KOREA – ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN

(DS504)

THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The United States welcomes the opportunity to present its views in this proceeding on *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan (DS504)*. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") as relevant to certain issues in this dispute.

II. JAPAN'S CLAIMS REGARDING ARTICLE 3 OF THE AD AGREEMENT

A. Definition of the Domestic Industry under Articles 3.1 and 4.1 of the AD Agreement

2. Japan argues that the Korea Trade Commission's ("KTC") definition of the domestic industry that included only two Korean producers representing 55.4 percent of total domestic production and that consisted of only those producers that applied for the imposition of antidumping duties, is inconsistent with Articles 3.1 and 4.1 of the AD Agreement.[1] Japan asserts that defining the industry to consist of those producers constituting approximately half of domestic production, particularly when the definition includes only those parties seeking duties, posed a material risk of distortion.[2] Japan also asserts that the KTC failed to make any qualitative assessment to ensure that this domestic industry definition was not biased.[3]

3. Korea contends that the process it used in defining the domestic industry was neither biased nor skewed to favor any of the parties.[4] Korea asserts that all domestic producers were invited to participate and received questionnaires, but only two of the nine domestic producers responded in full to the questionnaire. Korea claims that it examined and positively found that the domestic industry could be defined on the basis of the two responding producers because they accounted for a major proportion of the domestic industry.[5] Observing that the Appellate Body in *EC – Fasteners (China)* stated that there was no obligation to ensure that the domestic industry definition included producers with different views about the application, Korea argues that it defined the domestic industry using an objective process that did not involve any risk of material distortion.[6]

4. The United States takes no position on the factual merits of Japan's claims. The United States provides the following comments on the applicable legal obligations.

5. The United States agrees with Japan that Article 3.1 informs the interpretation of Article 4.1.[7] Article 4.1 establishes that the "domestic industry" can be defined as either (1) the "domestic producers as a whole of the like products," *i.e.*, all domestic producers, or (2) a subset of domestic producers "whose collective output of the products constitutes a major proportion of

[1] Japan's First Written Submission, para. 233.
[2] Japan's First Written Submission, para. 254.
[3] Japan's First Written Submission, para. 254.
[4] Korea's First Written Submission, para. 312.
[5] Korea's First Written Submission, para. 312.
[6] Korea's First Written Submission, para. 316.
[7] Japan's First Written Submission, para. 236.

the total domestic production" of the like products. Article 4.1 of the AD Agreement does not require that all domestic producers be included in the domestic industry, nor does it articulate a minimum limit on the percentage of domestic production that must be included to constitute a "major proportion" of the total domestic production of those products.

6. Although undefined in the AD Agreement, the term "major proportion" must be interpreted in the context of Article 3.1 of the AD Agreement. Article 3.1 of the AD Agreement provides the following:

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

7. Thus, Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence." The Appellate Body has endorsed a description of "positive evidence" as "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy."[8] The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. Under this obligation, the domestic industry is to be investigated in an unbiased manner that does not favor the interests of any interested party in the investigation.[9] How an authority chooses to define the domestic industry has repercussions throughout the course of the injury analysis and determination; thus, the overarching obligations of Article 3.1 necessarily extend to an authority's definition of the domestic industry.

8. In this case, the Panel should consider whether the authority, consistent with Article 3.1, defined the domestic industry in a fair and unbiased manner. A flawed definition of the domestic industry can distort an authority's material injury analysis. For a material injury determination to be based on "positive evidence and involve an objective examination," the authority must rely upon a properly defined domestic industry to perform the analysis. The Appellate Body has recognized that a proper definition of the domestic industry is critical to ensuring an accurate and unbiased injury analysis. The Appellate Body in *EC – Fasteners (China)* found that "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product."[10] The Appellate Body's analysis focused squarely on whether the definition could have the effect *or risk* of introducing a distortion to the injury analysis.

9. In evaluating whether an authority's definition of the domestic industry introduces a distortion to the analysis, a Panel should consider the existence of an inverse relationship

[8] *Mexico – Anti-Dumping Measures on Rice* (AB), paras. 163-164. *See also EC – Tube and Pipe Fittings* (AB), para. 7.226.
[9] *US – Hot-Rolled Steel* (AB), para. 193.
[10] *EC – Fasteners (China)* (AB), para. 414.

between the proportion of producers included in the domestic industry and the absence of a risk of material distortion in the assessment of injury.[11] The Panel's analysis on risk of distortion should thus begin with consideration of the domestic production captured by the KTC's definition of the domestic industry.

10. If the KTC's definition meets the "major proportion" of domestic production standard of Article 4.1, the Panel should go on to assess whether the non-inclusion of those domestic producers that did not express support for the petition from the injury analysis was biased or designed to favor the interest of any group of interested parties in the investigation, including the producers who filed the petition, inconsistent with Article 3.1 of the AD Agreement.[12]

B. The Volume of Subject Imports under Articles 3.1 and 3.2 of the AD Agreement

11. Japan contends that the KTC's analysis of the volume of subject imports was inconsistent with Articles 3.1 and 3.2 of the AD agreement.[13] Japan asserts that the KTC failed to conduct an objective evaluation regarding whether the subject imports competed against and significantly displaced the domestically-produced product.[14] Japan further asserts that the KTC focused on import quantity in its volume analysis and improperly dismissed respondents' argument that most of the imports that entered in 2013 were not sold in the Korean market but were held in inventory.[15]

12. Korea argues that its consideration of the volume of subject imports was consistent with Article 3.2.[16] It states that in accordance with its legal obligations, it took into consideration the absolute and relative volumes of subject imports and found, based on an objective examination of positive evidence, that there was a significant increase in the volume of subject imports.[17] Korea contends that there is no requirement in the AD Agreement for an investigating authority to exclude imports that were held in inventory from its volume analysis or for it to determine whether subject imports significantly displaced the domestically produced product.[18]

13. The United States takes no position on the merits of Japan's factual claims related to the KTC's volume findings, but offers the following comments on the applicable legal obligations of Articles 3.1 and 3.2 of the AD Agreement.

14. The obligations of Article 3.2 of the AD Agreement must be considered in conjunction with the overarching principles of Article 3.1 of that Agreement.[19] With respect to volume, Article 3.2 of the AD Agreement states that an investigating authority shall "consider whether

[11] *EC – Fasteners (China)* (AB 21.5), para. 5.302.
[12] *US – Hot-Rolled Steel* (AB), para. 193.
[13] Japan's First Written Submission, paras. 116-118.
[14] Japan's First Written Submission, paras. 117, 137-41.
[15] Japan's First Written Submission, paras. 134-136.
[16] Korea's First Written Submission, para. 175.
[17] Korea's First Written Submission, para. 175.
[18] Korea's First Written Submission, paras. 177-182.
[19] *China – GOES* (AB), para. 130.

there has been a significant increase in dumped imports," either in absolute terms or relative to production or consumption of the importing country.

15. Based upon the clear text of the AD Agreement, which uses the disjunctive terms "either" and "or," analysis of the volume of subject imports should include consideration of the absolute volume of subject imports, as well as whether there was a significant increase in the volume of subject imports in absolute terms, a significant increase in the volume of subject imports relative to production in the importing Member, or a significant increase in the volume of subject imports relative to consumption in the importing Member. The last sentence of Article 3.2 specifies that "no one or several" of the Article 3.2 factors "can necessarily give decisive guidance."

16. Investigating authorities have discretion in determining what methodology to apply to examine the volume of subject imports because the AD Agreement does not require any particular methodology.[20] As the panel in *Thailand – H-Beams* stated, "it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation, as Article 3 contains no requirements concerning the methodology to be used."[21]

C. Price Effects under Articles 3.1 and 3.2 of the AD Agreement

17. Japan argues that the KTC's analysis of price effects was inconsistent with Articles 3.1 and 3.2 of the AD Agreement.[22] Japan asserts that the KTC failed to consider the diverging price trends of the domestic product and subject imports and the consistent and significant overselling of the domestic product by subject imports in finding price depression and price suppression.[23] Japan further asserts that the KTC failed to ensure price comparability between the domestic product and subject imports, which consisted of a wide variety of products that were different in terms of their physical characteristics, consumer preferences, end-uses, and prices.[24]

18. Korea maintains that the KTC objectively examined the price effects of subject imports on the domestic product by considering the evolution of prices of subject imports and the domestic product and the impact of subject imports on domestic prices.[25] Korea asserts that contrary to Japan's claims, it considered and adequately explained the price trends and overselling of the domestic product by subject imports.[26] Additionally, Korea contends that it objectively verified the comparability and competitive relationship between subject imports and the domestic product.[27]

19. The United States takes no position on the merits of Japan's factual claims related to the KTC's price effects findings, but offers the following comments on the applicable legal obligations of Articles 3.1 and 3.2 of the AD Agreement.

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[20] *EC – Bed Linen* (AB), para. 113.
[21] *Thailand – H-Beams* (Panel), para. 7.194.
[22] Japan's First Written Submission, paras. 63-64.
[23] Japan's First Written Submission, para. 73.
[24] Japan's First Written Submission, paras. 107-09.
[25] Korea's First Written Submission, paras. 93, 77.
[26] Korea's First Written Submission, paras. 97-110, 113-118.
[27] Korea's First Written Submission, paras. 47-54, 129-143.

20. The obligations of Article 3.2 of the AD Agreement must be considered in conjunction with the overarching principles of Article 3.1 of that Agreement.[28] Article 3.2 of the AD Agreement outlines the examination that authorities must conduct to determine the price effects of dumped imports on the domestic market. Article 3.2 of the AD Agreement states, in relevant part:

> [w]ith regard to the effect of dumped imports on prices, the investigating authorities shall consider whether [1] there has been significant price undercutting by the dumped imports as compared with the price of a like product of an importing Member, or whether the effect of such imports is to [2] depress prices to a significant degree or [3] prevent price increases, which otherwise would have occurred, to a significant degree.

21. The United States observes that Article 3.2 requires that an authority "consider" the volume and price effects of the relevant imports. The United States recalls that the Appellate Body in *China – GOES* found that Article 3.2 does not require an authority "to make a *definitive determination*" on price effects, recognizing the distinction between use of the verb "consider" in Article 3.2 of the AD Agreement and the verb "demonstrate" in Article 3.5.[29] However, the fact that no definitive determination is required "does not diminish the scope of *what* the investigating authority is required to consider."[30]

22. The text contemplates three inquiries with regard to the effects of dumped imports on prices: price undercutting, price depression and price suppression.[31] As the Appellate Body in *China – GOES* explained, the inquiries set out in Article 3.2 are separated by the words "or" and "otherwise," indicating that the elements relevant to the consideration of significant price undercutting may differ from those relevant to the consideration of significant price depression and suppression.[32] Thus, even if prices of subject imports do not significantly undercut those of the like domestic products, subject imports could still have a price-depressing or price-suppressing effect on domestic prices.[33]

23. The Appellate Body has explained, however, that the investigating authority's inquiry must provide the authority with a "meaningful understanding of whether subject imports have explanatory force"[34] for price depression or suppression, and, as required by Article 3.1, that understanding must be based on positive evidence and an objective examination.

24. In assessing price depression or suppression, the authority may not confine its consideration to an isolated analysis of domestic prices. Rather, the plain text of Article 3.2 envisions an inquiry into the relationship between subject imports and domestic prices. Article 3.2 introduces the obligations on price effects by clarifying that the nature of the inquiry is to understand the "effect of the dumped imports on prices."[35] An authority's analysis of the three

[28] *China – GOES* (AB), para. 130.
[29] *China – GOES* (AB), para. 130.
[30] *China – GOES* (AB), para. 131 (emphasis in original).
[31] *China – HP-SSST (Japan) / China – HP-SSST (EU)* (AB), para. 5.155.
[32] *China – GOES* (AB), para. 137.
[33] *China – GOES* (AB), para. 137.
[34] *China – GOES* (AB), para. 144.
[35] AD Agreement, Article 3.2.

delineated price effects – price undercutting, price depression, and price suppression – must necessarily be in reference to the subject imports.

25. The Appellate Body has endorsed this interpretation that it is not enough for an authority to simply observe what is happening to domestic prices. The Appellate Body described the "type of link contemplated by the term 'the effect of' under Articles 3.2 and 15.2" as follows:

> The language of Articles 3.2 and 15.2 thus expressly link significant price depression and suppression with subject imports, and contemplates an inquiry into the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable – that is, subject imports – has explanatory force for the occurrence of significant depression or suppression of a second variable – that is, domestic prices.[36]

26. Although the United States does not address the factual underpinnings of the KTC's injury determination, the United States recalls that prior panels and the Appellate Body have considered the analysis by investigating authorities under Articles 3.1 and 3.2 of pricing parallels between subject imports and domestic like products, and of overselling by subject imports.[37] The Appellate Body in *China – GOES* explained that Article 3.2 requires an investigating authority in its final determination to provide sufficient reasoning as to what explanatory force parallel pricing trends have for the depression or suppression or domestic prices.[38] Moreover, the Appellate Body in *China – GOES* recognized that although price depression and price suppression are not contingent on a finding of price undercutting, the investigating authority must conduct an objective examination of all the evidence in making its determinations with respect to these effects.[39] Such evidence would include evidence of overselling by the subject imports, for example.

27. The AD Agreement does not prescribe a particular methodology to be used in an investigating authority's price effects analysis. Nevertheless, Article 3.2 does set certain parameters for how the analysis is to be performed, as elaborated above. Based on these parameters, the Panel must evaluate whether the investigating authority provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings, and how those factual findings supported the overall determination of price depression.

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[36] *China – GOES* (AB), para. 149.

[37] *See, e.g.*, *China – Autos (US)* (Panel), paras. 7.258 - 7.267 (MOFCOM's analysis of alleged parallel pricing fails to reflect an objective examination based on positive evidence of the prices of subject imports and the domestic like product), 7.268-7.275 (MOFCOM's final determination of price depression fails to reflect an objective examination of the evidence of overselling by the subject imports); and *China – GOES* (AB), paras. 208-210 (finding no basis to fault the panel for failing to discuss alleged parallel pricing trends where MOFCOM failed to provide sufficient reasoning in its final determination as to what explanatory force the alleged trends had for price depression or suppression).

[38] *China – GOES* (AB), para. 136.

[39] *China – GOES* (AB), paras. 137, 152; *see also China – Autos (US)* (Panel), paras. 7.272-7.275. The panel in *China – Autos* did not, however, exclude the possibility that an investigating authority may find the existence of price depression in circumstances in which subject imports oversold the domestically produced product during all or part of the period of investigation. *See id*. at para. 7.274.

28. Regarding price comparability, when there is record evidence indicating that subject imports are not a homogenous product and/or that subject imports differ from the domestically-produced product, an investigating authority should evaluate those differences to determine whether they affected prices and take steps to explain the implications of such price comparability (or lack thereof) between subject imports and the domestic product.[40] Failing to do so may call into question whether an investigating authority has made its injury determination based on positive evidence and an objective examination.[41]

D. Adverse Impact under Articles 3.1 and 3.4 of the AD Agreement

29. Japan argues that the KTC's analysis of adverse impact is inconsistent with Articles 3.1 and 3.4. Japan asserts that the KTC did not establish a "logical link" between its findings of volume and price effects and its finding of adverse impact and that it failed to examine whether the state of the domestic industry was "connected to" the effects of subject imports.[42] Japan further contends that the KTC did not provide a meaningful "evaluation of all relevant economic factors," including "ability to raise capital" and the "magnitude of the margin of dumping."[43]

30. Korea argues that its obligation under Article 3.4 is to examine the impact of subject imports on the domestic industry, not to demonstrate that subject imports are causing injury to the domestic industry.[44] Additionally, Korea asserts that the KTC is not required to "link" the economic factors set forth under Article 3.4 to its volume and price findings.[45] Korea maintains that pursuant to its obligation under Article 3.4, it examined and adequately explained the relationship between subject imports and the state of the domestic industry, basing its determination on all relevant factors and indices.[46]

31. The United States, again, takes no position on the merits of the parties' factual arguments, but offers the following views on the appropriate legal interpretation of Articles 3.1 and 3.4.

32. As with Article 3.2 and 4.1 of the AD Agreement, the Appellate Body has recognized that it is appropriate to read the obligations of Article 3.4 in conjunction with Article 3.1 of the AD Agreement.[47] Accordingly, all determinations or findings made in connection with Article 3.4 must be based on "positive evidence" and "involve an objective examination," as required by Article 3.1 of the AD Agreement.

33. Article 3.4 of the AD Agreement sets out an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The article provides that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and

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[40] *China – Broiler Products*, para. 7.483. Ensuring that the products being compared are "like products" will not always suffice to ensure price comparability. *See id.*
[41] *China – GOES* (AB), para. 200.
[42] Japan's First Written Submission, paras. 149-172.
[43] Japan's First Written Submission, paras. 143-145, 173-179.
[44] Korea's First Written Submission, para. 211.
[45] Korea's First Written Submission, para. 211.
[46] Korea's First Written Submission, paras. 215, 220, 233-239.
[47] *China – GOES* (AB), para 126 (citing *Thailand – H-Beams* (AB), para. 106).

enumerates certain factors that an authority must include in its evaluation. The United States observes that Article 3.4 imposes an obligation on the authority to conduct an "examination" of the impact of the dumped imports on the domestic industry. And the text of Article 3.4 expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

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

35. This interpretation is supported by the Appellate Body's observations in *China – GOES*:

> Articles 3.4 [of the AD Agreement] and 15.4 [of the SCM Agreement]…do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 [of the AD Agreement] and 15.2 [of the SCM Agreement].[48]

36. Thus, in examining "the relationship between subject imports and the state of the domestic industry"[49] pursuant to Article 3.4 of the AD Agreement, an authority must consider whether changes in the state of the industry are the consequences of subject imports and whether subject imports have explanatory force for the industry's performance trends. The "examination" contemplated by Article 3.4 must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[50]

37. The manner in which an authority chooses to articulate the "evaluation" of economic factors may vary. Article 3.4 does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out.[51] The United States observes that the Panel must be able to discern that the authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination.

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[48] *China – GOES* (AB), para. 149.
[49] *China – GOES* (AB), para. 149.
[50] *Thailand – H-Beams* (Panel), para. 7.236.
[51] *EC – Tube or Pipe Fittings* (AB), para. 131. Indeed, in that dispute, an internal "note for the file" setting out the European Commission's consideration of some of the injury factors listed in Article 3.4 was found to satisfy the requirements of Articles 3.1 and 3.4 of the AD Agreement. *Id*. at paras. 119 and 133.

E. Causation under Articles 3.1 and 3.5 of the AD Agreement

38. Japan claims that the KTC's causation analysis was inconsistent with Articles 3.1 and 3.5 of the AD Agreement.[52] Japan argues that the KTC relied on deficient volume and price effects findings and failed to establish a causal relationship between subject imports and injury to the domestic industry.[53] Japan further alleges that the KTC failed to establish that it did not attribute injury caused by other factors to the subject imports.[54]

39. Korea argues that it demonstrated a causal relationship between subject imports and injury to the domestic industry by examining each relevant injury factor and conducting a "holistic evaluation" of the injury factors.[55] It further argues that the KTC properly separated and distinguished the injury of "known" factors other than subject imports which at the same time were found to be injuring the domestic industry.[56]

40. Article 3.5 states:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of the Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.[57]

41. As with Articles 3.2, 3.4, and 4.1 of the AD Agreement, the Appellate Body has recognized that it is appropriate to read the obligations of Article 3.5 in conjunction with Article 3.1 of the AD Agreement. Accordingly, any determinations or findings made in connection with Article 3.5 must be based on "positive evidence" and "involve an objective examination," as required by Article 3.1 of the AD Agreement.

1. An Inconsistency with Article 3.2 of the AD Agreement Can, Under Certain Circumstances, Produce a Finding of Causation Inconsistent with Article 3.5 of the AD Agreement

42. The United States does not take a position on Japan's claims that the KTC's findings on volume and price effects are inconsistent with Article 3.2 of the AD Agreement. With respect to

[52] Japan's First Written Submission, paras. 185-187.
[53] Japan's First Written Submission, paras. 192-210.
[54] Japan's First Written Submission, paras. 211-231.
[55] Korea's First Written Submission, paras. 259.
[56] Korea's First Written Submission, paras. 259-288.
[57] AD Agreement, Art. 3.5.

the interpretation of Articles 3.2 and 3.5, however, the United States agrees with Japan's argument that a deficient volume or price effects analysis could compromise a causation analysis where the findings on volume or price effects serve as a key element of the causation analysis.[58] As the Appellate Body explained in *China – GOES*, the provisions in Article 3 "contemplate a logical progression in an authority's examination leading to the ultimate injury and causation determination."[59] Fatal deficiencies in a volume or price effects analysis could compromise the objective nature of the causation analysis.

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

44. For example, the panel in *China – Autos (US)* explained "it would be difficult, if not impossible, to make a determination of causation consistent with the requirements of Articles 3 and 15 of the Anti-Dumping and SCM Agreements, respectively, in a situation where an important element of that determination, the underlying price effects analysis, is itself inconsistent with the provisions of those Agreements."[60] The panel properly recognized that a final injury determination is the product of multiple intermediate determinations, each of which must be supported by positive evidence and an objective examination. Likewise, the Appellate Body agreed with the panel's reasoning in *China – HP-SSST* that flaws in an investigating authority's analysis under Article 3.2 of the AD Agreement might render an investigating authority's causation determination inconsistent with Articles 3.1 and 3.5 of the AD Agreement.[61]

2. Article 3.5 of the AD Agreement Requires an Authority to Examine Known Factors Which at the Same Time Were Injuring the Domestic Industry

45. The third sentence of Article 3.5 of the AD Agreement provides that, in addition to examining the effects of the dumped imports, an authority must examine other known factors which at the same time are injuring the domestic industry. Under Article 3.5, the premise of a non-attribution analysis is that there is at least one known factor other than the dumped imports that is at the same time injuring the domestic industry. As the Appellate Body has found, if known factors other than dumped imports are simultaneously causing injury, the third sentence of Article 3.5 requires the authority to engage in a non-attribution analysis to ensure that the effects of those other factors are not attributed to the dumped imports.[62] If there are no known

[58] Japan's First Written Submission, paras. 192-196.
[59] *China – GOES* (AB), para. 143.
[60] *China – Autos (US)* (Panel), para. 7.327.
[61] *China – HP-SSST* (AB), para. 5.297 (agreeing with *China – HP-SSST* (Panel), paras. 7.188 and 7.205).
[62] *US – Tyres* (AB), para. 252.

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

46. The AD Agreement does not specify the particular methods and approaches an authority may use to conduct causation analysis, including the non-attribution aspect of that analysis.[63] The question of whether an investigating authority's analysis is consistent with the non-attribution aspects of Article 3.5 should turn on whether the authority has in fact evaluated the other known factors and whether its evaluation is supported by positive evidence and reflects an objective examination, as required by Article 3.1.[64]

47. The United States does not take a view on Japan's factual assertions that the KTC's analysis of the effects of factors other than subject imports is unsupported by positive evidence and fails to consider adequately all known factors other than subject imports that were alleged to be causing injury to the domestic industry. Based on the above discussion of the applicable provisions, however, the United States observes that the Panel must determine if the investigating authority demonstrated that it examined other "known factors" within the meaning of Article 3.5 of the AD Agreement, and based its causation analysis on an examination of all relevant evidence.

III. JAPAN'S CLAIMS REGARDING ARTICLE 12 OF THE AD AGREEMENT

48. Japan argues that Korea breached Articles 12.2 and 12.2.2 of the AD Agreement by failing to issue a public notice or report disclosing all relevant information supporting its decision to impose anti-dumping duties against Japanese imports. Specifically, Japan alleges that Korea omitted or did not provide sufficient explanations of its injury determinations regarding price effects and causation. Japan contends that Korea further violated Article 12.2.2 by not adequately addressing comments from the Japanese respondents.[65]

49. Korea responds that it complied with Articles 12.2 and 12.2.2 of the AD Agreement by disclosing the Final Resolution and Final Report from its investigative authority through the Final Decision issued by its Ministry of Strategy and Finance.[66] Korea argues that Japan has failed to establish a *prima facie* case that the disclosed information from the Korean authorities "failed to provide a reasonable understanding of the facts that led to the determination…"[67]

50. While the United States does not assess the factual assertions of the parties, it does comment on the pertinent legal obligations under Article 12 of the AD Agreement.

51. Article 12.2 requires investigating authorities to provide public notice or a separate report of preliminary or final determinations. The notice or report must provide "in sufficient detail the

[63] *See US – Hot-Rolled Steel* (AB), para. 224; *see also US – Tyres* (AB), para. 252 (stating, in safeguard proceedings conducted under the China Accession Protocol, "[t]he extent of the analysis of other causal factors that is required will depend on the impact of the other factors that are alleged to be relevant and the facts and circumstances of the particular case").
[64] *EC – Countervailing Measures on DRAM Chips* (Panel), paras. 7.272-7.273 (citing *US-Hot-Rolled Steel* (AB), paras. 192-193).
[65] *See generally* Japan's First Written Submission, paras. 48, 298-317.
[66] Korea's First Written Submission, paras. 417.
[67] Korea's First Written Submission, paras. 259-288.

findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Article 12.2.2 further states:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

52. Article 12.2.2 is triggered after an investigating authority makes a final determination to impose anti-dumping duties.[68] According to the Appellate Body in *China – GOES,* the notice requirement of Article 12.2.2 "capture[s] the principle that those parties whose interests are affected by the imposition of final anti-dumping…duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties."[69] Detailed findings permit such parties to seek judicial review of a final determination and also allow exporting members to assess a determination's compliance with the AD Agreement and seek dispute settlement if necessary.[70] If the relevant information is confidential, the investigating authorities may provide non-confidential summaries of that information.[71] The panel in *China – X-Ray* further explained that it is important for investigating authorities to present their reasons in an understandable manner because "the concept of 'public' is broad."[72]

53. In *China – GOES,* the Appellate Body explained that "'relevant information on the matters of fact' is…to be understood in the light of the content of the findings needed to satisfy the substantive requirements with respect to the imposition of final measures under the *Anti-Dumping Agreement*…as well as the factual circumstances of each case."[73] Therefore, Article 12.2.2 does not require investigating authorities "to disclose *all* the factual information that is before them, but rather those ["matters of fact"] that allow an understanding of the factual basis that led to the imposition of final measures."[74]

54. The Appellate Body also stated in *China – GOES* that public notice under 12.2.2 must include a discussion of the elements that establish injury under Article 3.[75] In that case, the Appellate Body determined that China had violated Article 12.2.2 by making a determination of significant price depression and suppression without also disclosing facts regarding price

[68] *China – GOES* (AB), para. 256.
[69] *China –GOES* (AB), para. 258.
[70] *China – X-Ray Equipment,* para. 7.459.
[71] *China – GOES* (AB), para. 259.
[72] *China – X-Ray Equipment,* para. 7.459.
[73] *China – X-Ray Equipment,* para. 257.
[74] *China – X-Ray Equipment,* para. 256.
[75] The Appellate Body reached this conclusion in part by noting that Article 12.2.2 cross-references Article 12.2.1, which under sub-heading (iv) requires that public notice contain "considerations relevant to the injury determination as set out in Article 3." *China – GOES* (AB), para. 257.

comparisons between domestic and imported products.[76] Similarly, the panel in *China – X-Ray* concluded that a public notice needs to include the price effects methodology, including an assessment of "the relationship between domestic and subject import prices, and between domestic price and cost."[77]

55. Article 12.2.2 further requires that a public notice or report contain "reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers." Because the interests of exporters and importers may be adversely affected by a final dumping determination, it is important that such parties are able to provide input on the evidence and methodology used by investigating authorities during the course of an investigation. As the panel in *China – X-Ray Equipment* explained, "it is particularly important that the 'reasons' for rejecting or accepting…arguments [related to fact and law] should be set forth in sufficient detail to allow those exporters and importers to understand why their arguments or claims were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or the WTO Agreement."[78] If the public notice or report does not contain a detailed explanation as to why an argument was rejected, there is little way of knowing whether the investigating authority considered the comments of an interested party, or whether the final determination was consistent with the provisions of the AD Agreement.

56. Based on the discussion of Articles 12.2 and 12.2.2 above, the Panel must determine whether Korea provided public notice or a report detailing the "relevant information on the matters of fact and law and reasons" that led to Korea's decision to impose anti-dumping duties on Japanese imports. The panel should further determine whether any such public notice or report adequately explains why Korea rejected comments from the Japanese respondents.

IV. KOREA'S PRELIMINARY RULING REQUEST

57. In its preliminary ruling request, Korea asserts that Japan's panel request breaches Article 6.2 of the DSU by failing to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" with respect to its claims under Articles 3.1, 3.2, 3.4, 3.5, and 4.1 of the Anti-Dumping Agreement.[79] Specifically, Korea argues that Japan's request fails to provide a brief summary of the complaint because it merely "paraphrases" the obligations under the provisions of the Anti-Dumping Agreement and fails to "link any specific aspects of the challenged measures or the underlying investigation to any specific obligations of the provisions in question."[80] Thus, Korea requests the Panel to find Japan's claims as outside of the Panel's terms of reference.

58. Japan rejects Korea's assertions and requests the Panel to dismiss Korea's preliminary ruling request in its entirety. Japan submits that its panel request provides the "'brief summary'

[76] *China – GOES* (AB), para. 267.
[77] *China – X-Ray Equipment*, para. 7.461.
[78] *China – X-Ray Equipment.*, para. 7.472.
[79] Request for Preliminary Ruling in Relations to Japan's Panel Request, 22 November 2016 (Korea's Request), para. 1.
[80] Korea's Request, para. 1.

that is 'sufficient to present the problem clearly'" with regard to its claims.[81] It argues that Korea erroneously interprets the requirements of Article 6.2 of the DSU by (1) insisting that the complainant must provide a legal basis for each of the component parts of a single obligation and (2) confusing the distinction between a claim and the arguments made to support that claim.[82]

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

> [A] panel's terms of reference are governed by the request for the establishment of a panel. In other words, the panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will have the authority to make findings.[83]

60. Article 6.2 of the DSU provides that the panel request shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." These two distinct requirements – "(i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint" – "constitute the 'matter referred to the DSB,' which forms the basis of a panel's terms of reference under Article 7.1 of the DSU."[84]

61. The Appellate Body has stated that the "legal basis of the complaint . . . [is] 'the specific provision of the covered agreement that contains the obligation alleged to be violated.'"[85] The identification of the covered agreement provision claimed to have been breached is thus the "minimum prerequisite" for presenting the legal basis of the complaint.[86] Further, the requirement of a "brief summary" sufficient to "present the problem clearly" entails connecting the challenged measure with the provisions alleged to have been infringed.[87] Consequently, "to the extent that a provision contains not one single distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."[88]

62. However, a panel request is required to state the *claim* at issue. It is not required to provide argumentation as to why and precisely how the measure breaches the relevant

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[81] Japan's Response to Korea's Preliminary Ruling Request, 16 December 2016 (Japan's Response), para. 4.
[82] Japan's Response, para. 2.

[83] *EC – Selected Customs Matters* (AB), para. 131.

[84] *Argentina – Import Measures* (AB), para. 5.39.

[85] *China – HP-SSST* (AB), para. 5.14; *US – Products from China* (AB), para. 4.12; *EC – Selected Customs Matters* (AB), para. 130.

[86] *China – HP-SSST* (AB), para. 5.14; *Korea – Dairy* (AB), para. 124.

[87] *China – HP-SSST* (AB), para. 5.15; *China – Raw Materials* (AB), para. 220; *US – Products from China* AB), para. 4.8.

[88] *China – HP-SSST* (AB), para. 5.15; *China – Raw Materials* (AB), para. 220; *US – Products from China* (AB), para. 4.8.

obligation.[89] Thus, to demonstrate that a particular claim falls outside a panel's terms of reference, the responding Member must show that the panel request did not clearly identify the obligation or provision alleged to be breached by the challenged measure.[90] To the extent Korea's arguments suggest that Article 6.2 required Japan to indicate the reasons why it considered Korea to have breached the specific legal obligations in question, those arguments would appear not to reflect an accurate interpretation of the DSU.

V. CONCLUSION

63. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the AD Agreement and the DSU.

[89] *China – HP-SSST* (AB), para. 5.14 (finding that "it is the claims, and not the arguments, that are to be set out in a panel request in a way that is sufficient to present the problem clearly"); *EC – Selected Customs Matters* (AB), para. 153 ("Article 6.2 of the DSU requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly).

[90] *China – HP-SSST* (AB), para. 5.14 ("the reference in Article 6.2 of the DSU to the 'legal basis of the complaint' refers to the claims pertaining to a specific provision of a covered agreement containing the obligation alleged to be violated; and that it is the claims, and not the arguments, that are to be set out in a panel request in a way that is sufficient to present the problem clearly").