "high-quality panel reports, while not unduly delaying the panel process".[672] Prudent expeditiousness is a core facet of our "objective assessment". With that in mind, we explain our exercise of judicial economy for each applicable claim.

7.228. First, Japan contends that the KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement by conducting a cumulative assessment of Indian and Japanese imports for the purposes of its likelihood-of-injury assessment.[673] Japan argues there is limited competition between Japanese and Indian imports because of the differences in the mix of grades and price levels.[674] Japan contends, therefore, that the KIA could not have assumed that Japanese and Indian products could be cumulated, and failed to conduct an adequate analysis of the competitive relationship between them.[675] Korea rejects Japan's argument and responds that the competitive relationship was adequately addressed in the KIA's determination, and moreover, the difference in product mixes was rendered irrelevant by the "high adaptability" of SSB production facilities and the made-to-order nature of the market, together with the fact that all relevant producers could and did compete over the same demand.[676]

7.229. We consider it appropriate to exercise judicial economy over Japan's claim that the KIA's cumulation analysis was inconsistent with Article 11.3. It emerged during these proceedings that the KIA's likelihood-of-injury assessment was not conducted exclusively on a cumulative basis. On the contrary, with respect to the KIA's examination of prices during the POR and the consequences of the drop in prices arising from lifting the anti-dumping duties, the KIA engaged in both cumulative and decumulative analyses, including with respect to Japan individually.[677] Each of the intermediate findings on the consequences of the drop in prices arising from lifting the anti-dumping duties, which in turn led to the ultimate conclusion, incorporated findings specific to Japan.[678] The intermediate finding of the "large recovery of price competitiveness in the domestic market" was based on a Japan-specific analysis of the effects of its prices falling by KRW [[***]].[679] The subsequent intermediate finding of a "growth in exports to Korea and weaken[ing] [of] the price competitiveness of the like products" was likewise based on a Japan-specific analysis of a price decline by "[[***]]% for Japanese products".[680] Accordingly, the ultimate conclusion that "a drop in the price of the dumped imports and an increase in the volume of dumped imports will lead to

[669] Appellate Body Report, *Australia – Salmon*, para. 223.
[670] Appellate Body Report, *Canada – Autos*, para. 117.
[671] See, e.g. Articles 3.3, 3.7, 11, 12.2, 12.8, and 21.1 of the DSU.
[672] Article 12.2 of the DSU.
[673] Japan's first written submission, paras. 90-105.
[674] Japan's first written submission, paras. 106-115; second written submission paras. 10 and 151-153.
[675] Japan's first written submission, paras. 116-118; second written submission paras. 151-155.
[676] Korea's first written submission, paras. 133-182; second written submission, paras. 50, 52, 59, and 71.
[677] Korea's first written submission, para. 247; responses to Panel question No. 19(a)(ii), and Nos. 64(a) and 64(d); and second written submission, paras. 90, 105, and 185.
[678] Korea's first written submission, para. 247; response to Panel question No. 64(a); and second written submission, paras. 105, 185, and 240-241.
[679] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 63; see also Korea's response to Panel question No. 64(a).
[680] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67; see also Korea's first written submission, para. 247; and second written submission, para. 185.

recurrence of material injuries to the domestic industry" was, with respect to the consequences of the drop in Japanese prices, premised on certain Japan-specific findings.[681]

7.230. Thus, with respect to Japan, the ultimate conclusion on the consequences of the drop in prices did not turn on a cumulative assessment. We therefore agree with Korea that "[t]he relevance of the cumulation decision is thus very limited as the authorities complemented and supplemented the cumulative analysis consistently with a country-specific analysis".[682] As Korea explains, "[t]he decision to cumulate therefore did not mean that no separate, complementary analysis of prices just for Japan took place".[683] Moreover, with respect to production capacity and capacity utilization, we see nothing in the KIA's determination to indicate that Japan's capacity utilization rate was cumulated with India's capacity utilization rate for the purposes of the KIA's ultimate conclusion.[684] With that in mind, given that we have found that the KIA acted inconsistently with Article 11.3 on the basis of findings by the KIA that rested upon Japan-specific analyses, we do not see why a finding on the KIA's decision to cumulate the effects of Indian and Japanese dumped imports for certain aspects of its analysis would assist in resolving the present dispute. Specifically, we cannot see how such a finding would affect, or add to, the manner in which Korea chooses to comply with the inconsistencies that we have already found under Article 11.3 in section 7.5.[685]

7.231. We note that some of the parties' arguments relating to the competitive market relationship amongst SSBs from the respective countries had relevance beyond Japan's cumulation claim. We have addressed these, to the extent necessary, in section 7.5. In terms of Korea's description of the KIA's findings of the competitive market relationship, our evaluation proceeded on the basis of Korea's explanation[686], and in view of our findings in that section, we did not consider it necessary to address Japan's objections against aspects of that explanation as *ex post*, except where specifically required to resolve an aspect of the claim in question.

7.232. Second, Japan claims that Korea's decision to continue levying anti-dumping duties is inconsistent with Article VI:6(a) of the GATT 1994.[687] Japan argues this is because the KIA has not established that the effect of the alleged dumping is such as to cause or threaten material injury to an established domestic industry.[688] Korea reject's Japan's claim, and further responds that Japan has failed to specify which obligations under Article VI:6(a) of the GATT 1994 were allegedly violated and consequently that the argument is outside the Panel's terms of reference.[689]

7.233. We consider it appropriate to exercise judicial economy with regard to this claim. Japan's claim under Article VI:6(a) of the GATT 1994 is entirely consequential on Japan's arguments made under Article 11.3 of the Anti-Dumping Agreement.[690] We have already determined that the KIA's likelihood-of-injury determination is inconsistent with Article 11.3 of the Anti-Dumping Agreement. It would thus add nothing to the resolution of the dispute to reach a finding on Japan's claim under Article VI:6(a) of the GATT 1994, and we therefore decline to address

[681] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67. As we understand it, the KIA "noted current price trends over the POR of the dumped imports, both on a cumulated and de-cumulated basis" and found that "without duties, the underselling would be very significant for the dumped imports, and that *prices of Japanese dumped imports would drop significantly by at least* [[***]]%", and in turn "*[t]his intermediate finding* supported the *overall reasonable conclusion* that there was a likelihood of future injury if the duties expired". (Korea's second written submission, para. 185 (emphasis added); see also first written submission, paras. 247-248). We reject Japan's argument to the contrary. (Japan's response to Panel question No. 40, paras. 225-226).

[682] Korea's second written submission, para. 90.

[683] Korea's second written submission, para. 105.

[684] Rather, the KIA's determination consistently referenced respective country-specific figures for India and Japan on production capacity. (OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 57-61 and 67; KTC's final resolution, (Exhibit KOR-4.b (BCI)), pp. 19-22).

[685] See further Annex A-3 (Interim Review), para. 2.211.

[686] See, e.g. paras. 7.70-7.74 above.

[687] Japan's first written submission, para. 193; second written submission, paras. 438-448.

[688] Japan's first written submission, para. 193; second written submission, paras. 438-448.

[689] Korea's first written submission, paras. 458-464; second written submission, paras. 313-318.

[690] Japan's first written submission, para. 193; second written submission, paras. 438-448.

it. It is likewise unnecessary to consider whether or not Japan's claim under Article VI:6(a) of the GATT 1994 would be outside our terms of reference.[691]

7.234. Third, Japan claims that certain alleged "essential facts" pertaining to six of the KIA's findings were not sufficiently disclosed under Articles 6.9 and 11.4 of the Anti-Dumping Agreement.[692] Japan argues that neither the information disclosed nor the method of disclosure was sufficient to enable the interested parties to understand the basis of the KIA's decision and to comment on the completeness or correctness of conclusions reached by the investigating authority.[693] Korea responds that the KIA disclosed all essential facts under consideration in a manner consistent with Article 6.9.[694]

7.235. We consider it appropriate to exercise judicial economy over these claims. Japan's claims under Articles 6.9 and 11.4 pertain to alleged "essential facts" concerning the KIA's likelihood-of-injury determination.[695] We have already found the KIA's likelihood-of-injury determination to be inconsistent with Article 11.3 due to a failure by the KIA to engage in an "unbiased and objective" evaluation of certain factual matters. Any fresh evaluation of the likelihood of injury by the KIA as a consequence of the findings in section 7.5 of this Report would necessarily require a renewed factual assessment of those matters.[696] A fresh factual evaluation would warrant a fresh disclosure of the "essential facts" under consideration for the purposes of Article 6.9.[697] A determination in the present Panel proceedings as to whether the KIA complied with the requirements of Article 6.9 in the review at issue would relate only to the particular factual assessment in the review at issue, and not to a fresh factual evaluation undertaken to comply with DSB rulings arising from this Report. Thus, findings in the present Panel proceedings would be relevant to a fresh factual evaluation by analogy only, if at all; any such fresh factual evaluation would again be subject to the procedural requirements of Article 6.9, and therefore the authority's compliance with Article 6.9 in respect of that fresh evaluation would turn on the particular circumstances of that case. Thus, our exercise of judicial economy over the present claims would not affect the obligation under Article 6.9 to "inform all interested parties of the essential facts under consideration which form the basis for the decision", including "in sufficient time for the parties to defend their interests", as part of any reinvestigation to comply with DSB rulings arising from this Report. We consider it relevant, in this regard, that Japan clarified explicitly that it "does not intend to challenge Korea's system … 'as such' in the current case".[698] Questions concerning systemic or regular practices of the KIA which may arise in a later review or fresh factual evaluation have thus not been raised as a matter for this Panel's consideration. Accordingly, a finding on Japan's claims under Articles 6.9 and 11.4 of the Anti-Dumping Agreement would add nothing to the manner in which Korea chooses to comply with the inconsistencies that we have already found under Article 11.3 of the Anti-Dumping Agreement.[699]

[691] While questions of jurisdiction are fundamental, we consider it appropriate and expeditious to apply judicial economy to Japan's claim on an *arguendo* basis to "enhance the simplicity and efficiency" of the proceedings. (Appellate Body Report, *China – Publications and Audiovisual Products*, para. 213; Panel Report, *US – Large Civil Aircraft (2nd complaint)*, fn 2933). Treating Japan's claim on an *arguendo* basis in this context allows this Panel to directly exercise judicial economy to remove the claim from consideration. Additionally considering Korea's rebuttal argument that Japan's claim is outside our terms of reference would add complexity to this analysis without affecting the outcome.

[692] Japan's first written submission, paras. 295-327; second written submission, paras. 529-542.

[693] Japan's first written submission, paras. 295-327; second written submission, paras. 529-542.

[694] Korea's first written submission, paras. 395-411.

[695] See para. 7.15 above.

[696] We note that under Article 21.3 of the DSU, the implementation of DSB recommendations and rulings is left, in the first instance, to the discretion of the implementing Member, and we do not seek to presuppose what method of implementation Korea might adopt in the present dispute. (Panel Reports, *US – Shrimp II (Viet Nam)*, para. 8.6; *EU – Footwear (China)*, para. 8.12; *EC – Fasteners (China)*, para. 8.8; and *US – Hot-Rolled Steel*, para. 8.11).

[697] Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, paras. 7.236-7.237.

[698] Japan's first written submission, para. 283.

[699] By contrast, we do not consider that our findings in section 7.5 of this Report would require the resubmission of the documents at issue in Japan's claims under Articles 6.5 of the Anti-Dumping Agreement, nor a re-evaluation by the KIA of "good cause shown" regarding the information in those documents for which confidential treatment was requested. Therefore, unlike our consideration of Japan's claims concerning "essential facts" and "public notice", we cannot exercise judicial economy over Japan's claims under Articles 6.5 on the basis that the KIA would need to re-observe those aspects of Articles 6.5 with respect to the documents at issue as a corollary of our findings in section 7.5.

7.236. Fourth, Japan claims that the exporters were not provided with a public notice stating the findings and all relevant information regarding matters of fact and law in sufficient detail as required by Articles 12.2, 12.2.2, and 12.3 of the Anti-Dumping Agreement.[700] Japan contends that it is not clear whether the KTC's final resolution, the OTI's final report, or the Ministry of Strategy and Finance's final report constituted public notice to the interested parties.[701] Regardless, Japan argues that none of these documents provide sufficient detail in relation to a range of the KIA's findings.[702] Korea responds that the Ministry of Strategy and Finance's final report constituted public notice and contained the KTC's final determination and the OTI's final report.[703] Korea continues that this public notice fully complied with the disclosure obligations of Articles 12.2, 12.2.2, and 12.3 of the Anti-Dumping Agreement.[704]

7.237. We consider it appropriate to exercise judicial economy over these claims for the same reasons as with respect to Japan's "essential facts" claims under Article 6.9. In particular, as we have already found the KIA's likelihood-of-injury determination to be inconsistent with Article 11.3, any fresh evaluation of the facts by the KIA as a consequence of this Report would necessitate compliance with the disciplines contained in Articles 12.2, 12.2.2, and 12.3 of the Anti-Dumping Agreement. Accordingly, a finding on Japan's claims under Articles 12.2, 12.2.2, and 12.3 of the Anti-Dumping Agreement would add nothing to the manner in which Korea chooses to comply with the inconsistencies that we have already found under Article 11.3 of the Anti-Dumping Agreement.

7.238. Fifth, Japan claims that Korea acted inconsistently with Articles 6.5.1 and 11.4 of the Anti-Dumping Agreement in respect of 80 instances in the documents as identified in the annex.[705] Japan argues that the KIA acted inconsistently with Articles 6.5.1 and 11.4 of the Anti-Dumping Agreement because the KIA failed to ensure the provision of non-confidential summaries without reference to exceptional circumstances justifying such failure.[706] Japan further argues that, to the extent non-confidential summaries were provided, such summaries were not sufficiently detailed.[707] Korea rejects Japan's argument that the KIA acted inconsistently with Articles 6.5.1 and 11.4 of the Anti-Dumping Agreement.[708]

7.239. We consider it appropriate to exercise judicial economy over Japan's claims with respect to Articles 6.5.1 and 11.4. We have already determined that the KIA acted inconsistently with Article 6.5 with respect to its confidential treatment of this same information.[709] This finding makes it unnecessary to consider whether the KIA complied with Articles 6.5.1 and 11.4 on the provision of non-confidential summaries for that information. We thus exercise judicial economy in respect of these claims in the interest of the efficient resolution of this dispute.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. With respect to Korea's request for a preliminary ruling under Articles 4.4 and 6.2 of the DSU and Articles 17.3 and 17.4 of the Anti-Dumping Agreement, Korea has not demonstrated that any of Japan's claims are not properly before this Panel.

b. With respect to Japan's claims under Article 11.3 of the Anti-Dumping Agreement:

   i. The KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement in its examination of the price and volume effects of the Japanese imports, by failing to

[700] Japan's first written submission, para. 348.
[701] Japan's first written submission, para. 348 (referring to KTC's notification of final determination, (Exhibit JPN-21.b) and Ordinance No. 624 and Public Notice No. 2017-86, (Exhibit JPN-24.b)).
[702] Japan's first written submission, paras. 348-388.
[703] Korea's first written submission, paras. 445-457.
[704] Korea's first written submission, paras. 445-457.
[705] Japan's first written submission, paras. 328 and 340, and annex, pp. 145-165.
[706] Japan's first written submission, paras. 328 and 340, and annex, pp. 145-165.
[707] Japan's first written submission, paras. 342 and 346.
[708] Korea's first written submission, para. 344; second written submission, paras. 560-561.
[709] See section 7.6.3 above.

undertake an unbiased and objective evaluation of the facts on the consequences of the drop in Japanese prices.

ii. The KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement in its findings on the exporters' production capacity and capacity utilization by rejecting data submitted by the Japanese exporters on the basis of their failure to comply with certain parameters of which they were not properly informed, and thereby failing to undertake an unbiased and objective evaluation of the facts on Japan's production capacity and capacity utilization.

iii. Japan has not demonstrated that the KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement by failing to consider, as other potential injury factors, the cost of raw materials, and the weak demand in the domestic and export markets.

iv. Given our findings at paragraph 8.1.b.i, we exercise judicial economy with respect to Japan's claim under Article 11.3 of the Anti-Dumping Agreement in relation to the assessment of KIA's alleged failure to examine third-country imports as an other potential injury factor.

v. Given our findings at paragraphs 8.1.b.i and ii, we exercise judicial economy with respect to Japan's claim under Article 11.3 of the Anti-Dumping Agreement in relation to the KIA's cumulation of Japanese imports with Indian imports for the purposes of its likelihood-of-injury assessment.

c. With respect to Japan's claims under Articles 6.8 and 11.4 and paragraphs 3 and 7 of Annex II to the Anti-Dumping Agreement:

i. The KIA acted inconsistently with Articles 6.8 and 11.4 by having recourse to the "facts available" in respect of Japan's production capacity.

ii. Given our finding at paragraph 8.1.c.i, we exercise judicial economy with regard to Japan's claims under paragraphs 3 and 7 of Annex II to the Anti-Dumping Agreement.

d. With respect to Japan's claims under Articles 6.5, 6.5.1, and 11.4 of the Anti-Dumping Agreement:

i. The KIA acted inconsistently with Articles 6.5 and 11.4 of the Anti-Dumping Agreement regarding its treatment of information provided by the applicants as confidential information.

ii. Given our finding at paragraph 8.1.d.i, we exercise judicial economy with respect to Japan's claims under Articles 6.5.1 and 11.4 of the Anti-Dumping Agreement.

e. Given our findings at paragraphs 8.1.b.i and ii, we exercise judicial economy with respect to Japan's claim under Article VI:6(a) of the GATT 1994 and Korea's corresponding objection under Article 6.2 of the DSU that Japan's claim in this regard was not properly before us.

f. Given our findings at paragraphs 8.1.b.i and ii, we exercise judicial economy with respect to Japan's claim under Articles 11.4 and 6.9 of the Anti-Dumping Agreement in relation to the KIA's disclosure of "essential facts".

g. Given our findings at paragraphs 8.1.b.i and ii, we exercise judicial economy with respect to Japan's claim that the KIA acted inconsistently with Articles 12.2, 12.2.2, and 12.3 of the Anti-Dumping Agreement in relation to the provisions of the findings and conclusions reached on all issues of fact and law.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are

inconsistent with certain provisions of the Anti-Dumping Agreement, they have nullified or impaired benefits accruing to Japan under that Agreement.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that Korea bring its measure into conformity with its obligations under the Anti-Dumping Agreement.