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

## NOTIFICATION OF AN APPEAL BY THE REPUBLIC OF KOREA UNDER ARTICLE 16.4 AND ARTICLE 17.1 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 22 January 2021, from the delegation of Korea, is being circulated to Members.

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1. Pursuant to Articles 16.4 and 17.1 of the DSU, the Republic of Korea ("Korea") hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the Report of the Panel in *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars* (WT/DS553/R). Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, Korea simultaneously files this Notice of Appeal with the Appellate Body Secretariat. Korea is restricting its appeal to those errors that it believes constitute serious errors of law or legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith.

2. For the reasons to be further elaborated in its submissions to the Appellate Body, Korea appeals, and requests the Appellate Body to reverse, modify, or declare moot and of no legal effect, the findings, conclusions, rulings and recommendations of the Panel, with respect to the following errors of law or legal interpretations contained in the Panel Report.[1]

## I. CLAIM 1: THE PANEL ACTED INCONSISTENTLY WITH ARTICLE 7.1 AND ARTICLE 11 OF THE DSU BY RENDERING FINDINGS ON ISSUES OUTSIDE ITS MANDATE AND BY MAKING THE CASE FOR JAPAN

3. Korea submits that the Panel exceeded its mandate with respect to its findings in paragraphs 8.1. b. i., 8.1. b. ii., and 8.1. c. i. of the Panel Report, because these findings are not based on the claims that are actually identified in Japan's Request for Establishment ("RFE") of a Panel. Korea recalls that the request for establishment of a panel determines the panel's terms of reference by identifying the measures and claims that the panel has authority to examine.[2] In addition, in reaching these findings the Panel made the case for Japan as it developed claims and arguments different from those actually included in Japan's RFE.

4. First, with respect to the Panel's findings in paragraphs 8.1. b. i. and 8.1. b. ii, Korea submits that, as demonstrated in paragraph 1 of its RFE, Japan's claim was that the Korean investigating authorities ("KIA") acted inconsistently with Article 11.3 of the Anti-Dumping Agreement by failing to demonstrate the "nexus" between the expiry of the duties and the likelihood of continuation or

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[1] Paragraph numbers provided in the following description of the legal errors of the Panel are intended to indicate the primary instance of the errors. These errors may also be reflected in or have consequences for other parts of the Panel Report, and Korea also appeals all analyses, findings, and conclusions deriving from or relying on the appealed errors. Korea also emphasizes that the paragraphs listed in this Notice of Appeal comprise only an "indicative list", pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review.

[2] See, e.g. Appellate Body Report, *EC – Selected Customs Matters*, para. 131. See Article 6.2 and Article 7.1 of the DSU.

recurrence of injury. However, the Panel improperly re-characterized Japan's original claim and rendered isolated findings on the KIA's analysis of the volume and price effects of dumped imports from Japan and on capacity utilization.

5. In particular, Japan's RFE asserts that Korea acted inconsistently with its obligations under Article 11.3 of the Anti-Dumping Agreement due to the following problem:

> [B]ecause Korea failed to properly determine, as the basis to continue the imposition of antidumping duties on the imports from Japan, that the expiry of the duties would be likely to lead to continuation or recurrence of injury. Specifically, Korea failed to demonstrate the nexus between the expiry of the duties and a continuation or recurrence of injury and to comply with the fundamental requirement that such determination shall rest on a sufficient factual basis and reasoned and adequate conclusions, due to, *inter alia*, the following reasons: …[3]

6. In contrast, the Panel's relevant findings in paragraphs 8.1. b. i. and 8.1. b. ii. are as follows:

> 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 undertake an unbiased and objective evaluation of the facts on the consequence 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.

7. The disconnect is obvious as the Panel made findings on a claim that was different from the claim presented in the RFE. It thus exceeded its mandate when making the above findings.

8. The Panel's failure to make a finding on the actual claim brought by Japan appears to have been driven by a misguided focus on the need for a "prompt and effective resolution of the dispute" which it claimed "hinges" on whether Japan has demonstrated that the KIA failed to undertake an "unbiased and objective" evaluation of the facts in respect of two individual findings relating to effects of the drop in Japanese prices on domestic prices and the volume of imports, on the one hand, and on the capacity utilization rate of Japanese producers, on the other.[4] In re-phrasing Japan's claim in this manner, the Panel reduced the examination of whether the KIA's likelihood-of-injury determination was inconsistent with Article 11.3 to these two intermediate findings, which the Panel referred to as the "two overarching questions".[5] However, these issues were not identified as such in the RFE, and certainly not in such an "overarching" manner.

9. The Panel's error appears to stem from its inaccurate reading of the RFE. In particular, the Panel asserts that Japan made "*several substantive claims* in these proceedings concerning the KIA's finding that lifting the anti-dumping duties would be 'highly likely' to lead to a recurrence of material injury to the domestic industry".[6] The Panel thus seems to have treated the alleged "overarching questions",[7] as separate *claims* under Article 11.3. However, the RFE makes clear that there was only *one* Article 11.3 claim that was presented to the Panel concerning the alleged failure by Korea "to demonstrate the nexus between the expiry of the duties and a continuation or recurrence of injury". In the RFE, Japan listed four "reasons" (not claims) in support of the claim it made. It identified these reasons in a non-exhaustive list (by the terms "*inter alia*" and "not limited to") and indicated that they applied cumulatively (by the terms "and" between bullet points (c)

[3] Japan's request for panel establishment, WT/DS553/2, p. 1.
[4] Panel Report, para. 7.16 (footnotes omitted).
[5] Panel Report, para. 7.17.
[6] Panel Report, para. 7.50 (italics added, footnote omitted).
[7] Panel Report, para. 7.17.

and (d), and "[i]n light of, in particular … reasons (a) *to* (d) above…"). The way Japan presented its RFE reflects the fact that Article 11.3 does not impose any specific steps that must be undertaken by an authority but that consistency with Article 11.3 depends on the totality of the facts which determine whether the authorities have a sufficient factual basis to extend the measures. Therefore, Japan felt obliged to point to a combination of several alleged reasons that together would support the claim of a lack of sufficient factual basis for the likelihood of injury determination. Japan was correct in presenting its claim this way. It was the Panel that erred in the way it addressed this single claim.

10. However, even within the specific issues addressed in the above findings, the Panel went well beyond what Japan had included in its RFE and thus exceeded its mandate.

11. In particular, in the context of the findings on the KIA's volume and price effects analysis as reflected in paragraph 8.1 b i. of the Panel Report, the Panel asserts that "Japan made one single claim concerning the price and volume effects that was comprised of multiple arguments and various alleged errors"[8] when in fact no such claim was ever made by Japan. Rather, as noted before, the claim that was made was of a more general nature related to the lack of demonstrated nexus between the expiry of the duties and the likelihood of recurrence or continuation of injury. One of the listed "reasons" – not claims – related to the findings on import volume and prices of Japanese imports but concerned a *different argument* than the one addressed by the Panel.

12. In its RFE, paragraph 1 (d), Japan argues that the KIA failed to present "any plausible reason why imports from Japan of SSB of the models, types or grades which are the same as or comparable with those imported from other countries or produced by the domestic industry would increase after the expiry of the duties". It stated that "as a result", Korea failed to demonstrate, whether and how the expiry of the duties would lead to the alleged increase in imports of SSB from Japan and the alleged decrease in prices of SSB imported from Japan. In other words, Japan's reason for asserting that the volume and price effects analysis was flawed was entirely based on the alleged lack of competitive overlap between the different models, types or grades of products sold by Japanese producers on the one hand and Korean domestic producers on the other hand. It thus concerned the alleged difference between "special" and "general purpose" steel which the Japanese respondents had put so much emphasis on during the investigation and that was central to Japan's argument before the Panel. Leaving aside that the Panel expressly rejected this argument in a different section of the Report, the relevant point here is that Japan did not make the "single claim" concerning "the drop in Japanese price" that the Panel addressed in its findings. The Panel thus exceeded its mandate and developed a claim for Japan that it did not include in its RFE in this manner. This is not in accordance with the Panel's task of undertaking an objective assessment of the matter.

13. A similar flaw vitiates the finding of the Panel in paragraph 8.1 b. ii related to the KIA's analysis of capacity utilization. The "reason" that Japan included in its RFE to support its allegation of a violation was unrelated to the alleged change in parameters that the Panel made its finding of violation on. In particular, Japan's RFE states that the KIA "adopted information from a secondary source that was both inaccurate and irrelevant when calculating the production capacity of Japan's SSB sector" and that "[a]s a result", Korea's finding that the Japanese producers had the capability to increase their production and exports to Korea was neither based on positive evidence nor on an objective examination. Japan's allegation was thus based on the use of the "secondary source" ISSF data for determining production capacity which it alleged to be "inaccurate and irrelevant". Nothing in the RFE suggests that Japan took issue with the alleged "change in parameters" of the capacity related information requests of the KIA.

14. Yet, as noted above, the Panel's finding in paragraph 8.1.b.ii is that KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement "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." This finding addresses an issue different from the one raised by Japan in the RFE. In fact, it is telling that the Panel never examines let alone finds that the alleged "secondary source" ISSF data that was used by the KIA was "inaccurate and irrelevant" as had been alleged by Japan. Once again, therefore, the Panel made the case for Japan. In addition, the case it developed was different from the one that was set out in Japan's RFE. The

[8] Panel Report, para 7.119

Panel thus exceeded its mandate and acted in a manner that is inconsistent with its obligation to make an objective assessment of the matter.

15. In sum, by making its findings of violation of Article 11.3 of the Anti-Dumping Agreement in paragraph 8.1. b. i. and paragraph 8.1. b. ii. of the Panel Report, the Panel did not address the claim of lack of "causal nexus" that Japan actually made. It unduly overstepped its mandate as determined by Article 6.2 and 7.1 of the DSU and thus acted in violation of Article 7.1 and 11 of the DSU. By treating Japan's supporting "reasons" and arguments as separate and individual "claims", the Panel erred in law and failed to make an objective assessment of the different "matter" that was before it as reflected in the RFE, also in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.[9]

16. Moreover, the Panel's finding in paragraph 8.1 b.i and 8.1 b. ii related to the alleged flaws in the KIA's volume and price effects analysis and the KIA's analysis of Japan's production capacity were not even based on the specific reasons developed in Japan's RFE. For that reason as well, these findings are outside the Panel's mandate. By making the case for Japan and making a different case for Japan than the one actually made in the RFE, the Panel acted in violation of Articles 7.1 and 11 of the DSU as well as Article 17.6 of the Anti-Dumping Agreement.

17. In light of the foregoing, Korea respectfully requests that the Appellate Body reverse or declare moot and of no legal effect the Panel's findings in paragraphs 8.1. b. i. and 8.1. b. ii. of the Panel Report.

18. Second, the Panel's finding in paragraph 8.1.c. i. of the Panel Report on the alleged recourse to "facts available" by the KIA also exceeded its mandate. In respect of this finding as well the Panel made the case for Japan in violation of Articles 6.2, 7.1 and 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

19. In particular, the Panel's finding in paragraph 8.1. c. i. relates to but is different from Japan's claim reflected in paragraph 2 of the RFE. As is clear from the RFE, Japan argued that the third sunset review was inconsistent with Articles 11.4 and 6.8 and paragraphs 3 and 7 of Annex II of the Anti-Dumping Agreement, because:

> (a) Korea failed to take into account the information regarding actual production capacity which each of the Japanese exporters submitted, even though such information was verifiable, was appropriately submitted so that it could be used in the investigation without undue difficulties and was supplied in a timely fashion; and
>
> (b) Korea adopted information from a secondary source regarding the production capacity of Japanese exporters without special circumspection. For example, Korea did not examine the accuracy of the information from the secondary source by comparing it with the information obtained from the Japanese exporters.

20. This claim is thus evidently concerned with the obligations set out in paragraphs 3 and 7 of Annex II respectively requiring an authority to use such data that is verifiable, appropriately submitted and supplied in a timely fashion on the one hand and to use "special circumspection" when basing findings on secondary source information on the other hand.

21. In contrast, the Panel's finding in paragraph 8.1. c. i. of the Panel Report that "[t]he KIA acted inconsistently with Articles 6.8 and 11.4 by having recourse to the "facts available" in respect of Japan's production capacity" does not address these obligations of paragraphs 3 and 7 of Annex II. In fact, the Panel exercises judicial economy with respect to these claims related to paragraphs 3 and 7 of Annex II.[10] The Panel's finding is thus unrelated to the two reasons given in the RFE for the allegation of violation.

[9] See, e.g. Appellate Body Report, *EC – Fasteners (China)*, para. 566.
[10] Panel Report, para. 7.196, para. 8.1 c ii.

22. In particular, the Panel finds in paragraph 7.196 of the Panel Report that "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" and it "therefore conclude[s] that the KIA acted inconsistently with Article 6.8 by having recourse to the "facts available" in respect of Japan's production capacity."[11] It is clear, however, that no such claim related to the alleged failure of the KIA to adequately inform the Japanese exporters of the information required is included in the RFE of Japan.

23. As noted before, Japan's relevant claim is focused entirely on paragraphs 3 and 7 of Annex II of the Anti-Dumping Agreement.[12] In contrast, the specific reason for which the Panel faulted the KIA in paragraph 8.1. c. i. of the Panel Report may constitute a violation of paragraph 1 of Annex II of the Anti-Dumping Agreement (that is, *if* there is any sort of such violation on the part of the KIA) which requires the authorities to "specify in detail the information required from any interested party, and the manner in which that information should be structured". Yet, no such claim was included in the RFE.

24. Therefore, with respect to this "facts available" finding in paragraph 8.1. c. i. of the Panel Report as well, the Panel made findings on a claim that Japan never made. It thus overstepped its mandate and failed to make an objective assessment of the matter when finding that "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".[13] In overstepping its mandate, the Panel made the case for Japan and made a case that was different from the one that was made by Japan, in violation of Articles 7.1 and 11 of the DSU. The Panel again created its own claims never made by Japan. As noted before, the Panel exercised judicial economy in respect of the actual claims that Japan *did* include in the RFE. Indeed, in paragraph 7.196 and paragraph 8.1 c ii the Panel exercised judicial economy in respect of "Japan's claims under paragraphs 3 and 7 of Annex II of the Anti-Dumping Agreement."[14]

25. In light of the foregoing, Korea respectfully requests that the Appellate Body also reverse or declare moot and of no legal effect the Panel's findings in paragraphs 8.1. c. i. of the Panel Report.

## II. CLAIM 2: THE PANEL ACTED INCONSISTENTLY WITH ARTICLE 11 OF THE DSU BY EXERCISING FALSE JUDICIAL ECONOMY WITH RESPECT TO THE CUMULATIVE NATURE OF THE KIA'S LIKELIHOOD OF INJURY ASSESSMENT

26. Korea submits that the Panel's finding in paragraph 7.229 and paragraph 8.1. b. v. of the Panel Report to exercise judicial economy with respect to Japan's alleged claim with respect to the cumulation of Japanese imports with Indian imports for the purpose of the KIA's likelihood-of-injury determination was in error. By exercising false judicial economy, the Panel failed to undertake an objective assessment of the matter in violation of Article 11 of the DSU. Given its link with the Panel's actual findings of violation (as reflected in paragraph 8.1.b.v of the Panel Report), the absence of findings on an essential aspect of the KIA's determination that was at the heart of Japan's allegations of violation means that the Panel's findings in paragraph 8.1. b. i. and paragraph 8.1. b. ii. of the Panel Report are also flawed as a matter of law.

27. Korea recalls that in paragraph 1(a) of Japans' RFE, Japan takes issue with the decision by the KIA to cumulatively assess the effects of the subject imports (i.e., stainless steel bars, "SSB") from Japan, India and Spain. Japan explicitly acknowledges that the KIA's likelihood-of-injury determination is "based on its cumulative assessment", and challenges that cumulative assessment because "the majority of the models, types of grades of SSB imported from Japan during the period of review were distinct from those of the imports from India and of the like domestic products".[15] Korea notes in particular that the RFE does not reflect an argument that cumulation was allegedly

[11] Panel Report, para 7.196.
[12] See Japan's RFE WT/DS553/2.
[13] Panel Report, para. 8.1 c i.
[14] Panel Report, para. 7.196, para. 8.1 c ii. This error is remarkably similar to what happened in relation to the claim on cumulation which is addressed in the next section of this Notice of Appeal. In that context as well the Panel exercises judicial economy with respect to the challenge actually developed by Japan, while making findings on issues not included in Japan's RFE.
[15] Japan's RFE, WT/DS553/2.

not permissible because of price differences between the products in questions. Japan's claim concerning cumulation was all about an alleged difference in "models" and "types of grades".

28. In line with its RFE, Japan argued that Japanese SSB producers serve different SSB market segments from Korean or Indian SSB producers, as the Japanese producers allegedly were selling a fundamentally distinctive category of SSB called "special steel", while Korean and Indian producers allegedly focus on the so-called "general-purpose" SSBs. Therefore, Japan argued, the KIA's cumulation of the Japanese and Indian SSB imports is flawed. This was actually the central issue of the dispute all along, and was the basis for Japan's entire argument that these products should not be cumulated for the purpose of the likelihood-of-injury determination in the KIA's underlying third sunset review.

29. As succinctly explained in Korea's second integrated executive summary, the KIA considered that, the dumped imports (including those from Japan) and the like domestic products were in a competitive relationship based on various factors such as "physical characteristics, manufacturing process, distribution channel, purpose of use, consumer's evaluation, etc.".[16] Before the Panel, Korea demonstrated that the KIA adequately addressed the Japanese respondents' specific argument about the "special" and "general-purpose" steels from Japan and India/Korea.[17] Notably, all of these findings and issues concerned the question "Whether the Authorities' Cumulative Assessment was Improper", as the title of the relevant section in Korea's second integrated executive summary, as well as so many relevant parts of the parties' submissions and even the Panel's questions, confirm.[18]

30. Importantly, the Panel considered Japan's arguments and expressly found that "Japan has not established a *prima facie* case that the KIA erred by failing to undertake analysis that differentiated between general purpose and special steel".[19] The Panel, therefore, essentially rejected Japan's challenge that the KIA's cumulative assessment is flawed.

31. However, the Panel creatively and arbitrarily decided to divide Japan's single-integrated challenge of the cumulative nature of the KIA's determination in paragraph 1(a) of the RFE into two – one with respect to the KIA's alleged failure to undertake an analysis that differentiated between general purpose and special steel, and an alleged second one related to the KIA's cumulative assessment more generally. As noted above, the Panel ruled in favour of Korea with respect to the former and thus effectively invalidated Japan's challenge of the cumulative assessment that was undertaken by the KIA. However, despite having reached this conclusion, the Panel avoided making any finding on the issue of cumulative assessment in general by unduly invoking the principle of judicial economy. Korea submits that the exercise of judicial economy was not justified in this situation given the integrated nature of the challenge as presented by Japan in its RFE and in light of the impact of the issue on the Panel's other findings which required the Panel to make findings on the justified nature of the cumulative assessment undertaken by the KIA.[20]

32. The Panel's exercise of judicial economy is thus a "false judicial economy"[21] which constitutes a serious violation of Article 11 of the DSU with consequences going well beyond the specifics of this alleged "claim."

33. First, the only problem that was "clearly presented" in the RFE as being the basis for Japan's challenge against the KIA's use of a cumulative assessment was that the "vast majority of the models, types or grades of SSB imported from Japan during the period of review were distinct from those of the imports from India and of the like domestic products." Thus, when the Panel rejected Japan's argument about the "product distinction" and alleged difference in "special steel" or general purpose models, it should have rejected Japan's relevant challenge in its entirety. There was no other problem properly before the Panel that left the issue of cumulative assessment unresolved. Pursuant to Article 6.2 of the DSU, an issue or claim that is not presented clearly in a panel request

[16] Korea's Second Integrated Executive Summary, paras. 22-31.
[17] Korea's Second Integrated Executive Summary, paras. 22-31.
[18] Korea's Second Integrated Executive Summary, p. 5. See, paras 30-31 of Korea's second integrated executive summary.
[19] Panel Report, para. 7.109.
[20] Appellate Body Report, *US – Wheat Gluten*, para. 183. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.194.
[21] Appellate Body Report, *US – Tuna II (Mexico*), para. 403; Appellate Body Report, *Australia – Salmon*, para. 223.

falls "outside the panel's jurisdiction[] and cannot be heard".[22] The Panel's willful avoidance of reaching the logical conclusion in favour of Korea on the validity of the KIA's cumulative assessment that resulted from its own findings rejecting Japan's argument about the distinction between the models sold by the various producers constitutes a lack of "objective assessment" of the matter.

34. Second, the Panel's exercise of judicial economy is in any case unfounded and the result of a distortion of the facts on the record. The Panel's decision to avoid making a finding on the KIA's cumulative assessment apparently rests on its consideration that "it *emerged* during these proceedings that the KIA's likelihood-of-injury assessment was not conducted exclusively on a cumulative basis" (emphasis added), but also on a de-cumulative basis, "including with respect to Japan individually".[23] As an initial matter, Korea is puzzled by the Panel's description that a matter that is so fundamental as to underlie virtually all material findings in the underlying sunset review as the cumulative nature of the KIA's assessment, would somehow "emerge" only in the course of the WTO proceeding. In fact, as is clear from the RFE, Japan never questioned the cumulative nature of the KIA's determination and actually made it a key part of its challenge as demonstrated in its RFE. Moreover, the KIA's explicit finding confirming that it examined the likelihood of injury by cumulating the effects of the various imports is unequivocally reflected in the relevant parts of the official investigative report and resolution.[24] In particular, after reviewing and rejecting the Japanese respondents' contention that the effects of the imports from Japan and India must not be assessed cumulatively due to an alleged difference in models or product types, the KIA explicitly held that "when reviewing the likelihood of continuation or recurrence of dumping and injury to the domestic industry in this case, it is appropriate to conduct a cumulative assessment", and thus proceeded with its review on that cumulative basis.[25]

35. In sum, the record shows that the KIA made its findings on a cumulative basis. As noted before, in its RFE and subsequent submissions, Japan expressly acknowledges the fact that the KIA made its findings on this cumulative basis and takes issue with this cumulative assessment.[26] These are the agreed facts that the Panel disregarded or distorted. The Panel cannot re-write the explicit finding by the KIA that it will examine the likelihood of injury on a cumulative basis. This fact is not something that can change at some later point in time or "emerge" differently in the course of Panel proceeding

36. The Panel's artificial reasoning is basically that, in direct contradiction with the record, the KIA undertook both a cumulative and a de-cumulative analysis. Based on that reading, the Panel considers that it is thus entitled to disregard the KIA's cumulative assessment and rely only on the Japan-specific aspects of the analysis for the purpose of a prompt and positive resolution of the dispute. The Panel then draws its conclusion that the KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement exclusively on the basis of the KIA's Japan-specific analysis. And it subsequently exercises judicial economy on the question of the justified nature of the cumulative assessment. Korea is deeply troubled by the Panel's lack of objective assessment of what the KIA actually did and its *de novo* construction of the facts.

37. Korea points in particular to paragraphs 7.229 and 7.230 of the Panel Report (as well as the footnotes and referenced documents), in which the Panel seeks to justify its decision to avoid making a ruling on the justified nature of KIA's decision to engage in a cumulative assessment. The Panel refers to the KIA's consideration of Japan-specific prices before and after the termination of the measure, as well as Korea's explanations presented during the Panel proceeding in response to the Panel's focus on the price difference between Japanese and Korean SSBs. Obviously, the KIA complemented and supplemented its cumulative assessment with country-specific analyses, as any objective and unbiased authority would do. This is confirmed in the Panel Report in which it is stated that Korea confirmed that "the authorities *complemented* and *supplemented* the cumulative analysis consistently with a country-specific analysis" (emphasis added).[27] Thus, such country-specific

[22] Appellate Body, *EC – Fasteners (China)*, para. 595.
[23] Panel Report, para. 7.229.
[24] See Final Resolution, Exhibit KOR-4b, p. 11; Final Report, Exhibit KOR-5c, p. 34.
[25] See Final Resolution, Exhibit KOR-4b, p. 11; Final Report, Exhibit KOR-5c, p. 34.
[26] Also see Panel report para 3.1 a (i) and fn 9 summarizing the request of Japan as reflected in as a late as Japan's second written submission.
[27] Panel Report, para. 7.230.

analysis, at most, "*supported* the overall reasonable conclusion that there was a likelihood of future injury if the duties expired" (emphasis added).[28]

38. The Panel starts by redefining the role of the country-specific analysis in the KIA's investigative reports as follows: "[e]ach 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" (emphasis added).[29] The Panel then develops its reasoning that, "[a]ccordingly, 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 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".[30] In so doing, the Panel ignores the complementary nature of these country-specific factual statements and re-characterizes these as Japan-specific findings suggesting that the KIA actually made several likelihood-of-injury determinations, one based on cumulative assessment and some other on the basis of a de-cumulative assessment. This is of course completely incorrect. From here, the Panel reaches its misguided conclusion: "[t]hus, with respect to Japan, the ultimate conclusion on the consequences of the drop in prices did not turn on a cumulative assessment".[31]

39. The above line of reasoning by the Panel is logically flawed and inconsistent with the facts on the record. The Panel's blatant failure to undertake an objective assessment becomes even more obvious when the KIA's likelihood-of-injury determination is examined word-by-word. Notably, the KIA's summary conclusion entitled "Overall Evaluation" states, in relevant part, as follows:

> …Where the anti-dumping measures are terminated, it is predicted that a steep fall in the price of the *dumped imports* (Japanese Δ [[]]%) will lead to an increase in exports to Korea and weaken the price competitiveness of Like Products…
>
> …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. (Emphasis added)[32]

40. As is clear from the above, the KIA made its price-related and volume-related findings on cumulated basis, as enunciated by its express and repeated use of the term "dumped *imports*".

41. The KIA's consideration of the Japan-specific drop in price in the relevant *parenthesis* obviously was meant to complement and supplement its price-related finding on a cumulative basis. It was like one example of the cumulated conclusion. Yet, the Panel ignored the parenthesis nature of this part of the sentence and completely disregarded the actual, cumulated finding that was made. The Panel created its own de-cumulated finding based on a skewed presentation of Korea's arguments and a disregard of the text of the KIA's findings actually made. It treated this de-cumulated finding as something that was standing on its own, and that was to be examined in isolation, entirely separate from that alleged other, cumulated analysis. That is how it arrived at its own conclusion that the KIA actually rendered a separate and independent likelihood-of-injury determination solely on the basis of the price of the Japanese SSBs, despite even Japan stating the opposite. The implications of this lack of objective assessment are very significant. For example, the KIA explicitly observed *price undercutting* by the dumped imports of the domestic like product on that cumulative basis.[33] Therefore, if the Panel had not disregarded the cumulative nature of the

[28] Panel Report, para. 7.230, fn. 681.
[29] Panel Report, para. 7.229.
[30] Panel Report, para. 7.229.
[31] Panel Report, para. 7.230.
[32] Final Resolution, Exhibit KOR-4b, pp. 22-23. In paragraph 7.116 of the Panel Report, the Panel refers to the "Overall Evaluation" section of the Final Resolution, but fails to acknowledge that this overall evaluation refers to a "drop in the price of the dumped imports" in general and "an increase in the volume of dumped imports" in general and not solely to Japanese prices and Japanese import volumes.
[33] See Korea's Comments on Japan's Interim Review Comments, p. 30.

KIA's assessment, it would not have been able to find fault with the KIA's price analysis under Article 11.3 of the Anti-Dumping Agreement.

42. Korea does not deny that the KIA may also have considered country-specific price developments. However, this does not detract from the fact that the KIA's *likelihood-of-injury determination* was made on the basis of a cumulated approach. In fact, it is precisely this cumulated approach that Japan took issue with in its RFE. The Panel's finding is thus not based on the finding actually made by the KIA and is not an "objective assessment" of the matter.

43. Third, the Panel's exercise of judicial economy is undoubtedly false even by its own definition of "judicial economy". At the outset, the Panel correctly acknowledged that the principle of judicial economy applies to claims or issues that are not necessary for resolving the matter at hand so as to allow for prompt compliance by the Member concerned.[34] It considered that findings on issues for which it exercises judicial economy "would add nothing to the way in which Korea chooses to comply with the inconsistencies that we have already found".[35] The Panel could have not been more misguided.

44. In fact, the Panel was able to reach its finding in paragraph 8.1. b. i. of the Panel Report only by comparing the Japan-specific prices with the price of the like domestic product. Yet, whether such a country-specific analysis was relevant depended on whether the KIA had rightly reached its conclusions on the basis of a cumulative assessment. Only if the Panel would have rejected the cumulative assessment, could the question have arisen whether any country-specific findings provided a sufficient factual basis for the sunset determination. As Korea repeatedly stressed before the Panel, if the cumulative assessment is deemed valid, then the price to be compared with the prices of the domestic like product is not the price of the Japanese SSB individually, but the cumulated price of the Japanese and Indian SSBs. Therefore, in order to resolve the dispute, the Panel was required to rule on the issue of cumulative assessment – and in fact, it actually did when it was forced to reject Japan's argument on the so-called "product distinction" referred to above. Therefore, this is an issue that cannot be subject to a judicial economy because this issue is at the heart of resolving the dispute. In this respect, Korea recalls that Japan challenged the KIA's "cumulative assessment" as the number one "reason" for its claim of violation of Article 11.3 as specified in the RFE.

45. Korea notes that normally, as a respondent, Korea would not care about a Panel not addressing a claim of the complainant. It would normally just be one less finding to worry about. However, in this case, this false exercise of judicial economy had a profound negative impact on Korea as it enabled the Panel to reach its findings of violation of Article 11.3 based on country-specific assessments that the KIA never made and certainly not in the isolated manner as discussed by the Panel. In that sense, this exercise of false judicial economy is not just problematic *per se* because it fails to resolve the dispute; it actually reveals a bias on the side of the Panel as it deprived Korea of the finding that would have prevented the findings of violation that the Panel made. This error by the Panel reflects the pervasive and fundamental nature of the lack of objective assessment of the Panel.

46. In light of the above reasons and explanations, Korea respectfully requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU as result of its false exercise of judicial economy. Moreover, this lack of objective assessment of the matter also taints the Panel's findings in paragraph 8.1. b. i. and paragraph 8.1. b. ii. of the Panel Report. Given the important relationship between this question of the cumulative nature of the assessment and the findings of violation made by the Panel, Korea respectfully requests that the Appellate Body reverse or declare moot and of no legal effect the Panel's findings in paragraph 8.1. b. i. and paragraph 8.1. b. ii. of the Panel Report. These findings cannot be sustained to the extent that the KIA's cumulative assessment must be presumed to be valid as Japan has failed to establish otherwise.

[34] Panel Report, para. 7.226.
[35] Panel Report, para. 7.227.

## III. CLAIM 3: THE PANEL ERRED IN LAW BY FAILING TO REVIEW THE KIA'S DETERMINATION IN A HOLISTIC MANNER IN ORDER TO ASSESS WHETHER THE KIA HAD A SUFFICIENT FACTUAL BASIS FOR ITS DETERMINATION

47. Korea submits that the Panel's two findings that the KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement in paragraph 8.1. b. i and paragraph 8.1. b. ii. reflect a fundamental error of law in the interpretation and application of Article 11.3 of the Anti-Dumping Agreement. In addition, the Panel's relevant findings did not involve an objective assessment of the matter under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

48. In particular, the Panel erred when making a finding of violation of Article 11.3 based on its concerns over the evaluation of particular aspects of the KIA's overall likelihood-of-injury examination in isolation, without properly undertaking a holistic assessment of whether the KIA's determination had a sufficient factual basis. Korea submits that a finding of violation of Article 11.3 cannot be based on isolated concerns related to the authorities' volume and price effects analysis but requires a holistic evaluation of the determinations made with a view to establishing whether, taken together, the authorities had a sufficient factual basis for the likelihood-of-injury determination. Although the Panel conceded that such a holistic assessment is indeed required,[36] it did not do so. Instead, it reached a finding of violation of Article 11.3 based on certain limited aspects of the KIA's holistic assessment in clinical isolation. This constitutes manifest error of law.

49. Furthermore, as a general matter, Korea recalls that the Panel may not invalidate the KIA's ultimate likelihood-of-injury determination on the basis of limited flaws (if any) in the intermediate findings. The applicable standard of review in this dispute confirms that not just any error of assessment of an investigating authority amounts to a violation, especially not if the determination rests on multiple considerations. The error in question must also be sufficiently material to undermine the objectivity of the *entire* assessment. This is all the more true in the context of Article 11.3 which does not require any specific intermediate findings (unlike Article 3) but simply requires that there be a sufficient factual basis for the likelihood determination. It is well established that an "objective assessment" under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review.[37] Since Article 11.3 does not impose specific analytical steps but rather requires a more holistic assessment of whether there exists a sufficient factual basis, the Panel's task is to examine if such a factual basis existed rather than to focus on isolated individual pieces of evidence and related intermediate findings.

50. In order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the authority's decision on its own terms, in particular, by identifying the inference drawn by the authority from the evidence, and then by considering whether the evidence could sustain that inference. Where a panel examines whether a piece of evidence could directly lead to an ultimate conclusion—rather than support an intermediate inference that the authority sought to draw from that particular piece of evidence—the panel risks constructing a case different from that put forward by the investigating authority. In so doing, the panel ceases to review the authority's determination and embarks on its own *de novo* evaluation of the investigating authority's decision. Panels may not conduct a *de novo* review of authority determinations.[38]

51. The Panel, however, examined only specific elements of the KIA's overall likelihood-of-injury determination in an isolated manner and found errors concerning KIA's intermediate findings on (i) the price and volume effects of Japanese products,[39] and (ii) the production capacity and capacity utilization[40] of Japanese producers. However, it is undisputed that the KIA's determination rested on *numerous other* considerations, which together formed the basis for the KIA's ultimate conclusion that the expiry of the duty would be likely to lead to a continuation or recurrence of injury. Therefore, even assuming *arguendo* that the KIA's evaluation of the Japanese products' volume and price effects was flawed, this single flaw cannot be the basis for a finding of violation of

[36] Panel Report, para. 7.114.
[37] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184; Appellate Body Report, *US – Lamb*, para. 105, Appellate Body Report, *US – Cotton Yarn*, paras. 75-78.
[38] Appellate Body Report, *US – Countervailing Dutu Investigation on DRAMS*, para. 151.
[39] Panel Report, para. 8.1.b.i.
[40] Panel Report, para. 8.1.b.ii.

Article 11.3 of the Anti-Dumping Agreement in the context of this case. The Panel's approach to Article 11.3 is thus in error as a matter of law as it is built on the wrong premise that specific investigative steps are required. It denies the fact that a determination of a likely continuation of injury is only flawed if it is demonstrated that the authorities did not have a sufficient factual basis for the determination. If, as is the case here, that basis consists of more than certain country-specific volume and price effects or a country specific assessment of available capacity, a panel can only reach a conclusion of violation if the other remaining facts, taken together do not suffice as a factual basis for the conclusion. The Panel never undertook this examination but found violations of Article 11.3 based on isolated factual findings of the KIA. That is an error of law.

52. Moreover, as a matter of fact, it is undisputed that the KIA undertook a holistic assessment of all available evidence related to a number of considerations when reaching its "overall" conclusion on the likelihood of injury which was not Japan-specific. This is evident even by looking at the *summary* conclusion of the KIA in its Final Resolution, entitled "Overall Evaluation":

> The production capacity of the dumped imports of the countries subject to the review was [[ ]] tons for Japan, [[ ]] tons for India, and [[ ]] tons for Spain, and the utilization rate in 2015 was [[ ]]% for Japan, [[ ]]% for India, and [[ ]]% for Spain, which shows that they have sufficient additional production capacity and room for exports.
>
> Given the increase in the volume of the dumped imports since 2014 and the large market share before the anti-dumping measures pursuant to the original investigation ([[ ]]% in 2003), it is found that once the anti-dumping measures are terminated, volume and domestic market share of the dumped imports are highly likely to rise.
>
> Where the anti-dumping measures are terminated, it is predicted that a steep fall in the price of the dumped imports (Japanese Δ [[ ]]%) will lead to an increase in exports to Korea and weaken the price competitiveness of Like Products.
>
> Volume of dumped imports to Korea is likely to rise upon the termination of anti-dumping measures considering that import controls by the U.S. and the EU have left the countries subject to the review with a limited market for exports.
>
> 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.[41]

53. Immediately apparent from the above-reproduced *summary* "Overall Evaluation" is that the KIA's likelihood-of-injury determination rested on several other findings than the price and volume analyses with respect to Japan, contrary to the Panel's assessment. It is also clear, as noted before, that this determination was made on a cumulative basis, i.e. by combining the effects of imports from India, Japan and Spain. All of these important factual considerations were disregarded by the Panel.

54. Thus, even assuming *arguendo* that the finding of a drop in the Japanese products' prices was part of that overall finding on prices and that a similar increase in the volume of dumped imports may also have applied to Japanese products, those Japan-specific findings were clearly not dispositive of this part of the generally applicable findings. For example, the KIA considered that the volume of the dumped imports was in increasing trend since 2014 (despite the continued imposition of anti-dumping measures). The KIA also considered that the dumped imports enjoyed large market share prior to the original measure, and found that "it is highly likely that" volume and market share of the dumped imports would rise upon removal of the anti-dumping measure. In addition, the KIA considered that "import controls" being maintained by major markets such as the United States and

[41] Final Resolution, Exhibit KOR-4b, pp. 22-23.

the European Union limits the accessible markets for the dumped imports, such that the dumped imports into the Korean market will "likely" rise upon removal of the current anti-dumping measure. Furthermore, it was found that there were considerable spare production capacities in the countries subject to the underlying review. These facts and others reasonably suggested that further increases of the dumped imports upon removal of the current anti-dumping measure were probable. Thus, the KIA considered that, "[t]aking the circumstances into consideration as a whole", termination of the current anti-dumping measure will likely cause recurrence of injury to the domestic industry.

55. Therefore, even by simply looking at the *summary* conclusion of the KIA's determination without engaging with more detailed analyses enshrined in the main body of its investigative reports that were not specifically mentioned in the summary "Overall Evaluation", there are at least four additional findings for the KIA's likelihood-of-injury determination, each of which, collectively with the price-related and volume-related findings by the KIA, formed the basis of the KIA's comprehensive likelihood-of-injury determination. This is not to mention that there are many additional factors explicitly considered by the KIA to support its likelihood-of-injury determination, as even the Panel acknowledged.[42] The Panel did not even attempt to address any of such other factors or findings that together formed the overall basis for the KIA's likelihood-of-injury determination. Clearly, the Panel erred in finding a violation of Article 11.3 of the Anti-Dumping Agreement in this respect as well. It fails to correctly apply Article 11.3 to the facts of this case. That is an error of law.

56. In addition, in its assessment of the facts, the Panel did not undertake an objective examination.

57. The Panel reasoned that "the plain text of this final conclusion" makes it clear that the consequences of "a drop in the price of the dumped imports and an increase in volume of the dumped imports" was "central" to the KIA's likelihood-of-injury determination,[43] and implied that, as such, the flaw that it found with respect to the KIA's Japan'-specific price-related finding invalidates the final conclusion taken as a whole.[44] Yet, it is well established that what a panel *should not do* is to have recourse to an *a priori* "syllogism" that accords presumptive weight to certain propositions. This is all the more so when this was not the approach to the evaluation of the evidence adopted by the investigating authority.[45] The KIA did not give such decisive "central" weight to the Japanese price developments and there is no basis for the Panel to have done so and to have "invalidated" the KIA's determination of likelihood of injury of the KIA without examining whether the remaining elements of the KIA's findings were sufficient to support the overall conclusion. Thus, the KIA's finding was based on a holistic determination of a large number of considerations, whereas the Panel's finding was based on a perceived price differential in isolation.

58. Indeed, a plain reading of the Overall Evaluation reveals that the KIA's conclusive determination preceded by "[t]aking the circumstances … as a whole" refers to a logical drop in price that result from the removal of the duties and a likely increase in volume *following* the removal of the measure, taking all the relevant circumstances just now observed into consideration. The price- and volume-related data seemingly pertinent to the POR were considered by the KIA as one of many indicative factors, along with other such factors that the Panel completely neglected to consider.

59. The Panel emphasizes the Japan-specific information captured in the parenthesis to unduly re-characterize the overall price-related finding made by the KIA. In addition, the Panel fails to respect the forward looking nature of sunset reviews as it is completely focused on the current price difference in the POR. The Panel expressly avoided addressing "Korea's contention regarding the limitations of POR-bound pricing data in *projecting* the future consequences of lifting of anti-dumping duties" (emphasis added).[46] In this respect, the Panel refused to place only "indicative value" on

[42] See among others, Korea's Opening Statement at the Second Substantive Meeting, para. 89; Korea's second written submission, para. 29; Korea's response to the Panel Question No. 98, paras. 152-155; Panel Report, para. 7.111.

[43] Panel Report, para. 7.116.

[44] See Panel Report, para. 7.115.

[45] Appellate Body Report, *Japan – DRAMS (Korea*), para. 135.

[46] See Panel Report, para. 7.120.

that parenthesized Japan-specific information, because "the structure and flow of the KIA's determination suggest the contrary".[47] This is another willful distortion of the facts.

60. The Panel's assessment of the KIA's volume-related consideration preceded by the remark that "[o]ur conclusion is not altered by the reference to "an increase in the volume of the dumped imports" in the overall determination extracted above" is equally flawed and erroneous.[48] In this connection, the Panel starts by proffering a dubious reasoning that "[i]t 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"".[49] This part of the Panel's analysis is already quite problematic, but the Panel went beyond "the point of no return" by finding that the KIA basically erred by not establishing "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" (emphasis added).[50]

61. Korea recalls that even the rigid requirement for a price effect analysis under Article 3.2 of the Anti-Dumping Agreement applicable only to the original investigations cannot, as a matter of law, be expanded beyond the fine boundaries of the "effect on prices of the like domestic product". Here, however, the Panel transposed an Article 3.2-style price effect analysis into Article 11.3 in which no methodological guidance is provided, and then further expanded the scope of that requirement beyond the boundaries of the price effect analysis to encompass the issue of supply-and-demand.[51] This novel but misguided attempt by the Panel must necessarily be dismissed. The Panel refers to its more detailed and flawed analysis in section 7.5.3.2 of the Panel Report,[52] which will be addressed by Korea in the following Section of this Notice of Appeal specifically addressing section 7.5.3.1 and section 7.5.3.2 of the Panel Report.

62. In sum, the Panel failed to properly consider the KIA's likelihood-of-injury determination in the required holistic manner by failing to examine several of the intermediate findings by the KIA that together constituted the basis for the KIA's overall likelihood-of-injury determination. In addition, the Panel's examinations of the KIA's price- and volume-related findings in support of its conclusion in paragraph 7.117 are flawed as a matter of law due to the Panel's failure to undertake an objective assessment of the matter.

63. Furthermore, Korea submits that the Panel repeated the same error of law in its finding in paragraph 7.183 that the KIA's intermediate finding that there exists 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" and likewise in the finding in paragraph 8.1 b. ii.[53] Based on an alleged lack of objective and unbiased evaluation by the KIA of the capacity utilization and available capacity the Panel makes findings of violation of Article 11.3. However, Article 11.3 does not impose any obligations related to the determination of available capacity contrary to what is the case in, for example, Article 3.7 of the Anti-Dumping Agreement. The determination of likelihood of continuation or recurrence of injury is an overall determination that is based on all available evidence and is not determined by one or more intermediate findings with respect to elements not required by Article 11.3 of the Anti-Dumping Agreement.

64. The Panel should have but did not examine whether even after its finding on the specific intermediate finding in question about the capacity utilization, the KIA's likelihood-of-injury determination was still sufficiently supported by the facts on the record. Thus, the Panel erred in law

[47] See Panel Report, para. 7.120.
[48] Panel Report, para. 7.118.
[49] Panel Report, para. 7.118.
[50] Panel Report, para. 7.118.
[51] This is not to mention that the Panel again relies on its false and re-constructed finding about the KIA's "premise that price is the most important factor in consumers' purchasing decisions with consumers preferring low-priced products". See Panel Report, fn. 342. In the following section, Korea demonstrates that this finding squarely contravenes the record fact and is a product of the Panel's impermissible *de novo* review and/or biased assessment of fact.
[52] Panel Report, para. 7.118.
[53] The Panel finds as follows: "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.

when it applied Article 11.3 to the facts of this case as it reduced the factual basis for the determination of a likelihood of injury to an assessment of whether the Japanese producers had sufficient freely available capacity.

65. For example, even if the KIA had erred in using the ISSF data and the correct data for use was the Japanese respondents' naked numerical allegation (*quod non*), the KIA explicitly confirmed that SSB producers can easily increase their production capacities by simply outsourcing the secondary processing, as confirmed by the case of [[ ]], one of the Japanese respondents.[54] In addition, it was also considered by the KIA that even according to the Japanese respondents' own production capacity data, their idling spare capacity still matched [[ ]]% of the domestic industry's overall domestic sales volume, further confirming its consideration that the Japanese respondents had sufficient capacity to significantly increase their export volume upon removal of the current anti-dumping measure in any event.[55] Although the Panel recognized that the KIA had in fact considered these important factors,[56] the Panel summarily disregarded their relevance with cursory statement that "there is no indication that the KIA considered that this alone … would substantiate the intermediate finding at issue".[57] The Panel, therefore, did not even attempt to weigh these countering factors against the flaws that it (erroneously) found to exist in order to examine whether any such perceived errors in the KIA's intermediate findings were so serious as to invalidate the KIA's overall likelihood-of-injury determination.

66. Finally, the Panel's findings are fundamentally misplaced in that they completely disregard the fact that the KIA's likelihood-of-injury determination was based on the cumulative assessment. It follows that, as long as cumulation is justified (which should be deemed so, absent any finding to the contrary), any flaw limited to a Japan-specific finding, without more, cannot constitute a violation of Article 11.3 of the Anti-Dumping Agreement. In this sense, even assuming *arguendo* that the KIA's analyses of Japan-specific price drop and Japan-specific capacity utilization were flawed as the Panel Report wrongly suggests, such flaws cannot by themselves constitute violation of Article 11.3 of the Anti-Dumping Agreement. Because the Panel Report is totally devoid of the requisite analyses or findings, the entirety of the Panel's findings that the KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement should be reversed or declared to be moot and of no legal effect.

67. For the above reasons, given that the Panel found a violation of Article 11.3 of the Anti-Dumping Agreement based on its isolated analyses on the KIA's intermediate findings on (i) the price and volume effects of Japanese products, and (ii) their product capacity and capacity utilization, respectively, the Panel erred in law. Moreover, the Panel failed to undertake an objective assessment of the importance of these isolated findings in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. Therefore, Korea respectfully requests that the Appellate Body reverse or declare moot and of no legal effect the Panel's findings in paragraphs 8.1. b. i. and 8.1. b. ii. of the Panel Report.

## IV. CLAIM 4: LEGAL ERRORS IN THE PANEL'S FINDING THAT KOREA ACTED INCONSISTENTLY WITH ARTICLE 11.3 IN RELATION TO THE KIA'S INTERMEDIATE FINDINGS ON VOLUME AND PRICE EFFECTS

68. The Panel erred in law and failed to make an objective assessment of the matter in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement when it found in paragraph 7.117 and paragraph 8.1 b. i. that "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.

69. In particular, the Panel found that the KIA failed to engage in an "unbiased and objective" evaluation of the record facts by concluding that domestic price competitiveness would be weakened due to the Japanese pricing level resulting from the removal of the anti-dumping duty[58] and that

[54] See Final Report, Exhibit KOR-5c (BCI), p. 87; see also Korea's opening statement at the second substantive meeting, para. 69. Note that this was repeatedly brought to the Panel's attention by Korea. See Korea's second written submission, paras. 200, 206-208.
[55] See Final Resolution, Exhibit KOR-4b, p. 19.
[56] Panel Report, para. 7.175.
[57] Panel Report, para. 7.179.
[58] Panel Report, paras. 7.85, 7.105.

this amounted to a violation of Article 11.3.[59] In so doing, the Panel erred in law and failed to make an objective assessment of the matter.

70. First, as noted above, the Panel erred in law by finding that the KIA's determination on the volume and price effects amounted to a violation of Article 11.3. Article 11.3 of the Anti-Dumping Agreement requires a Member to terminate an anti-dumping duty after five years unless it is demonstrated in a review that the termination is likely to lead to the continuation or recurrence of dumping and injury. Article 11.3 does not give any additional guidance on how to make this forward-looking determination and does not impose any methodological steps. In this respect, it differs from, for example, Article 3 on injury that imposes specific legal obligations on Members in terms of the required "building blocks" for making an injury determination and the manner in which such intermediate determinations are to be made. While Article 3.2 requires a consideration of the volume and price effects of dumped imports, Article 11.3 does not impose such an obligation.

71. Rather, investigating authorities have a certain degree of discretion when determining "likely" continuation or recurrence of injury[60] and are not mandated to follow the provisions of Article 3 when making a likelihood of injury determination.[61] Instead of applying the disciplines of Article 3, the likelihood-of-injury determination must rest on a sufficient factual basis to allow the investigating authority to draw reasoned and adequate conclusions that future injury is likely if the anti-dumping measure were to expire.[62] Article 11.3 does not prescribe any specific methodology to be applied in making a "likelihood" determination, and does not identify any particular factors that authorities must take into account in making such a determination.[63] However, the Panel approached Article 11.3 as if it were Article 3.2 that requires a consideration of the volume and price effects of dumped imports such that any inconsistencies in that consideration will immediately lead to a violation of Article 3.2 and thus of Article 3. Given that there is no obligation under Article 11.3 that the likelihood-of-injury determination must involve analyses of volume and price effects resulting from the expiry of the duty, however, any perceived flaw in the analysis of volume and price effects cannot in itself constitute a violation of Article 11.3 of the Anti-Dumping Agreement. The Panel's contrary conclusion constitutes error of law.

72. Second, Korea considers that it is well established that the causal relationship within the meaning of Article 3.5, including its building blocks such as price effects of dumped imports, may be presumed to exist in a sunset review and must not be demonstrated anew. Article 11.3 does not impose a causation analysis. Furthermore, the KIA explicitly re-confirmed that the dumped (especially the Japanese products) and domestic products are in a competitive relationship with each other in the context of both its "likeness" analysis and its "cumulative" assessment.[64] The Panel did not find otherwise. However, the Panel effectively introduced a legal requirement in Article 11.3 under which any price difference during the POR that exceeds the currently applicable anti-dumping duty necessarily calls for a separate analysis on the price effect between the dumped and domestic products *following* the removal of the anti-dumping duty in order to demonstrate that such imports cause injury. Stated differently, the Panel's finding results in reading a requirement to conduct an *a priori* "*post-expiry* causation analysis" into Article 11.3 of the Anti-Dumping Agreement in these circumstances. That dogma does not comport with the text of Article 11.3 and the well-established jurisprudence arising out of Article 11.3.

73. In the absence of such requirement in Article 11.3 to undertake an *a priori post-expiry* "price effects" and causation analysis and given the fact that Article 3 does not apply to sunset reviews (including Article 3.2 on price effects and the related reference to paragraph 2 in Article 3.5), there exists no *a priori* obligation on the part of an investigating authority in a sunset review to reconcile any POR specific price differences that exceed the margin of the anti-dumping duty, as long as the products are in a competitive relationship. It was never demonstrated and the Panel did not find that the Japanese products and Korean products were not in competition with one another. Quite to the contrary, the Panel rejected, as did the KIA in the sunset review, Japan's argument that there

[59] Panel Report, paras. 7.117.

[60] Panel Report, *Ukraine – Ammonium Nitrate (Russia),* para. 7.165.

[61] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 280; see also, Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.117.

[62] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 364; see also, Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 166.

[63] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123.

[64] See among others, Panel Report, paras. 7.94-9.95, fn. 276 and 277.

existed a fundamental distinction between the "special steel" products from Japan and the alleged "general purpose" products from other countries.

74. The Panel tries to package its relevant finding not as introducing a legal requirement, but as a fact-specific finding based on the circumstances pertinent to the underlying sunset review. In particular, it relies heavily on its particular consideration that "SSB market is price-sensitive". The Panel's approach violates its obligation under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement as it is based on a distortion of the facts and does not constitute an objective assessment of the matter.

75. In a certain way, almost every market is price sensitive in the sense that price plays a role in competition together with other relevant considerations such as quality or reputation. Prices differ all the time and imports are cumulated even when they differ significantly in price as long as they are generally speaking in the market together and thus competing with one another to some degree. In the context of the SSB market, it is undisputed that competition takes place among the SSB producers over grade-specific demands. Other investigating authorities also long followed the same rationale with respect to their investigation of SSBs. As an example and as Korea explained to the Panel, the United States International Trade Commission ("USITC"), in its first parallel sunset review of SSBs from Japan and India, among others, did not have any problem in cumulating Japanese SSBs with Indian SSBs although the price differential between the two was well over 100%, dwarfing the relatively small price differential found in the underlying third sunset review by the KIA.[65]

76. The Panel did not find fault with the notion that like SSBs are in competition with one another absent evidence of clear market differences reflecting a consumer appreciation or end-use difference.[66] No such market differences were established in this case; rather, the confirmed overlap in product types and models from all origin and the fact that these products are based on internationally-recognized standards for relevant grade specifications were undisputed.[67] Indeed, the record confirms that SSBs are ordered, produced, and sold "on-demand", meaning that the producers would only produce and sell SSBs *upon order* based on grade specifications of the product model ordered, such that the SSB producers do not, in principle, even need to maintain inventories.[68] It is on the basis of this "on-demand" order that competition between the dumped and domestic products inevitably takes place. Thus, there is no further market segmentation even if certain differences in quality and reputation allowed certain producers to demand higher prices for their products. There was no basis to consider otherwise in the record evidence. These are simply the facts which are reflected in the relevant parts of the record.[69] And the Panel never found otherwise.

77. There is thus simply no basis in the evidence on the record or the arguments of the interested parties to support the Panel's contrived conclusion that certain price differences among SSBs from different origins must necessarily be subject to an Article 3.2/3.5-style price effect and causation analysis in a sunset review. The WTO jurisprudence has already clearly established the different nature of original investigations and sunset reviews that runs counter to reading the obligations of Article 3, such as Article 3.2 and Article 3.5, into Article 11.3. This refusal to transpose the obligations of Article 3 into sunset reviews under Article 11.3 is not only textually correct, it also makes perfect sense given the different nature of investigations and reviews. Of particular importance is the limited relevance of the specific situation prevailing during the POR in a sunset review since a sunset review is forward-looking by nature. It would not make sense to require an in-depth analysis of prices in case of overselling while at the same time accepting that a sunset review can lead to a conclusion of likely continuation or recurrence of injury even in cases where there were no sales of the dumped imports at all and thus no current price effects. Yet, the Panel treated this sunset review as if it were an original investigation and effectively introduced a new rule that in case of dumped imports that are priced higher than domestic products during the course of the sunset review's POR, an additional

[65] Korea's Comments on Japan's Interim Review Comments, pp. 7-8

[66] Korea's Opening Statement at the Second Substantive Meeting, para. 40.

[67] Korea's Opening Statement at the Second Substantive Meeting, para. 40.

[68] See Korea's response to the Panel Questions 6 and 37; Purchase Order, Exhibit KOR-56b; see also More Purchase Order Examples Showing that Orders are Placed on the Basis of Grade Specifications, Exhibit KOR-68b; Korea's second written submission, paras. 99-100; and Korea's response to Panel Questions 19, 28, pp. 49-55, 72-74.

[69] See, among others, ISO Stainless Steel Grade Comparability Table, etc., KOR-8; OTI Final Report, Exhibit KOR-5c (BCI), p. 9, fn. 17; OTI Final Report (Second Sunset Review), Exhibit KOR-11b (BCI), p. 9, fn. 4; KS Specification, Exhibit KOR-17b; JIS Specification Exhibit KOR-18b; and Atlas SSB Grade Database, Exhibit KOR-64.

examination of likely future price effects is always required. This is not a case specific finding but the introduction of an *a priori* rule in every situation.

78. The Panel explains that its finding is based on a specific factual situation pertinent to the case at hand where the on average price difference between the Japanese dumped and Korean domestic products amounts to nearly [[ ]]% even after the removal of the anti-dumping duties. This very general observation does not change the fact that the Panel's finding operates to effectively introduce a legal test imposing an impermissible *a priori* obligation on the part of the investigating authority to proactively undertake a forward-looking price effect and causation analysis whenever there exists a post-expiry overselling based on a POR-based price difference.

79. Moreover, although the KIA *did* observe price undercutting by the dumped imports in its cumulative assessment, there is no basis to consider that competition requires price undercutting. Similarly, the Panel actually stated that it did not consider that a price depression / price suppression analysis is legally required under Article 11.3 of the Anti-Dumping Agreement.[70] That being the case, it is unclear why the Panel nevertheless considered that an alleged lack of explanation related to on average higher prices of Japanese imports would, in and of itself, constitute a violation of Article 11.3 of the Anti-Dumping Agreement.

80. Third, even with respect to the assessment of Japanese import volumes and prices, the Panel failed to make an objective assessment of the matter as its assessment is not objectively based on record evidence, is internally contradictory and lacks the required adequate and reasoned explanation. It thus violated Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

81. In particular, Korea notes that the Panel itself rejected the key argument that supported Japan's price and volume related claims based on the alleged distinction between higher priced "special" steel that the Japanese producers were allegedly selling and "general purpose" steel sold by the other producers including the domestic producers. In paragraph 7.109, the Panel thus found that 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 steels when examining the consequences of the drop in Japanese prices upon removing the anti-dumping duties. Yet, this distinction had been the basis for Japan's argument that Japanese imports could not be cumulated with other imports and that the removal of the duties would not have any effect as Japanese products were not competing with domestic (general purpose) products. The Panel entirely fails to square this conclusion rejecting Japan's principal claim with the finding that the KIA failed to undertake an objective and unbiased evaluation of the facts.

82. Furthermore, given the competitive overlap between Japanese and domestic SSB products, the Panel fails to provide an explanation as to why the KIA was not justified in making the factual finding that the removal of the [[ ]] % duties would lead to a drop in the price of Japanese products by the same [[ ]] % and that this would "weaken" the price competiveness of (domestic) like products.[71] Both factual findings by the KIA simply reflect the reality of what the removal of the duties for a competing product is predicted to do. Similarly factual in nature is the KIA's finding that if duties are removed, imports in general and also imports from Japan which were subject to relatively high duties are likely to increase since the facts clearly supported the conclusion that Japanese producers were still interested in the Korean market. If the market is "price sensitive" as the Panel stated on various occasions with reference to the KIA's findings, then it seems *prima facie* objective to consider that a [[ ]] % fall in price will lead to more exports, even if on average the price of Japanese product is still higher than that of domestic like products. Nothing on the record, again, even remotely suggests that lower-priced like product would always win demand. Instead, the KIA explicitly considered, "[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".[72] This particular finding can only be construed to mean that competition takes place within same or comparable SSB models with different prices based on both quality and price competitiveness.

83. However, the Panel twisted this explicit finding and instead found that "the KIA considered [price] to be the most important factor in purchasing decisions, *with consumers preferring lower*

[70] Panel Report, para. 7.78.
[71] Panel Report, para 7.110.
[72] Final Report, Exhibit KOR-5c, p. 55.

*prices*" (emphasis added).[73] Yet, this is not what the KIA found and the Panel fails to point to any statement to this effect in the KIA's third sunset review at issue. The Panel dropped footnote 296 for this astonishing re-statement of the record in paragraph 7.99 of the Panel Report, which cites to its own paragraphs 7.73 and 7.76. Paragraph 7.73 of the Panel Report does not provide much reference in this regard, while paragraph 7.76 simply repeats what is said in paragraph 7.99: "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'". In paragraph 7.76, the Panel drops footnote 202, which provides another astonishing re-construction of Korea's arguments and record facts. In this paragraph and footnote, the Panel cites to Korea's argument that the KIA repeatedly and consistently confirmed the competitive relationship between the dumped and domestic products in the previous proceedings as part of its "likeness" analyses. The point that Korea made was that the KIA repeatedly confirmed its finding of the *competitive relationship* between the dumped and domestic products, which remained virtually unchanged throughout the anti-dumping proceeding, including the various reviews. Clearly, the KIA in the underlying third sunset review *did not* reach the finding that consumers always prefer lower priced products. Nor is it sensible to consider, as the Panel does, that lower-priced SSBs would have a definite advantage in market competition, because, as Korea repeatedly argued, "Indian products would have a 100% market share" if that was the case.[74] Instead, the KIA sensibly found, "within the same steel grade, Korean and Japanese products have high credibility in quality and Indian and Chinese products have high price competitiveness".

84. The Panel, however, overrides and replaces the KIA's explicit finding in the underlying third sunset review with a finding of its own created by artificially cobbling together the interested parties' random statements, out-of-context findings by the KIA in *previous* reviews, and Korea's statements provided in wholly different contexts.[75] In so doing, the Panel replaced the actual finding by the KIA with a finding of its own, only to reach its predetermined finding, which had been foreshadowed from the very start of the dispute as is clear from Question 10(b) of the Panel's First Hearing Questions.[76] The newly created and arbitrary finding in paragraph 8.1. b. i. of the Panel Report is an impermissible *de novo* review and a biased assessment of the facts in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

85. It is noteworthy that the Panel elsewhere actually "accepted" Korea's position that "cheaper priced products will [not] always win the buyer" in the SSB market, but still rejected Korea's argument because it considered that the KIA's observation of the price-relationship among Japanese, Korean, Chinese, and Indian products only confirmed the price premium commanded by the Japanese *and* Korean products vis-à-vis Chinese and Indian products, but not by the Japanese SSB vis-à-vis the Korean SSBs.[77] The Panel circumvented the logical conclusion of its own finding that would have led to a finding in favour of Korea, by erecting a procedural straw man that the KIA would not have made a similar statement about the price difference between Japanese and Korean products.

86. Indeed, the Panel's key reasoning for its conclusion in paragraph 8.1. b. i. of the Panel Report is premised on its flawed and re-constructed intermediate finding that, with respect to the SSB market, the KIA considered "[price] to be the most important factor in purchasing decisions, with consumers preferring lower prices". However, the flaw in that artificial finding is obvious from the Panel's own "accepted" premise that "cheaper priced product will not always win the buyer" and that "within the same steel grade" competition can and does take place based on quality and price

[73] Panel Report, para. 7.99.

[74] See Korea's Comments on the Interim Report, para. 32; Korea's Response to the Panel Question 64(c).

[75] It must be noted the Panel gave undue weight on individual pieces of evidence or statements submitted by the interested parties during the underlying sunset review, even when such statements contradicted the KIA's explicit findings. See the Panel Report, paras. 7.65-7.69. Korea specifically warned the Panel against such a *de novo* review in Korea's Comments on the Interim Report (paras. 10-16) to no avail. In paragraphs 7.70-7.72 of the Panel Report, the Panel cherry-picks the KIA's observations out of their context, only to link them to its flawed re-construction of the record facts and the KIA's findings in paragraph 7.73-7.74 of the Panel Report. It is on the basis of the foregoing that the Panel's relevant findings that followed were made. Thus, the Panel effectively conducted a misplaced *de novo* review with respect to its finding in paragraph 8.1. i. b. of the Panel Report. Korea invites the Appellate Body to review Korea's Comments on the Interim Report for more detailed errors committed by the Panel.

[76] First Hearing Questions, Exhibit KOR-69 (BCI), p. 5.

[77] Panel Report, para. 7.90.

competitiveness. If that is so, the only logical conclusion is that it was reasonable of the KIA to conclude, in the absence of any other evidence pointing to a lack of competitive overlap between Japanese and Korean products that "a drop in price of the dumped imports" will weaken the competiveness of domestic products and is likely to have an injurious effect on the domestic industry.

87. Fourth, the Panel's undue imposition of an *a priori* rule in case of higher priced imports is also clear from its discussion of the volume related analysis.

88. In this context as well, the Panel first accepted the 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".[78] Nevertheless, the Panel considered that more was required than this general proposition in the given situation because the margin of the price difference was larger than the margin of the anti-dumping duty being imposed.[79] It thus introduced a new and unsupported legal requirement of what authorities must do in cases of overselling. In addition, the Panel also relies again on its biased and re-constructed finding about the SSB market's alleged price sensitivity to support the legal dogma that it seeks to introduce.

89. In particular, the Panel once again wilfully distorted and disregarded the KIA's finding about the competitive relationship between the dumped and domestic products. The Panel acknowledged the KIA's extensive analyses and findings on the competitive relationship amongst SSBs that Korea submitted, but found that it was not enough to render the alleged "price gap" or "price differential" irrelevant.[80] However, other than repeating its improper and misguided reliance on the flawed and re-constructed intermediate finding about the SSB market's alleged "super" price sensitivity, the Panel never really engaged with the KIA's analysis and finding about the competitive relationship between the dumped and domestic products.

90. Specifically, the KIA repeatedly confirmed that, regardless of price differences,[81] the Japanese products were confirmed to be in competitive relationship with the Korean or Indian products based on various factors such as internationally-recognized standard on grade specifications, physical characteristics, qualities, consumer evaluations, customer survey, actual transaction documents, on-site verification materials, investigation report of other investigating authorities (i.e., USITC), product function, components, interchangeability, manufacturing process, distribution channel/market, etc.[82] In addition, Korea demonstrated that price comparability is naturally ensured for SSB products, because, as the record shows and both the applicants and respondents uniformly confirmed, SSB competition takes place based on demand for certain grade specification, and SSBs are produced and sold "on-demand" basis, thus allowing the SSB producers to maintain virtually zero or minimal level of inventories.[83] Given that SSB producers compete over the same demand (for certain grade specification), it would be "absurd to argue that price comparability is not ensured between SSB products with the same certified grade specification".[84] This is due to the confirmed "high adaptability" of the SSB production facilities, which enables the producers to tailor to the demand almost immediately upon order. As noted, the interested parties either explicitly or implicitly

[78] Panel Report, para. 7.92.

[79] See generally, Panel Report, paras. 7.92-7.95.

[80] See generally, Panel Report, paras. 7.94-7.95. Korea objected to the Panel's finding that Korea seemingly suggests that the price gap was simply "irrelevant" to no avail. See Korea's Comments on the Interim Report, paras. 53-55.

[81] Note that there almost always have been such price differential between the Japanese and Korean SSBs throughout the KIA's SSB anti-dumping proceeding. The KIA nevertheless repeatedly confirmed the competitive relationship among SSBs from different origin (including those from Japan) on various other grounds.

[82] See, among others, Korea's first written submission, paras. 88-103; Korea's second written submission, paras. 111-119, OTI Final Report (Original Investigation), Exhibit KOR-9b (BCI), pp. 55, 90; OTI Final Report (First Sunset Review), Exhibit KOR-10b (BCI), p. 17; OTI Final Report (Second Sunset Review), Exhibit KOR-11b (BCI), p. 9; OTI Final Report, Exhibit KOR-5b (BCI), pp. 33-34. See also Panel Report, paras. 7.94-9.95, fn. 276 and 277.

[83] See Panel Report, paras. 7.94-9.95, fn. 276 and 277. See among others, Exhibit JPN-013 (BCI), p. 7; Exhibit JPN-017 (BCI), p. 4. That more than [[ ]]% of the SSB sales volume follows the make-to-order system has been confirmed by the OTI in both the second and third sunset reviews. See page 46 of OTI's Final Report (Second Sunset Review), Exhibit KOR-61b (BCI): "Because [[ ]]% or more of the sales volume follows the make-to-order system, the company holds an amount of stock equivalent to around [[]] of inventory". In this connection, see also Korea's second written submission, paras. 97-100.

[84] See Korea's second written submission, paras. 97-100.

confirmed this on several occasions.[85] All of these considerations based on extensive analysis formed the basis of the KIA's finding that the SSBs are in competitive relationship with each other. However, the Panel does not even begin to engage with these reasonable findings by the KIA as repeatedly stressed by Korea.

91. The Panel does not examine (nor even attempt to examine) whether the price difference that it put so much emphasis on is so material that despite all the relevant findings by the KIA on the competitive relationship, the Japanese and Korean SSBs cannot be perceived to serve the same demand. In fact, the Panel's analysis is completely devoid of any examination whatsoever of the KIA's examination of the competitive relationship between the dumped and domestic products. However, it is clear that the Panel should have engaged with these findings on the competitive relationship as these findings are directly linked to the supply-and-demand relationship between the Japanese and Korean SSBs within the analytical framework of the Panel's own examination of the likely volume increase in the dumped imports upon removal of the current anti-dumping duties. The failure of the Panel to address this essential question is an error of law under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU.

92. In addition, the Panel's failure in this regard also demonstrates that the Panel's assessment was not about ascribing different weight to different pieces of evidence, but about introducing an *a priori* legal requirement to undertake a price effect analysis whenever the margin of the POR-based price difference exceeds the anti-dumping duty margin. Yet no such legal requirement exists in Article 11.3 and the Panel's interpretation and application of Article 11.3 as reflected in the Panel's finding in paragraph 8.1.b. i. of the Panel Report is thus in error as a matter of law.

93. A final point that confirms the lack of objective assessment by the Panel is its decision to avoid addressing Korea's explanation that the Japanese respondents *never* substantiated any alleged lack of incentive to increase exports to Korea upon removal of the anti-dumping duties.[86] It was a mere assertion by the Japanese respondents based on the argument that they only export "special steel" SSBs and were not interested in competing with "general purpose" SSBs as sold by Korea. This argument was not only unsubstantiated; it was actually contradicted by the facts on the record as even the Panel conceded. Korea repeatedly pointed out that this argument about a "lack of incentive" to increase exports to Korea was never substantiated by the Japanese respondents to the KIA during the underlying sunset review.[87] In fact, as Korea noted, the Japanese respondents explicitly confirmed that Korea is their "top 3" market for its SSB exports in a parallel SSB sunset review before the USITC.[88] The Panel declined to give any weight to the evidence on the record that disproved the Japanese respondents' storyline,[89] and avoided addressing Korea's arguments in this respect.[90] Tellingly, the Panel also failed to point to any substantiated argument presented by the Japanese respondents that would have supported this lack of incentive argument. The Panel's apparent double standard in building its reasoning for the finding in paragraph 8.1.b. i. of the Panel Report is yet another confirmation of its lack of objective assessment.

94. In light of all of the above, Korea respectfully requests that the Appellate Body reverse or declare moot and of no legal effect the Panel's findings in paragraph 8.1. b. i. of the Panel Report.

[85] See among others, Panel Report, paras. 7.94-9.95, fn. 276 and 277; Attachment D-3 of JPN-009a, Exhibit KOR-39b (BCI); Japanese Respondents' Opinion Regarding Applicants' Rebuttal, JPN-13b (BCI), p. 7; and Japanese Respondents' Response to KTC's Additional Inquiries, JPN-17b (BCI), p. 4.

[86] Panel Report, para. 7.98.

[87] See Panel Report, para. 7.98, fn. 290. In addition, any *unsubstantiated* allegation of "lack of incentive" by the Japanese respondents were made in the context of their core (albeit incorrect) argument about the Japanese producers having completely shifted away from exporting the "general-purpose" steels to Korea. As noted before, the panel explicitly rejected this distinction. However, the Panel surgically detached the "lack of incentive" part of the Japanese respondents' naked allegation in the context of their distinction between the "general-purpose" and "special" steels, and linked it to the issue of price differential that is of its own making. This is an impermissible *de novo* review.

[88] See Panel Report, para. 7.104, fn. 313.

[89] See Panel Report, para. 7.104, fn. 313.

[90] See Panel Report, para. 7.98.

## V. CLAIM 5: LEGAL ERRORS IN THE PANEL'S FINDING THAT KOREA ACTED INCONSISTENTLY WITH ARTICLE 11.3 IN RELATION TO THE KIA'S INTERMEDIATE FINDINGS ON CAPACITY UTILIZATION

95. The Panel erred in law by finding in paragraph 7.183 and paragraph 8.1 b) ii of the Panel Report that the KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement in relation to its findings on the production capacity and capacity utilization in Japan. The Panel also failed to make an objective assessment of the matter before it in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

96. Korea recalls that the Panel found that the KIA failed to engage in an "unbiased and objective" evaluation of the record facts leading to the "intermediate finding" on the Japanese industry's "utilization rate … which shows that they have sufficient additional production capacity and room for exports".[91] The Panel further explained that "[t]his is 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".[92] On that basis, the Panel concluded that this alleged lack of evaluation with respect to this "intermediate" finding "invalidates the KIA's overall likelihood of injury determination and gives rise to a violation of Article 11.3 of the Anti Dumping Agreement"[93] and thus that the "KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement."[94]

97. First, as noted before, the Panel erred in law by finding that the KIA's intermediate finding on capacity utilization violated Article 11.3 of the Anti-Dumping Agreement given that Article 11.3 of the Anti-Dumping Agreement does not require an authority to consider export capacity and capacity utilization. Absent a requirement to undertake such an analysis, there is no legal basis for considering that any alleged flaw with respect to a consideration on capacity utilization necessarily leads to a violation of Article 11.3 of the Anti-Dumping Agreement. The Panel's interpretation of Article 11.3 as a provision requiring certain analytical steps which, if undertaken imperfectly, lead to a violation of Article 11.3 is in error as it does not have a legal basis in the text of the Anti-Dumping Agreement.

98. Second, the Panel acknowledged that Article 11.3 "is silent on the appropriate methodology for determining capacity utilization rates for exporters in sunset reviews".[95] This suggests that the panel agreed that Article 11.3 does not require that the exporting producers' capacity utilization data is necessarily used. Also, it must be noted that the Panel did not come up with any reason as to why the KIA's reliance on the internationally reputable ISSF data was unreasonable or biased and resulted in a substantive error of such magnitude so as to invalidate the KIA's overall likelihood-of-injury determination under Article 11.3 of the Anti-Dumping Agreement. In fact, the Panel did not fault the KIA for relying on the ISSF data when reaching its conclusions on capacity utilization. The sole basis for considering that the KIA acted in violation of Article 11.3 of the Anti-Dumping Agreement was because it "reject[ed]" data submitted by the Japanese exporters which the Panel considers to be in error because they were supposedly "not properly informed" of the relevant information to be submitted.[96] Leaving aside the fact that the Panel's conclusion about the lack of information was not the result of an objective assessment of the matter, as explained below, the Panel also erred in law by concluding that Article 11.3 is violated because exporters were allegedly not properly informed of a particular element that the authorities were considering as part of the totality of facts. The Panel never examined whether despite this alleged error the KIA still had a sufficient factual basis for its conclusions.

99. Furthermore, if there is no methodology that is prescribed by the Anti-Dumping Agreement, there is no basis for invalidating the determination simply because another, reliable source of information (i.e., ISSF data) was used for determining available capacity as part of the total configuration of the facts. Korea considers that the Panel's alleged error in the KIA's analysis is at least five steps removed from the core obligation of Article 11.3 and thus clearly insufficient to support a finding of violation. In particular, first, Article 11.3 is concerned with a sufficient factual basis to support a likelihood of injury determination and does not address any intermediate findings. Second, Article 11.3 does not require a capacity utilization analysis. Third, Article 11.3 permits a

[91] Panel Report, paras. 7.174.
[92] Panel Report, paras. 7.174.
[93] Panel Report, para. 7.183
[94] Panel Report, para. 8.1 b) ii
[95] Panel Report, paras. 7.130.
[96] Panel Report, paras. 7.174.

cumulative approach to assessing the likelihood of injury. Fourth, Article 11.3 does not make the information related to individual producers part of the information that is "necessary" to determine the likelihood of injury as the review is not producer specific. Fifth, the Panel never finds that the country-wide ISSF capacity data that the KIA used in this sunset review for all producers, including for the Indian producers that did provide a lot of information on production capacity, was unreliable. Despite all of this, the Panel concludes that the KIA would have violated Article 11.3 because it was not sufficiently detailed in requesting information on production capacity from a number of individual Japanese producers. This is a clear error of law.

100. The Panel erred in law in its interpretation and application of the term "review" in Article 11.3 of the Anti-Dumping Agreement in paragraph 7.132 as requiring a certain "appropriate degree of diligence" that includes informing interested parties of the alleged change in scope of the necessary data. Not only did the Panel have no basis for the assertion that the KIA changed the scope of the enquiry, the Panel was also legally wrong to read a host of procedural requirements into the term "review" when no such requirements exist in the text of the Anti-Dumping Agreement.

101. Third, the Panel failed to make an objective assessment of the matter in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement when it considered that the KIA's decision to use of ISSF data for the assessment of capacity utilization became "improper" simply because it *allegedly* failed to inform Japanese exporters of the "broader product scope" of this data and without affording them an opportunity to comment or submit data based on those parameters.[97] The Panel never provided the required adequate explanation of why the KIA's reliance on the ISSF data was biased or not objective. In paragraph 7.157 of the Panel Report, the Panel merely states that the argument that the ISSF data was to be preferred because it provided country-wide data is "unconvincing" but it does not otherwise find fault with the ISSF data as such. The decision of the Panel is that it "cannot fault the Japanese exporters for failing to submit data and materials of which they were not made aware".[98] However, that does not address the key question of whether it was biased of the KIA to rely on a credible source such as the ISSF data. The Panel failed to focus on what the KIA actually relied on and whether this was a proper basis for its findings. That is a fundamental error in its approach that amounts to a violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement as it ignored the fact that it was not the trier of fact in this dispute. It should have reviewed what the KIA *did use* as the factual basis for its finding rather than to focus on what the KIA *did not* rely on.

102. In fact, to rely on the ISSF data was wholly reasonable. This data constituted objective, reliable, and credible information that was derived from an internationally-reputable industry organization, and it was used by the KIA in relation to all investigated countries in the third sunset review as well as in previous sunset review. The data, therefore, constituted "positive evidence" that provided a sufficient factual basis for the KIA's intermediate finding on capacity utilization of the Japanese industry. The Panel's finding in paragraph 7.174 of the Panel Report that the KIA's evaluation of the facts leading to its intermediate finding on the utilization rate in Japan was not "objective and unbiased" is thus not based on what the KIA actually did (i.e. to use ISSF data) but on what it allegedly did not do (i.e. to inform exporters of the alleged broader product scope). The Panel thus failed to make an objective assessment of the matter in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

103. Fourth, the Panel failed to make an objective assessment of the matter in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement when finding that the KIA changed the parameters for assessing capacity utilization in Japan. In particular, the Panel's finding that "[n]one 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'",[99] and 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'"[100] are not the result of an objective assessment of the matter.

[97] Panel Report. Para. 7.132
[98] Panel Report, para 7.159.
[99] Panel Report, paras. 7.145.
[100] Panel Report, paras. 7.149.

104. The record evidence demonstrates that from the beginning of the third sunset review (and even earlier), the KIA applied the same methodology for calculating capacity utilization and never changed its parameters. This is, for example, obvious from the information requests sent to the investigated exporters and the domestic industry, which consistently applied the same parameters.

105. In addition, the Panel failed to examine objectively essential aspects of the dialogue between the KIA and the Japanese exporters, which confirm that the KIA applied the same parameters for assessing capacity utilization, that consistent requests were made for specific production volume and capacity data (backed up by information for verification), and that the information submitted by the exporters was unsubstantiated and did not correspond to what was requested.[101] In this respect, Korea considers that the Panel also failed to make an objective assessment of the matter when it concluded that the Japanese exporters were not made aware that, "what mattered for the KIA was such reasonable convertible capacity upon removal of the duties and not the capacity currently and specifically allocated to the covered SSB products in the POR".[102]

106. Korea provides further details in respect of the Panel's lack of objective assessment of the dialogue that took place between the KIA and the Japanese exporters on this matter below in the context of the discussion on "facts available".

107. In sum, the record clearly demonstrates that repeated requests for information were made to the Japanese respondents of more than just production capacity currently and specifically allocated to the covered products. Fortunately, to the extent that the Japanese respondents submitted no such information *whatsoever*, the question is quite straightforward. Given this lack of substantiated information, it is irrelevant whether certain technical details about the so-called changed "parameter" had been properly conveyed to the Japanese respondents or not. The fact remains that the KIA had in fact (repeatedly, for several months) requested the Japanese respondents to provide information about the overall capacity of the SSB production facilities and the proportion of the capacity currently allocated to both the covered products and other products.[103] The fact also remains that the Japanese respondents never provided the requested information and, importantly, never provided any data to back up the number they consistently provided.

108. Fifth, the Panel failed to make an objective assessment of the matter in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement when it did 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."[104]

109. The Panel might have reached a different conclusion than did the KIA, but as is clear from Article 17.6 of the Anti-Dumping Agreement, that alone is not enough to find that an authority acted in a biased manner. If anything is clear from the extensive dialogue between the KIA and the Japanese producers, it is that the KIA actively engaged with these producers and provided the producers repeated opportunities to provide the data to support the number they continued to give in denial of the fact that clearly this bare number was not considered sufficient by the KIA. The lengthy summary of this dialogue by the Panel over several pages in paragraphs 7.134-7.164 clearly demonstrates that the Japanese producers had ample opportunity to present information, to provide comments on the reasons why their information was not used and to comment on the use of the ISSF data. Yet, other than repeating the same numerical allegation (i.e., same figure of [[ ]] tons) arguing that this number represents capacity and that the KIA must accept this number, they never presented the actual data to support the number not even when they were informed that the internationally reputable ISSF data showed a markedly different capacity utilization number and was going to be relied on by the KIA. It was entirely reasonable of the KIA to expect producers to present data if this data was able to contradict the ISSF data. They did not do so. The Panel does not address this point and entirely fails to provide an adequate explanation of how its finding of lack of objective evaluation holds in light of these facts.

[101] Panel Report, paras. 7.164, 7.174.
[102] Panel Report, para 7.158.
[103] See among others, Panel Report, para. 7.144.
[104] Panel Report, para. 7.164.

110. For the above reasons, Korea respectfully requests that the Appellate Body reverse or declare moot and of no legal effect the Panel's findings in paragraphs 8.1. b. ii. of the Panel Report.

## VI. CLAIM 6: LEGAL ERROR IN THE PANEL'S FINDING THAT KOREA ACTED INCONSISTENTLY WITH ARTICLES 11.4 AND 6.8 OF THE ANTI-DUMPING AGREEMENT BY RESORTING TO AND APPLYING "FACTS AVAILABLE" IN RESPECT OF PRODUCTION AND EXPORT CAPACITY

111. The Panel's finding that the KIA acted inconsistently with Articles 11.4 and 6.8 of the Anti-Dumping Agreement by having recourse to "facts available" to determine the production and export capacity of the Japanese exporters was based on an erroneous interpretation and application of Articles 6.8 and 11.4, and involved a failure to make an objective assessment of the matter under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.[105]

112. First, the Panel erred in law by finding that the production capacity of the three participating Japanese respondents comprised "necessary information" under Article 6.8 for the purpose of determining the likelihood of continuation or recurrence of injury or even for determining the relevant available capacity in Japan.[106]

113. The information on individual production volume and capacity of certain Japanese respondents did not constitute information that was "necessary" to make an affirmative or negative final determination on the likelihood of continuation or recurrence of injury. As there is no requirement under Article 11.3 to establish capacity utilization and freely available capacity for investigated exporters when making a likelihood-of-injury determination, information to calculate such capacity cannot be deemed to constitute "necessary" information.[107]

114. The Panel appears to have taken the view that, because certain information was "requested" in the KIA's *dumping* questionnaire to exporters, the KIA (whether the Dumping Investigation Division or Injury Investigation Division), must have considered this information to be "necessary".[108] However, not every piece of information requested in a questionnaire is *ipso facto* "necessary" within the meaning of Article 6.8. Nor does it become "necessary" information simply because the authorities continue to engage with the interested parties on the requested information, as erroneously assumed by the Panel.[109] The requisite forward-looking determination under Article 11.3 does not require capacity utilization data from individual respondents, let alone when reliable and relevant information is available from other sources, as was the case.

115. Second, the Panel erred in law when finding that the KIA had recourse to "facts available" to determine production and export capacity of the Japanese respondents. In particular, the Panel found that the KIA "reject[ed] the Japanese exporters' production capacity figures due to a failure to cooperate".[110] However, no such finding was made by the KIA in the Final Resolution and Final Report and the KIA never invoked the relevant provisions under domestic law related to the use of facts available. The Panel erred in law in its application of Article 6.8 and 11.4 of the Anti-Dumping Agreement to the facts of this case. The Panel erroneously confused the discretion that an investigating authority has to attach particular weight to certain information and to select the sources of information to rely on with a situation where an authority lacks the necessary information and is thus forced to resort to secondary source information.

116. While the KIA examined the data voluntarily submitted by the Japanese respondents, it decided to rely on another credible source of information, the ISSF data. This same source was used also for other exporting countries. The record unequivocally demonstrates that even for an Indian exporter who submitted verifiable production capacity data for all convertible capacities, the KIA did not use that verified production capacity data because it still decided to use the ISSF data for the overall SSB production capacity of India. The fact that the KIA considered such separately submitted production capacity data by the Indian producer as another piece of evidence in the totality of facts

[105] Panel Report, para. 8.1.c.i.
[106] Panel Report, para. 7.192.
[107] See, e.g. Appellate Body Reports, *US – Carbon Steel (India),* para. 4.416; *Mexico – Anti-Dumping Measures on Rice*, para. 293; and Panel Report, *US – Supercalendered Paper*, para. 7.174.
[108] Panel Report, paras. 7.187-7.191.
[109] Panel Report, para. 7.190.
[110] Panel Report, para. 7.194.

does not detract from the fact that it was the ISSF data that was used by the KIA also for this Indian producer. Thus, it cannot be said that the KIA resorted to facts available after rejecting the Japanese respondents' data just because it used the ISSF data. The KIA used the ISSF data in prior reviews and it used the ISSF data in the third sunset review also for producers in respect of which there was no issue with the information they submitted. It is thus not so that the KIA only reached the conclusion that it had to rely on the ISSF data after first having rejected the individual producers' data by resorting to facts available.

117. The KIA simply based itself on all available evidence and attached the weight it did to these various pieces of evidence. Indeed, from the very beginning (that is, even before the underlying third sunset review), the KIA considered the ISSF data to be the data that it will rely on to assess the country-by-country capacity utilization. When the Japanese respondents voluntarily visited the Injury Investigation Division of the KIA and submitted their alleged production capacity data on 1 September 2016, the KIA engaged with the Japanese respondents to verify the data submitted. But the KIA discovered a number of concerns with respect to the information provided by the individual Japanese respondents, and the data was not verifiable. The KIA thus maintained its position to make its determination on the basis of a reliable source used by many investigating authorities in the world. This was also the source used by the KIA in previous SSB sunset reviews and it was the source used also with respect to other exporting countries in the underlying third sunset review. To use the ISSF data did not require a finding of non-cooperation. It was not a situation in which recourse was had to a secondary source because the primary source information was not available. In fact, the primary source of country-wide capacity utilization can never be an individual exporter's information. The Panel thus erred in law in considering this to be a situation of the use of facts available.

118. Third, as noted above, the Panel failed to make an objective assessment of the matter when finding that the KIA "failed to adequately inform the Japanese exporters of its updated parameters for the 'necessary information'".[111] The KIA did not change the parameters for determining capacity utilization in Japan during the third sunset review. Throughout the review, the KIA applied the same methodology, which is corroborated by various pieces of record facts, such as the information requests sent to the investigated exporters and the domestic industry. The KIA also engaged in an extensive dialogue and properly informed the Japanese respondents of the information required. The Panel failed to properly distinguish between the initial 3 June 2016 standard request for information *from the Dumping Investigation Division* of the KIA on which the Panel based its entire determination, on the one hand, and the later request from the relevant *Injury Investigation Division* of the KIA which was the obvious starting point of the dialogue that related to the likelihood-of-injury determination.[112] This failure by the Panel to recognize the authority's actual starting point of the dialogue reveals a *de novo* approach by the Panel in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

119. In particular, the Panel's prejudicial and result-driven approach with respect to its findings in paragraphs 8.1. b. ii. and 8.1. c. i. of the Panel Report is based on its flawed factual finding that the KIA unduly changed the "parameters" of calculating the Japanese SSB industry's capacity utilization in the middle of the third sunset review. By "parameters", the Panel means that the KIA would have originally requested for production capacity *currently and specifically* allocated to the covered product, while it later used the overall production capacity that *can be converted to* the covered product, even if not currently so allocated. However, the KIA never changed such "parameters" as it always and very reasonably sought to use the overall production capacity that "can be converted to producing the covered product" for its injury proceeding. Before getting into the details, it is worth reflecting for a moment on what the Panel's reasoning implies. Why would any investigating authority narrowly request a producer to present information on the production capacity currently and specifically allocated to the production of SSBs when it is well known that capacity currently used for similar products can easily be re-focused to increase production of SSBs? Obviously, given the forward-looking nature of the sunset review, it is the latter that interests an authority, i.e. what is the freely available capacity to produce SSBs in the future from the total available capacity? That is common sense. That is what the Japanese producers must have understood as well but tried to avoid. Bizarrely, however, the Panel disregarded the common sense reading of the KIA's requests.

[111] Panel Report, para. 7.196.
[112] Panel Report, para. 7.134-7.135, para. 7.196.

It preferred to mis-read the KIA's request and to distort the facts in order to fit its reading of the KIA's request for production capacity information.

120. Korea considers it important to have a closer look at the details of the Panel's analysis since it reveals the Panel's pattern of behavior that consists of distorting the facts, re-constructing the KIA findings, misrepresenting arguments and applying a double standard of proof.

121. In the context of this issue as well the Panel does not base its conclusion on the KIA's findings but reaches its own conclusions which it then seeks to support by cobbling together various statements made in different contexts. In particular, the Panel's analysis reveals a biased approach that is obsessed with the irrelevant question whether the KIA expressly informed the Japanese producers that it had allegedly changed the parameters for providing production capacity data compared with the 3 June 2016 Dumping questionnaire.

122. As is clear from the evidence discussed by the Panel in paragraphs 7.137 – 7.159, the KIA made repeated requests for data and consistently requested information on peeling capacity related to other products. The Panel, rather than looking at what these pieces of evidence clearly *do* request, looks for what they *do not* say, i.e. that the parameters have changed. The Panel never allows for the possibility that for the KIA the parameters never changed since the relevant starting point of the dialogue is the 1 September 2016 meeting in which it was never suggested that the production capacity would be approached in the narrow fashion suggested by the Panel. The Panel erroneously looks at this dialogue *through its own lens* rather than looking at the dialogue in an objective manner and *from the perspective of the KIA* and *its* approach.

123. It suffices to take a look at the lengthy Panel discussion of the many requests that were made by the KIA for additional data and related capacity information beyond the bare number given by the Japanese producers. The Panel does not ask itself the basic question whether it is reasonable of an authority which repeatedly asks for additional information and "specific data"[113] to support the Japanese producers' number, to be dissatisfied by the lack of response and thus to decide not to give any weight to the number that was submitted but rather to rely on a reliable source such as the ISSF data. Nor does it ask itself the question whether it is credible of the Japanese producers and of Japan in this proceeding to argue that they did not know that anything more was required when the KIA repeatedly indicated that it was not satisfied with the "information" provided. Would the common sense question not be why these Japanese producers did not ask what exactly it was that was required if what they had submitted thus far was not considered good enough? And if the Japanese producers see that the KIA's interim report is not based on the number they provided but rather on the ISSF data with its well-known broader product scope, would one not expect the producers to respond by saying that, even using this broader product scope, the correct number for their capacity utilization is much higher rather than just again repeating the same information? The Panel prefers to ignore all of these objective questions.

124. The Panel rejects all of Korea's arguments related to the very many interactions there have been between the KIA and the Japanese producers all because of its own biased focus on the question of whether the producers were informed of the alleged change in parameters following the 3 June *Dumping Questionnaire*. The Panel looks at the evidence but states that "none of these pieces of evidence demonstrate that the KIA conveyed to the Japanese producers that it had redefined the preferred products scope for the capacity utilization rate as extending beyond the 'product under investigation.'"[114] It found that "while the KIA did make a request for data on production capacity and capacity utilization' at the public hearing, the inquiry is formulated in imprecise terms" and thus it is "unwilling to read additional words and meaning into this evidence that are not apparent on its face."[115] It "also consider[s] 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.'"[116] The Panel acknowledges that the injury questionnaire was very clear but considers that the terms used in the related oral dialogue with the Japanese exporters "are far less precise than the detailed written request issued to the applicants" and it thus again refuses to "read additional words and meaning into the documentary evidence of

[113] Panel Report, para. 7.142, referring to Minutes of the Meeting dated 21 September 2016 (Exhibit KOR-26 b(BCI) p.1.
[114] Panel Report, para. 7.145
[115] Panel Report, para. 7.148.
[116] Panel Report, para. 7.149

the oral dialogue that are not apparent on its face."[117] It rejects the suggestion that the OTI's revised interim report would have made it clear to the Japanese producers that the KIA was using the ISSF data with a broader products scope and that the Japanese producers could thus have submitted similar data because in this interim report the KIA allegedly "refrained from mentioning that their figures had been rejected due to an incorrect product scope."[118]

125. The Panel's conclusion is thus that it "cannot fault the Japanese exporters for failing to submit data and materials of which they were not made aware based on the available evidence"[119]. However, it was not *for the Panel* to fault the Japanese exporters. That is not its task. Its task under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement was to review whether it was reasonable *of the KIA* to rely on the ISSF data and not to give any weight to the limited and naked numerical allegation provided by the Japanese producers after the extensive dialogue that took place. Even if the Panel might have reached a different conclusion as the KIA as is clearly the case, that does not suffice to find against the KIA. Yet, that is exactly what the Panel did. In addition, its review of the facts was not objective as it was not open to plausible alternative explanations of the facts. Its short-sighted and results oriented analysis that sought to read the entire dialogue in the light of an alleged understanding of an irrelevant *template* Dumping Questionnaire was not an objective analysis under any standard. The Panel looks at this dialogue with the benefit of hindsight and in light of an argument developed in this proceeding rather than looking at what the KIA did at the time based on the information before it. Where a panel reads evidence with the "benefit of hindsight", it fails to consider how the evidence should have fairly been understood at the time of the investigation, and thereby fails to make an "objective assessment" in accordance with Article 11 of the DSU.[120]

126. In addition, the Panel consistently gave the Japanese producers the benefit of the doubt while being unduly demanding of the KIA.

127. To the extent that the Panel considered that the Japanese respondents were not made aware of what information was requested by the KIA and on that basis found that the KIA's resort to facts available was inconsistent with Article 6.8 of the Anti-Dumping Agreement,[121] the Panel's relevant findings are thus flawed due to the Panel's failure to undertake an objective assessment of the matter.

128. To appreciate the artificial and result-driven nature of the Panel's review, let us recap the different scenarios that the Panel considered. Under the scenario that the Panel preferred, the Panel had to construct a story line based on isolated pieces of information, which are artificially cobbled together. In that scenario, the story starts with the Dumping Investigation Division's dumping questionnaire. But, with this scenario, the Panel had to *assume* that the KIA explicitly noted but ignored the undeniable industrial reality of the SSB production facilities' high adaptability; the Panel also had to *ignore* the fact that the KIA already used the ISSF data in the second sunset review for Japan's SSB production capacity; and it had to also *disregard* the parameter that the KIA explicitly applied to the domestic industry in the third sunset review. In order to complete the story, the Panel had to draw certain undue inferences based on sporadic references by the KIA in isolation, while disregarding the straightforward meaning of other relevant pieces of evidence about the KIA's requests to the Japanese respondents for "more specific" information. Many other assumptions and logical jumps were made by the Panel in order to reach its conclusion that the KIA must have originally adopted a parameter that (i) does not comport with the prevailing industrial reality, (ii) is inconsistent with its previous findings to rely on the ISSF data, (iii) is not in accordance with the KIA's parallel findings for India in which the KIA decided to rely on the ISSF data despite the fact that the KIA fully verified [[ ]] production capacity, and (iv) would be inconsistent with the parameter that the KIA specifically applied to the domestic industry in the third sunset review from the very beginning. The Panel's choice of scenario is simply not a credible plot.

129. In the other scenario, supported by the facts that Korea repeatedly submitted from the very outset of the panel proceeding, the analysis is based on the undeniable industrial knowledge and

[117] Panel Report, para. 7.150
[118] Panel Report, para. 7.156
[119] Panel Report, para 7.159.
[120] Appellate Body Report. *US – Countervailing Duty Investigation on DRAMS*, para. 175, referring to Appellate Body Report, *US – Cotton Yarn*, para. 78
[121] See Panel Report, para. 7.196.

the KIA's previous findings reflecting such undisputed industrial common sense, including its previous use of the ISSF data (from which the KIA had no reason to depart only in the third sunset review and only with respect to the Japanese respondents), and the parameter that it specifically applied to both the Indian producers and to the domestic industry in the same third sunset review. The KIA applied the prevailing (thus not novel) parameter for assessing the SSB production capacity. This version of the story is straightforward, and does not require undue inferences or logical jumps of any kind. And, of course, the totality of circumstances undoubtedly establishes that this version of the facts is what truly happened.

130. The Panel's decision to opt for its contrived and artificial scenario certainly constitutes a failure to undertake an objective assessment under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement, as well as an error of law under Article 6.8 of the Anti-Dumping Agreement.

131. For the above reasons, Korea respectfully requests that the Appellate Body reverse or declare moot and of no legal effect the Panel's findings in paragraphs 8.1. c. i. of the Panel Report.

## VII. CLAIM 7: THE PANEL'S GENERAL FAILURE TO CONDUCT AN "OBJECTIVE ASSESSMENT" VITIATES ALL OF ITS RELEVANT FINDINGS

132. Korea submits that the Panel's overall approach to this dispute reveals a profound error of law in terms of the role of a panel in assisting Members to resolve disputes. The Panel's assessment generally fell short of the standard required under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. Indeed, in addition to the specific instances of violation of the obligation to make an "objective assessment" of the matter as identified above, the Panel's process and behavior was generally inconsistent with its obligations under the covered agreements.

133. In particular, disregarding its role as a neutral and objective adjudicator, the Panel engaged in a *de novo* review of the record facts as noted above, applied a double standard of proof, and used its interrogative powers to make the case for Japan, all of which constitute, individually and collectively, a failure to undertake objective assessment.[122] This is demonstrated, among others, by the number *and* the nature of the questions posed to Korea[123] which went far beyond merely seeking "to clarify and distill the legal arguments" of the parties.[124] The Panel errs in law when it considers that "a panel's discretion concerning the form, nature, and content of its questions to parties is unfettered in the DSU."[125] Article 11 of the DSU like Article 17.6 of the DSU limit this discretion by making it clear that the questions are not to be used to make the case for either party, and must be remain objective in tone as well as substance. Justice must not only be done; it must also be seen to be done. If the questions of the Panel reflect an appearance of bias, the Panel's duty of undertaking an objective assessment will be violated. That was the case in the context of this Panel proceeding. Clearly, the Panel acted as an *inquisitorial body* rather as an *adjudicatory body* that is to make an objective assessment of the matter before it in order to assist the parties in resolving the dispute.

134. Moreover, in denial of the well-established rule that the burden of proof rested upon Japan, as the complainant,[126] the Panel essentially took Japan's claims and presentation of the facts as a given, without examining objectively whether there was a basis for the claims or whether the presentation of the facts was accurate.

135. Korea provides some specific examples revealing a fundamental lack of objective assessment by the Panel which acted as a prosecutorial body making the case for Japan but reserves the right to present additional examples later as it is not possible in this Notice of Appeal to discuss each of the many questions addressed to Korea that reflect the Panel's lack of objective assessment.

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[122] See, e.g. Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 183; *EC – Fasteners (China)*, para. 566; and *US – Upland Cotton (Article 21.5 – Brazil)*, para. 293.

[123] See First Hearing Questions, Exhibit KOR-69; see also Second Hearing Questions, Exhibit KOR-70.

[124] See, e.g. Appellate Body Reports, *Thailand – H-Beams*, para. 136; and *US – Zeroing (EC),* paras. 257, 258, 261.

[125] Panel Report, para. 7.31.

[126] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14; and Panel Report, *China – Autos (US)*, para. 7.6.

136. Korea refers, for example, to Question 10(b) of Advance Questions to Parties for the First Substantive Meeting of the Panel 3 September 2019 – Updated 7 September 2019 ("First Hearing Questions"),[127] which states:

> b. If the Japanese prices are only lower than those of the domestic like products after being cumulated with the products of other countries, can such lower price provide a plausible basis for finding that different product types are in a competitive relationship and should be cumulated? Or does this involve *presuming* that the different product types are in a competitive relationship in order to *prove* that they are in a competitive relationship? (emphasis **original**)

137. Korea submits that this is not a question one could expect of an objective Panel that seeks to distill the legal arguments of the parties. Rather, this question is tendentious and leading in the direction of a violation. Korea notes that this question was part of the very first set of questions it received from the Panel pre-dating even the first substantive meeting of the Panel with the parties. It reveals the bias that existed from the very start of this proceeding.

138. An even more blatant and problematic example is the Panel's surprising use of its powers under Article 13 of the DSU. This Article 13 DSU request for information also dates back to this very first set of questions before the first hearing. As explained below, something out of the ordinary happened in this case that casts doubt on the good faith of the Panel in this case.

139. Just two days before the first substantive meeting of the Panel with the parties, on a Saturday afternoon, the Panel issued an extensive Article 13 DSU information request, in which it instructed Korea to provide very detailed information about the yearly (2012-2015) import volume, import value, market share, import tons, sales price of the so-called "special" and "general-purpose" steels with respect to Japan, India, Spain, China, Chinese Taipei, Italy, other countries, and Korea, and requested that such information be provided preferably during the first substantive meeting.[128] This request was alarming. It strongly suggested that the Panel was about to conduct a *de novo* review, because any perceived price differences between the Japanese and domestic SSB was not the basis for the KIA's rejection of the Japanese respondents' argument about the "special" and "general-purpose" steels. The KIA rejected the unsubstantiated assertions of the Japanese respondents that it was not interested in competing with Korea and others with respect to so-called "general purpose" steel. It transpired during the sunset review that the Japanese respondents were not even able to properly define these different categories and that in any case their assertion that they were no longer selling such "general purpose" steel SSBs was incorrect. The KIA thus rejected their arguments based on the reasonable findings that the (i) proportion of the "special" and "general" steels from Japan, Korea, and India did not change significantly since the second POR, and (ii) the POR export volume of the "special steel" submitted by the Japanese respondents was vastly different from the POR volume of the "special steel" from Japan as confirmed by the official customs clearance data. It was thus completely unclear on what basis and for what purpose the Panel was making its very board Article 13 DSU request. This Article 13 DSU request revealed that the Panel was out on a mission of its own, a mission which was in direct contradiction with its obligation of not conducting a *de novo* review.[129]

140. In any case, Korea, respecting the Panel's role as the master of the proceeding, complied with the Panel's request by gathering data in a way that was not done by the KIA during the challenged third sunset review and submitted the requested novel information as Exhibit KOR-41b.[130] It so happened that the requested information clearly demonstrated that the "general-purpose" steel from Japan was actually higher priced than the "special" steel from Japan, squarely refuting Japan's groundless assertion that the "special" steels are higher priced than the "general-purpose" steels or even that such categories were meaningful.

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[127] First Hearing Questions, Exhibit KOR-69 (BCI), p. 5.

[128] Pre-Hearing Request for Information, Exhibit KOR-71.

[129] Appellate Body Report, *US – Countervailing Duty Investigation on DRMS*, para. 183 (quoting from Appellate Body Report, US – Steel Safeguards, para. 299): "with respect to a panel's review, in accordance with Article 11, of facts established by an investigating authority … a panel must not conduct a de novo review of the evidence or substitute its judgment for that of the competent authorities".

[130] See Appendix 1, Exhibit KOR-41b.

141. The Panel, rather than drawing the above basic conclusion form this exhibit which confirmed the accuracy of the KIA's findings, continued on its quest to find fault with the KIA's determination. It now started looking at the new information it had requested in a different way. Korea recalls once again that this exhibit was created solely at the request of the Panel and was never part of the record before the KIA, nor was it ever considered by the KIA. The Panel looked at this exhibit KOR-41b and concluded that the prices of Japanese general purpose steel were significantly higher than the prices of Korean general purpose steel. As a true investigating authority keen to examine its newly created exhibit, it reached the conclusions that this price difference between the Japanese and Korean SSBs renders "any consideration of factors on the supply side alone [] insufficient to demonstrate [that] the Japanese imports would increase" upon removal of the current anti-dumping measure.[131] It claimed that it reached this finding based on "record evidence" when in fact its finding was its own reading of a newly created exhibit that it had requested Korea to prepare and which was never considered by the KIA in the third sunset review.

142. The complete *de novo* nature of the Panel's approach in relation to its Article 13 DSU request was painfully revealed in paragraph 7.104 of the Interim Report[132]:

> To the extent that Korea argues that the KIA had no need to address this question on the grounds that Japanese general-purpose steel was already competing directly with low-priced general-purpose steel from third countries during the POR, we reject it. Such a proposition is inconsistent with the position articulated during the review by both the applicants and the Japanese exporters, and is inconsistent with the record evidence on the respective pricing levels of general-purpose steel during the POR. According to this record evidence, the price of Japanese general-purpose steel (304 and 316) in the Korean market tracked far higher than imports of general-purpose steel from other countries, for instance at pricing levels often exceeding others by [[]]. As Japan suggests, this record material directly contradicts Korea's assertion that "[b]ecause in the SSB industries competition takes place directly over demand, the fact that a significant proportion of general-purpose steel was imported during the POR ipso facto confirms that the Japanese respondents had participated in and won the competition against the allegedly low-priced general-purpose steel from other countries". In light of the directly-contradictory record material, we are unwilling to consider that the KIA implicitly arrived at the finding contended for by Korea.

143. Clearly, what the Panel did here was to expand the role of WTO panels. The Panel showed no reservation in conducting a purely *de novo* review. First, as it did in other parts of the Report, the Panel re-evaluated certain isolated statements of the applicants and the Japanese respondents. Next, the Panel conducted a *de novo* analysis of the information that it received from Korea through its self-initiated Article 13 DSU request which had nothing to do with what the KIA had done. It even referred to Exhibit KOR-41b, a product of its abusive use of the DSU Article 13 power, "record evidence". Thus, the Panel attempted to expand not only the role of a WTO panel, but also the definitional scope of the "record evidence". Korea recalls once again that during the sunset review, none of the Japanese respondents argued that their "general purpose" steel was higher priced than that of Korea; rather, their argument consistently was that they were selling a different type of higher priced "special steel" that did not compete with the grade 304 and 316 "general purpose" steel of Korea and others. The general price differential was thus referred to in support of an argument that Japanese producers were not competing in the same grades as Korea. That proved to be wrong. Never did the KIA put together the price data as it was done by Korea in Exhibit KOR-41b and this per grade comparison that the Panel undertook was thus entirely *de novo*. Moreover, the Panel used this *de novo* analysis to reject a basic finding of the existence of a competitive relationship in light of the arguments as presented by the interested parties that were challenging the decision to examine likelihood of injury on a cumulated basis. In the absence of any rules on cumulation in Article 11.3, it is even highly doubtful whether an authority is required to establish the existence of competition in sunset reviews before cumulating. But none of these considerations seemed to hinder the Panel once it had discovered that on a per grade basis the prices of Japanese products were higher than those of Korean products. Unclear on what basis, the

[131] See Interim Report, para. 7.103.
[132] See Interim Report, para. 7.104.

Panel concluded that this was something that the authority must examine. All of this was based on an Exhibit that was created at the request of the Panel and that did not form part of the record.

144. At interim review, Korea strongly objected to paragraph 7.104 of the Interim Report, calling it a "regrettable textbook example" of impermissible *de novo* review.[133] In the final Panel Report, the Panel withdrew the original paragraph 7.104 finding. This is a clear admission of guilt by the Panel or at least a realization that it had shown its true colours in this paragraph and that it was thus necessary to quickly bury this paragraph in order to cover up what was going on. But it would be naïve to consider that the undeniable bias that was demonstrated by paragraph 7.104 of the Interim Report was limited to that specific finding only. As it transpired, rather, all of the price-related analysis and findings in the Panel Report must have been tainted by the biased and preconceived approach by the Panel.

145. Furthermore, Korea submits that the Panel applied a double standard of proof in violation of Article 11 of the DSU. Such a double standard of proof was reflected in various part of the proceeding. The premises that underlie Questions 95, 102 and 103 of the Panel, among others, which concern the Japanese respondents' alleged figures for their production capacity and export volume of "special steels", respectively, are clear evidence of this. It is undisputed that, for both of the figures, the Japanese respondents submitted no supporting materials that corroborated the figures, or materials that would have allowed verification of the figures. In essence, the figures are nothing more than mere allegations. It is also undisputed that, for both of the alleged figures, the Japanese respondents constantly changed their number or definition, or both. In addition, both of the alleged figures were found to be inconsistent with other available neutral and objective evidence. Yet, these crucial errors somehow did not affect the credibility and reliability of the Japanese respondents' alleged figures in the eyes of the Panel, as the questions basically posit that the KIA could have either simply accepted the Japanese respondents' unsubstantiated, incoherently alleged figures (Question 95) or that the KIA should have nonetheless reconciled the discrepancies (Questions 102 and 103). At the same time, the questions indicate that any treatment of such figures by the KIA is to be scrutinized, as if any failure to accept the Japanese respondents' figures (Question 95) or to reconcile the discrepancies (Questions 102 and 103) could somehow constitute violations of the Anti-Dumping Agreement. In so doing, the Panel effectively imposed on the KIA a 'legal obligation' to give every benefit of the doubt to the Japanese respondents, irrespective of their constant refusal to cooperate and the demonstrated material flaws in their arguments, while completely disregarding the fact that these respondents have consistently refused to participate in various parts of the underlying reviews (and in all previous investigation and reviews). In a stark contrast, the Panel in Question 106 for example apparently treats one of the most egregious self-contradictions in the Japanese respondents' position, i.e., the inconsistency in the respondents' production capacity definition (i.e., "covered" product versus "covered and excluded" products) as a mere point of "clarification", as if Japan can exonerate the respondents' fundamental inconsistency simply by cherry-picking one over the other.

146. As noted before, even assuming for the sake of argument that the Japanese respondents were uncertain about any aspect of the KIA's information request, why did they not ask for clarification? Why did the Panel ignore this very easy question? In the third sunset review, the Japanese respondents continued to answer the various follow-up requests from the KIA just giving the exact same number over and over again, while changing their position on key definitional element of their numerical allegation to avoid the KIA's very specific questions.[134] It also begs the question why the KIA would have posed such follow up requests. It also naturally begs the question as to why the Japanese respondents later changed the underlying scope and method of their numerical allegations (although without any plausible explanation). Given this situation and the facts on the record as recalled by Korea in its interim review comments, Korea submits that the KIA must not be faulted for failing to act as an "unbiased and objective" authority, to say the very least.

147. Unfortunately, however, that was exactly what the Panel did, as it dismissed all of Korea's submissions and evidence, to reach its cursory and bold conclusion that the Japanese respondents' profound failure to comply with the KIA's repeated requests is excusable while the KIA's failure to

[133] See Korea's Comments on the Interim Review, paras. 70-77.
[134] See among others, Korea's comments on Japan's responses to the Panel Question 95.

somehow "do more" did not live up to the decorum befitting that of an "unbiased and objective" authority.[135]

148. Korea submits that such an impermissible double standard by the Panel violates Article 11 of the DSU.

149. A final example of the wilful distortion of the facts and arguments of Korea relates to the use of "facts available" which led to the Panel's finding in paragraph 8.1. c. i. of the Panel Report. In Question 13 of the Second Hearing Questions, the Panel deduced from *Korea's response* to an earlier question of the Panel that the *KIA at the time of the underlying review* expressly invoked "facts available". That is, because Korea in its response to the Panel's Question 50 following the first substantive meeting dropped a footnote citing a section of the OTI's Final Report relating to the use of "facts available" for *dumping margin calculation* (which also has certain bearing on the KIA's likelihood-of-injury analysis), the Panel's question presumed that the Korean authorities could have invoked "facts available" in relation to their analysis of the Japanese respondents' *capacity utilization*. But the relevant part of the OTI Final Report demonstrably has no bearing on the use of facts available with respect to the production capacity data, and the footnote referenced in Question 13 of the Second Hearing Questions actually contains many other citations directly supporting Korea's response to the Panel's specific question. This was not the end of it. Question 14 of the Second Hearing Questions again attempted, *without any basis*, to conflate two separate explanations distinguished by two different bullets in order to draw another result-driven premise that the Korean authorities could have expressly resorted to the facts available in their use of the ISSF production capacity data.[136] At every step of the way, the Panel wilfully distorted the responses of Korea and constructed a reality that fitted the conclusion it wanted to reach. That is not what an objective adjudicator does. Despite so much evidence pointing in the opposite direction, the Panel concluded that the KIA had resorted to the use of facts available and because nothing in the KIA's final reports supports this conclusion, the Panel relied on a more general statement made by the Korea Trade Commission (KTC) in a communication to MOSF in which it explained what was wrong with the capacity information (not data) presented by the Japanese interested parties. It latched on to that statement in combination with the fact that the dumping questionnaire mentions the possible use of facts available (as is standard for any investigating authority's dumping questionnaire) and in that biased manner reached its conclusions reflected in paragraph 8.1. c i. of the Panel Report.

150. In light of the above, Korea submits that the Panel's entire adjudication of the matter in this dispute was tainted by a lack of objectivity in the Panel's assessment in violation of Article 11 of the DSU, particularly with respect to its findings in paragraph 8.1. b. i., paragraph 8.1. b. ii., and paragraph 8.1. c. i. of the Panel Report. Therefore, Korea respectfully requests that the Appellate Body reverse or declare moot and of no legal effect the Panel's findings in paragraph 8.1. b. i., paragraph 8.1. b. ii., and paragraph 8.1. c. i. of the Panel Report.

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151. In light of the foregoing, Korea respectfully requests reversal of the findings and conclusions of the Panel Report as indicated in this Notice of Appeal.

152. In light of the exceptional circumstances whereby there are currently an insufficient number of Appellate Body Members to constitute a Division, and in accordance with Rule 16(1) and (2) of the Appellate Body Working Procedures, Korea will await further instructions from the eventually-composed Division or the Appellate Body regarding any further steps to be taken by Korea in relation to this appeal. Korea thus reserves the right to submit an appellant submission when it will be so instructed. In the absence of such instructions, this notification is deemed also to be Korea's appellant submission.

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[135] See Panel Report, paras. 7.151-7.167.

[136] Korea notes that the Panel's Question 104 issued following the second substantive meeting now captures the entirety of the relevant page of Exhibit KOR-48, thus clearly showing the distinction made by the different bullets, which were summarily omitted in the Second Hearing Questions.