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UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF LARGE RESIDENTIAL WASHERS

REPORT OF THE PANEL

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Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, p. 575
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Dominican Republic – Safeguard Measures	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
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EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
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Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
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Korea – Pneumatic Valves (Japan)	Panel Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/R and Add.1, adopted 30 September 2019, as modified by Appellate Body Report WT/DS504/AB/R, DSR 2019:XI, p. 5935
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
Philippines – Distilled Spirits	Appellate Body Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII, p. 4163
Ukraine – Passenger Cars	Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R and Add.1, adopted 20 July 2015, DSR 2015:VI, p. 3117
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, p. 6027

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US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Lamb	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, p. 4107
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Steel Safeguards	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R and Corr.1 / WT/DS249/R and Corr.1 / WT/DS251/R and Corr.1 / WT/DS252/R and Corr.1 / WT/DS253/R and Corr.1 / WT/DS254/R and Corr.1 / WT/DS258/R and Corr.1 / WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, p. 3273
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wheat Gluten	Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001:III, p. 779
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Alliance	Alliance Laundry Systems
AUV	average unit value
BCI	Business Confidential Information
CIM	controlled-induction motor
COGS	cost of goods sold
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FL LRW	front loading large residential washers
GATT 1994	General Agreement on Tariffs and Trade 1994
GE	GE Appliances
LRW	large residential washer
MFN	most favoured nation
POI	period of investigation
PSC	permanent split-capacitor
PUC	product under consideration
SG&A	sales, general, and administrative
TL LRW	top loading large residential washers
USITC	United States International Trade Commission
USTR	United States Trade Representative
Whirlpool	Whirlpool Corporation
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Korea

1.1. On 14 May 2018, the Republic of Korea (Korea) requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 14 of the Agreement on Safeguards with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 26 June 2018 but failed to resolve this dispute.

1.2 Panel establishment and composition

1.3. On 14 August 2018, Korea requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994, and Article 14 of the Agreement on Safeguards with standard terms of reference.[2] At its meeting on 26 September 2018, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Korea in document WT/DS546/4, in accordance with Article 6 of the DSU.[3]

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

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the Republic of Korea in document WT/DS546/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 20 June 2019, Korea requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 1 July 2019, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Alexander Hugh McPhail
Members:	Mr Welber Oliveira Barral Ms Stephanie Sin Far Lee

1.6. Brazil, China, Egypt, the European Union, India, Japan, Kazakhstan, Mexico, Norway, the Russian Federation, Thailand, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, we adopted the timetable, Working Procedures[5] and Additional Working Procedures on Business Confidential Information (BCI)[6] on 9 October 2019.[7]

1.8. In view of the various restrictions imposed on gatherings and international travel in relation to the COVID-19 pandemic, it was not possible to hold the Panel's first and second substantive meetings with the parties in person. We continued to consult the parties throughout 2020 on the

[1] Request for consultations by Korea, WT/DS546/1 (Korea's consultations request).
[2] Request for establishment of a panel by Korea, WT/DS546/4 (Korea's panel request).
[3] DSB, Minutes of Meeting held on 26 September 2018, WT/DSB/M/419, para. 7.4.
[4] Constitution note of the Panel, WT/DS546/5, para. 2.
[5] Working Procedures of the Panel (Annex A-1).
[6] Additional Working Procedures of the Panel on Business Confidential Information (Annex A-2).
[7] We revised these Additional Working Procedures on BCI on 18 October 2019 and on 31 October 2019. We also revised the timetable over the course of the proceedings in consultation with the parties.

possibility of adopting alternative methods to an in-person meeting.[8] However, taking into account the views expressed by Korea and the United States in this regard, and considering in-person meetings were not possible in 2020 due to the aforementioned restrictions caused by the COVID-19 pandemic, we decided not to hold these meetings in 2020.

1.9. Following additional consultation with the parties, we adopted on 29 January 2021 Additional Working Procedures that set out the procedures for holding the Panel's substantive meeting through a virtual format.[9] After further consulting the parties, we held the first substantive meeting with the parties on 23 and 26 February 2021 through a partially virtual format. The session with the third parties took place on 24 February 2021. We held the second substantive meeting on 14, 15, and 18 June 2021, also through a partially virtual format.

1.10. We issued the descriptive part of its Report to the parties on 20 August 2021. We issued our Interim Report and Final Report to the parties on 25 October 2021 and 15 December 2021 respectively.

2 FACTUAL ASPECTS

2.1 The measure at issue

2.1. The dispute concerns the definitive safeguard measure imposed by the United States on imports of large residential washers (LRWs). The United States imposed this measure pursuant to Proclamation 9694 issued by the US President on 23 January 2018.[10] The measure was imposed following an investigation conducted by the United States International Trade Commission (USITC).[11]

3 PARTIES' REQUESTS FOR FINDINGS

3.1. Korea requests that the Panel find that the United States' definitive safeguard measure on LRWs is inconsistent with the United States' obligations under the Agreement on Safeguards and the GATT 1994. Specifically, Korea contends that the United States acted inconsistently with[12]:

a. Article XIX:1(a) of the GATT 1994 and Articles 1 and 3.1 of the Agreement on Safeguards, by failing to provide a reasoned and adequate explanation of the "unforeseen developments" and the "obligations incurred" by the United States, which would have resulted in the alleged increased imports of LRWs causing serious injury;

b. Articles 2.1, 3.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards, by failing to properly define the domestic industry;

c. Articles 2.1 and 3.1 of the Agreement on Safeguards, by failing to properly determine that LRWs were imported in "such increased quantities, absolute or relative to domestic production, and under such conditions" to cause serious injury to the domestic industry;

[8] In particular, we explored the possibility of (a) replacing the first substantive meeting of the Panel with a written procedure, or (b) holding the substantive meetings through a fully virtual format, wherein all participants would participate in the meeting by logging into a virtual platform such as Cisco WebEx, or a partially virtual format, where a limited number of participants could be present at the designated room at the WTO (taking into account the local restrictions on in-person meetings) whereas other participants, including the panellists, would participate through the Cisco WebEx platform.

[9] Additional Working Procedures of the Panel concerning holding a substantive meeting conducted via Cisco WebEx adopted on 29 January 2021 (Annex A-3). We revised these Additional Working Procedures on 21 April 2021.

[10] Presidential Documents, Proclamation 9694 of January 23, 2018 – To Facilitate Positive Adjustment to Competition from Imports of Large Residential Washers, 83 FR 3553 (25 January 2018), (Exhibit KOR-3).

[11] USITC, Public Report, Large Residential Washers, Inv. No. TA 201 076, USITC Pub. 4745 (December 2017) (USITC report), (Exhibit KOR-1). We note that in its comments to the Descriptive Part of the Panel Report, *Korea noted that the safeguard measure at issue was extended on 14 January 2021 for two additional years*, through 7 February 2023. (Korea's comments to the Descriptive Part of the Panel Report (referring to US notification to the WTO, G/SG/N/10/USA/8/Suppl.7)).

[12] Korea's first written submission, para. 573. See also Korea's second written submission, para. 333.

d. Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c) of the Agreement on Safeguards, by failing to provide a reasoned and adequate explanation of the existence of a significant overall impairment in the position of the domestic industry based on all relevant factors to support its conclusion that the domestic industry was suffering "serious injury or threat thereof";

e. Articles 2.1, 3.1, 4.2(b), and 4.2(c) of the Agreement on Safeguards, by failing to provide a reasoned and adequate explanation of the "causal link" between the alleged increased imports of LRWs and serious injury or threat thereof, and failing to ensure that injury caused by other factors was not attributed to the increased imports;

f. Articles 5.1 and 7.1 of the Agreement on Safeguards, by failing to apply the safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment";

g. Articles 12.1 and 12.2 of the Agreement on Safeguards, by (i) failing to provide immediate notifications of the different decisions; and (ii) failing to provide all pertinent information in its notifications, including evidence of serious injury or threat thereof caused by increased imports, among others, as a result of the undue redaction of allegedly confidential information and failing to provide adequate non-confidential summaries;

h. Articles 8.1 and 12.3 of the Agreement on Safeguards, by failing to endeavour to maintain a substantially equivalent level of concessions and other obligations under the GATT 1994 between the United States and Korea in accordance with Article 12.3 of the Agreement on Safeguards;

i. Article 11.1(a) of the Agreement on Safeguards as a consequence of the inconsistencies identified in paragraphs (a)-(h) above; and

j. Article II:1 of the GATT 1994, because the safeguard measure amounts to a withdrawal or modification of the United States' concessions without a justification under Article XIX of the GATT 1994, the Agreement on Safeguards or any other provisions of the WTO Agreement.

3.2. The United States requests that the Panel reject Korea's claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

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

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the European Union, Japan, and Mexico are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, and C-3). Brazil, China, Egypt, India, Kazakhstan, Norway, the Russian Federation, Thailand, and Viet Nam did not submit third-party written submissions or make third-party oral statements to the Panel.

6 INTERIM REVIEW

6.1. On 25 October 2021, we issued our Interim Report to the parties. On 8 November 2021, Korea submitted a written request asking us to review precise aspects of the Interim Report. The United States did not submit such a request, but on 17 November 2021 submitted comments on Korea's request for review.

6.2. The request and comments made at the interim review stage as well as our discussion and disposition of Korea's request are set out in Annex A-4.

7 FINDINGS

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

7.1.1 Standard of review

7.1. Article 11 of the DSU sets out a general standard of review for WTO panels, and provides as follows:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

7.2. Dispute settlement reports previously adopted by the Dispute Settlement Body (previous DSB reports) have established that the general standard of review contained in Article 11 of the DSU is applicable to disputes involving claims of violation of the Agreement on Safeguards and Article XIX of the GATT 1994.[13] We agree with previous DSB reports that, pursuant to this standard of review, a panel is required to assess whether the competent authority has examined all pertinent facts and provided an adequate explanation as to how those facts support the determination.[14] However, in conducting such a review, a panel must neither conduct a *de novo* review of the evidence nor substitute its judgement for that of the competent authority.[15]

7.3. Moreover, Article 3.1 of the Agreement on Safeguards, last sentence, requires competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. We agree with previous DSB reports that, based on this requirement, the competent authorities' published report must contain the reasoned and adequate explanation that demonstrates compliance with the relevant obligations.[16]

7.1.2 Treaty interpretation

7.4. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". The principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are generally accepted as such customary rules.[17]

7.1.3 Burden of proof

7.5. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[18] Therefore, as the complaining party, Korea bears the burden of demonstrating that the challenged measures are inconsistent with the Agreement on Safeguards and the GATT 1994. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case that, without effective refutation by the defending party, requires a panel, as a matter

[13] See, e.g. Appellate Body Reports, *Argentina – Footwear (EC)*, para. 120; and *US – Lamb*, paras. 100-102; and Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.4.

[14] Appellate Body Report, *US – Cotton Yarn*, para. 74.

[15] Appellate Body Report, *US – Cotton Yarn*, para. 74. See also ibid. paras. 71-73 (referring to Appellate Body Reports, *Argentina – Footwear (EC)*, para. 121; *US – Lamb*, para. 103; and *US – Wheat Gluten*, para. 55).

[16] Appellate Body Report, *US – Steel Safeguards*, paras. 296-297.

[17] Appellate Body Reports, *US – Gasoline*, DSR 1996:1, p. 15; *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 104, section D.

[18] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1197:1, p. 337.

of law, to rule in favour of the complaining party.[19] Generally, each party asserting a fact shall provide proof thereof.[20]

7.2 "Unforeseen developments" and "the effect of obligations incurred" under the GATT 1994

7.6. Korea makes two sets of claims under Article XIX:1(a) of the GATT 1994 as well as Articles 1 and 3.1 of the Agreement on Safeguards.

a. First, Korea claims that the USITC acted inconsistently with these provisions because it failed to provide a reasoned and adequate explanation regarding the existence of unforeseen developments, which would have resulted in the alleged increased imports of LRWs causing serious injury to the US domestic industry.[21]

b. Second, Korea claims that the USITC acted inconsistently with these provisions because it failed to provide a reasoned and adequate explanation regarding the obligations incurred by the United States, which would have resulted in the alleged increased imports of LRWs causing serious injury to the US domestic industry.[22]

7.7. The United States asks us to reject Korea's claims.

7.8. We note that Article XIX:1(a) of the GATT 1994 provides as follows:

> *If, as a result of unforeseen developments* and *of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products*, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.[23]

7.9. Article 3.1 of the Agreement on Safeguards states as follows:

> A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

7.10. Article 1 of the Agreement on Safeguards "establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994" whereas Article 11.1(a) of this agreement provides that "[a] Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement".

7.11. In resolving Korea's claims, like previous DSB reports, we understand the references in Article XIX:1(a) to "a result of unforeseen developments" and "the effect of obligations incurred" to be references to "circumstances which must be demonstrated as a matter of fact" in order for a

[19] Appellate Body Report, *EC – Hormones*, para. 104.
[20] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1197:1, p. 335.
[21] Korea's first written submission, paras. 59 and 85; second written submission, paras. 47 and 72.
[22] Korea's first written submission, paras. 59 and 80; second written submission, para. 51.
[23] Emphasis added.

safeguard measure to be applied consistently with Article XIX:1(a) of the GATT 1994.[24] We note that the United States does not dispute that Article XIX:1(a) obligates a Member to demonstrate these circumstances. However, while Korea takes the view that the competent authorities must make this demonstration in their published report, the United States contends that no such demonstration needs to be included in the published report since neither Article XIX:1(a) nor the Agreement on Safeguards requires the competent authorities to make any findings regarding these two circumstances.[25] Therefore, we will proceed as follows:

a. We will first determine whether the two factual circumstances set out in Article XIX:1(a) need to be demonstrated as a matter of fact in the report of the competent authorities.

b. If yes, we will examine whether the USITC made such a demonstration in its published report. In doing so, as discussed in more detail in paragraph 7.24 below, we note that the United States acknowledges that the USITC made no finding on "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994. With respect to the "effect of GATT obligations", the United States submits that the USITC report demonstrates that the United States undertook tariff obligations with respect to the products at issue and thus complies with Article XIX:1(a) of the GATT 1994.[26]

7.2.1 Demonstration of factual circumstances set out in Article XIX:1(a) of the GATT 1994

7.12. Korea contends that competent authorities must affirmatively find in their report that imports were the result of the two factual circumstances set out in the first clause of Article XIX:1(a) of the GATT 1994, i.e. "unforeseen developments" and the "effect of obligations incurred under GATT 1994".[27] Noting in this regard that "unforeseen developments" and "effect of obligations" are circumstances which must be demonstrated as a matter of fact, Korea contends that they are therefore "pertinent issues of fact and law" under Article 3.1 of the Agreement on Safeguards.[28] In Korea's view, considering that Article 3.1 requires competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law, the USITC report was required to contain reasoned and adequate explanations with respect to these two factual circumstances.[29]

7.13. The United States contends that neither Article XIX:1(a) of the GATT 1994 nor Article 3.1 of the Agreement on Safeguards requires competent authorities to make findings in their report on "unforeseen developments" within the meaning of Article XIX:1(a) or to identify in the report the relevant tariff concessions or obligations incurred under the GATT.[30] Instead, in the United States' view, it is sufficient to demonstrate the existence of "unforeseen developments" and the "effect of obligations incurred" upon challenge before a WTO panel.[31]

7.14. The United States notes in this regard that previous DSB reports have found that unforeseen developments as well as the effect of GATT obligations are pertinent issues of fact and law under Article 3.1 that must be reflected in the published report of the competent authorities.[32] The United States disagrees with the interpretation of Article XIX:1(a) set out in those reports. In this regard, the United States distinguishes between the two clauses of Article XIX:1(a), stating that the first clause reflects "circumstances" that must be shown (namely, "unforeseen developments" and the "effect of GATT 1994 obligations") and the second clause reflects "conditions" that must be met to undertake a WTO-consistent safeguard measure (namely, imports in such increased quantities

[24] Appellate Body Report, *Korea – Dairy*, para. 85. We note that the United States also refers to "the unforeseen developments" and "the effect of obligations incurred" as "factual circumstances". (United States' opening statement at the first meeting of the Panel, para. 8).

[25] Korea's first written submission, paras. 76 and 84; second written submission, para. 48; United States' responses to Panel question No. 50, para. 90; and No. 52, para. 93.

[26] United States' first written submission, paras. 54-55.

[27] Korea's second written submission, para. 48.

[28] Korea's first written submission, paras. 76 and 84; second written submission, para. 69.

[29] Korea's first written submission, paras. 84-85.

[30] United States' first written submission, para. 20; response to Panel question No. 52, para. 93.

[31] United States' first written submission, para. 46; response to Panel question No. 52, para. 93.

[32] United States' first written submission, para. 48 (referring to Appellate Body Report, *US – Lamb*, para. 76); response to Panel question No. 47, paras. 86-87 (quoting Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.145-7.146).

and under such conditions as to cause serious injury to the domestic industry).[33] The United States argues that while the "conditions" for the imposition of a safeguard measure are clarified in Articles 2, 3, and 4 of the Agreement on Safeguards, the Agreement on Safeguards does not refer to the "circumstances" set forth in the first clause of Article XIX(1)(a).[34] Thus, according to the United States, the "pertinent issues of fact and law" for purposes of Article 3.1 are the "conditions" that Articles 2.1 and 3.1 charge the competent authorities to investigate (whether goods are imported in such quantities as to cause serious injury).[35]

7.15. The United States further argues that findings and reasoned conclusions can only be understood as relating to the investigation and determination, which according to the United States only cover whether increased imports have caused or are threatening to cause serious injury, and not issues that may be pertinent to the application of the measure.[36] In support of this argument, the United States draws a parallel between the first clause of Article XIX:1(a) of the GATT 1994 and Article 5.1 of the Agreement on Safeguards, noting that previous DSB reports have found that competent authorities are not obligated to make findings and reasoned conclusions under Article 3.1 on whether a measure was necessary to prevent or remedy serious injury and facilitate adjustment (in the sense of Article 5.1).[37] Thus, the United States takes the view that just like compliance with Article 5.1 need not be demonstrated in the competent authority's report, compliance with the circumstances set out in the first clause of Article XIX:1(a) need not be set out in that report.[38]

7.16. The United States concludes on this basis that unforeseen developments are not one of the "pertinent issues of fact and law" under Article 3.1 that must be set forth in the report of the competent authorities, and the absence of a finding on that issue in the USITC report does not show that the USITC acted inconsistently with Article XIX of GATT 1994 or Articles 1 and 3.1 of the Agreement on Safeguards.[39] Instead, according to the United States, WTO panels may evaluate whether an increase in imports was a result of unforeseen developments based on arguments and evidence presented exclusively in dispute settlement.[40] The United States similarly submits with respect to the "effect of GATT 1994 obligations" that nothing in Article XIX:1(a) of the GATT 1994 or the Agreement on Safeguards requires the competent authorities to identify the relevant tariff concessions in their report.[41]

7.17. In making our determination, we note that Article XIX:1(a) contains two clauses. The first clause refers to unforeseen developments and obligations incurred. The second clause refers to imports entering in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products. We agree in this regard with previous DSB reports, which note that while the second clause of Article XIX:1(a) sets out conditions for the application of safeguard measures, which are reiterated in Article 2.1 of the Agreement on Safeguards, "unforeseen developments" and "effect of obligations" are certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with Article XIX.[42] We also note that there is no dispute between the parties that, to comply with Article XIX:1(a) of the GATT 1994, it must be demonstrated that increased imports were the result of unforeseen developments and obligations incurred within the meaning of this first clause. The United States does not dispute that such a demonstration needs to be made, and itself notes that Article XIX:1(a) of the GATT 1994 provides for a safeguard measure when increased imports are "as a result of" unforeseen developments and the effect of the obligations incurred.[43]

[33] United States' first written submission, para. 41; second written submission, para. 12.
[34] United States' first written submission, para. 20; second written submission, para. 12.
[35] United States' first written submission, para. 20; second written submission, para. 12.
[36] United States' first written submission, para. 50.
[37] United States' first written submission, para. 50 (referring to Appellate Body Reports, *Korea – Dairy*, para. 99; and *US – Line Pipe*, para. 236).
[38] United States' first written submission, para. 50.
[39] United States' first written submission, para. 20.
[40] United States' first written submission, para. 46.
[41] United States' response to Panel question No. 52, para. 93.
[42] Appellate Body Reports, *Korea – Dairy*, para. 85; *Argentina – Footwear (EC)*, para. 92.
[43] See e.g. United States' response to Panel question No. 46, paras. 83-84; and opening statement at second meeting of the Panel, para. 4.

7.18. However, the question before us is whether findings and reasoned conclusions demonstrating the factual circumstances in the first clause of Article XIX:1(a) need to be set out in the report of the competent authorities, i.e. the USITC.

7.19. Like previous DSB reports, we consider that the obligation under Article 3.1 to provide findings and reasoned conclusions on all pertinent issues of fact and law requires findings and reasoned conclusions reached on the factual circumstances set out in the first clause of Article XIX:1(a) of the GATT 1994.[44] In particular, because unforeseen developments and the effect of obligations incurred are circumstances that must be demonstrated *as a matter of fact* in *order for a safeguard measure to apply*, we consider them to be "pertinent issues" under Article 3.1.

7.20. In this regard, we also disagree with the United States' argument on the distinction between the first and second clauses of Article XIX:1(a). Specifically, we disagree with its argument that the "pertinent issues of fact or law" for purposes of Article 3.1 are the "conditions" set out in Article 2.1 (and the second clause of Article XIX:1(a)), meaning that competent authorities must address these conditions as part of their Article 3.1 obligations, and not the "circumstances" set out in the first clause of Article XIX:1(a). We do not see anything in the text of Article 3.1 that would suggest that the phrase "pertinent issues of fact or law" should be read narrowly to exclude the circumstances set out in the first clause of Article XIX:1(a). In particular, while the United States argues that the Agreement on Safeguards does not refer to these circumstances (unlike the conditions in the second clause of Article XIX:1(a), which are clarified in Articles 2, 3, and 4 of this agreement), we do not consider such an omission to be dispositive or relevant to our determination. We note that Article XIX:1(a) and the Agreement on Safeguards apply cumulatively when a Member applies a safeguard measure.[45] Since they apply cumulatively, they both could give rise to "pertinent issues of fact and law" in equal measure.

7.21. We are also not persuaded by the parallel the United States draws between Article 5.1 of the Agreement on Safeguards and the first clause of Article XIX:1(a) of the GATT 1994. Article XIX:1(a) provides for a safeguard measure when increased imports are "as a result of" unforeseen developments and the effect of the obligations incurred. Indeed, unless these circumstances are demonstrated as a matter of fact, the right to apply a safeguard measure does not arise. However, Article 5.1 concerns the application of the safeguard measure.[46] A Member's application of a measure will follow, not precede, an assessment of whether it has a right to apply a safeguard measure in the first place. Therefore, we are not persuaded by the United States' argument based on the parallel between Article 5.1 of the Agreement on Safeguards and the first clause of Article XIX:1(a) of the GATT 1994.

7.22. Therefore, we find that "unforeseen developments" and the "effect of GATT 1994 obligations" within the meaning of the first clause of Article XIX:1(a) of the GATT 1994 are "pertinent issues of fact or law" under Article 3.1 of the Agreement on Safeguards. Accordingly, competent authorities must set out in their published report their findings and reasoned conclusion on "unforeseen developments" and the "effect of GATT 1994 obligations". We consider below whether the USITC did so in its published report.

7.2.2 Unforeseen developments

7.23. In presenting its claim, Korea asserts that the USITC (a) did not demonstrate in its published report the existence of "unforeseen developments"; and (b) did not establish a link between those "unforeseen developments" and the increase in imports causing or threatening to cause serious injury to the domestic industry.[47]

[44] Appellate Body Report, *US – Lamb*, para. 76; Panel Report, *Ukraine – Passenger Cars*, para. 7.56.
[45] Appellate Body Reports, *Argentina – Footwear (EC)*, para. 89; *Korea – Dairy*, paras. 74-75 and 77.
[46] We note in this regard that while the United States' Article 5.1 argument is based on the report of the Appellate Body in *US – Line Pipe*, the Appellate Body noted in that case that there are two basic enquiries that an interpreter faces under the Agreement on Safeguards. First, whether there is a right to apply a safeguard measure and second, whether that measure has been applied, in the words of Article 5.1, "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". The Appellate Body noted that it is this second enquiry that is addressed in the first sentence of Article 5.1. (Appellate Body Report, *US – Line Pipe*, para. 225).
[47] Korea's first written submission, para. 85; second written submission, paras. 47 and 72.

7.24. We found above that findings and reasoned conclusions on "unforeseen developments" must be set forth in the report of the competent authorities. The USITC report does not contain a finding on "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994, as the United States confirms.[48] However, the United States submits that the USITC report provides explanations of circumstances that qualify as "unforeseen developments".[49] The United States specifically refers to the following statement in the USITC report:

> Whirlpool and GE state that they did not foresee that LG and Samsung would move their production of LRWs for the U.S. market first from Korea and Mexico to China, and then from China to Thailand and Vietnam, and escape the disciplining effect of the resulting antidumping and countervailing duty orders, moves that in Whirlpool's view would have cost hundreds of millions of dollars.[50]

7.25. In the United States' view these observations demonstrate the existence of "unforeseen developments" because, if knowledgeable industry participants (i.e. Whirlpool Corporation (Whirlpool) and GE Appliances (GE)) did not foresee such rapid shifts in production in the 2012-2016 period, it follows that the Uruguay Round negotiators did not foresee such events 18 years earlier.[51] We do not consider these references to be sufficient to meet the United States' obligation under Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards.

7.26. We note that the part of the report referred to by the United States describes a statement by the domestic producers. The USITC did not make this statement or endorse it in any way. Nor does this reference suggest that the USITC understood the scenario described in the domestic producers' statement to be an unforeseen development within the meaning of Article XIX:1(a) of the GATT 1994. Indeed, as noted above, the United States confirms that the USITC report does not contain a finding on "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994. In the absence of such a finding in the USITC report, we conclude that the USITC has not demonstrated the existence of unforeseen developments under Article XIX:1(a) of the GATT 1994. Having reached this conclusion, we do not find it necessary to address Korea's additional argument that the USITC did not establish a link between those "unforeseen developments" and the increase in imports causing or threatening to cause serious injury to the domestic industry.

7.27. Based on the foregoing, we find that the USITC acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards. Considering our findings on these provisions, we do not find it necessary to address Korea's consequential claim under Article 1.

7.2.3 Effect of the obligations incurred under the GATT 1994

7.28. We found above that findings and reasoned conclusions on the "effect of GATT 1994 obligations" must be set forth in the report of the competent authorities. Unlike the situation on unforeseen developments, where the United States acknowledged that the USITC report did not contain any finding within the meaning of Article XIX:1(a) of the GATT 1994, the United States contends that the USITC report explicitly demonstrates that the United States incurred obligations, in the form of tariff concessions, with respect to the products at issue in this proceeding.[52] The United States asserts that these tariff concessions prevented the United States from increasing applied tariffs so as to modulate the increase in imports.[53]

7.29. Korea argues in this regard that the USITC report failed to identify the relevant obligations incurred under the GATT 1994, and to establish a link between the effect of those obligations and the increase in imports causing or threatening to cause serious injury to the domestic industry.[54] In Korea's view, a Member imposing a safeguard measure must demonstrate not only the existence of the obligations incurred under the GATT 1994 *per se*, but also the effects that such obligations have

[48] United States' response to Panel question No. 51, para. 91.
[49] United States' response to Panel question No. 51, para. 91.
[50] USITC report, (Exhibit KOR-1), p. 36 and fn 219.
[51] United States' response to Panel question No. 51, para. 92.
[52] United States' first written submission, para. 54.
[53] United States' first written submission, para. 54.
[54] Korea's first written submission, paras. 59 and 80; second written submission, para. 51.

produced.[55] Korea contends that a competent authority must explain how the effects of the obligations under the GATT 1994 have resulted in the increase in imports causing or threatening to cause serious injury to the domestic industry, i.e. that there must be a "logical connection" between the effects of the GATT 1994 obligation and the increased imports.[56] Korea notes that the USITC report contains a description of the tariff lines at issue, including the applicable most favoured nation (MFN) rates.[57] However, according to Korea, the description of the applicable tariff lines is "out-of-context" because there is neither a discussion of whether the applied rates are equal to the bound rates nor a reference to WTO tariff commitments or any other GATT 1994 obligations.[58]

7.30. The United States responds that the tariff concessions speak for themselves, because they reflect WTO bound rates that limit the United States' ability to reduce imports by raising tariffs.[59] According to the United States, no additional context is needed in the identification of such tariff concessions because the Schedules of Concessions annexed to the GATT 1994 are made an integral part of Part I of that Agreement pursuant to paragraph 7 of Article II of the GATT 1994.[60]

7.31. We begin our analysis with Korea's argument that the USITC report failed to identify the relevant obligations incurred by the United States under the GATT 1994 with respect to the products at issue.

7.32. The relevant passage in the USITC report, to which both parties refer, provides as follows:

> U.S. tariff treatment
>
> Finished LRWs are classifiable in subheading 8450.20.0063 of the Harmonized Tariff Schedule of the United States ("HTS"), which has a general tariff duty rate of 1 percent *ad valorem*. Parts and subassemblies covered by the scope of the investigation are classified under HTS subheading 8450.90.20, which provides for tubs and tub assemblies, and HTS subheading 8450.90.60, which provides for other parts. These two subheadings … each have a general duty rate of 2.6 percent *ad valorem*.[65] Decisions on the tariff classification and treatment of imported goods are within the authority of U.S. Customs and Border Protection.
>
> [65] Harmonized Tariff Schedule of the United States (2017). Under the U.S.-Israel FTA, the Caribbean Basin Economic Recovery Act ("CBERA") or the Generalized System of Preferences ("GSP") program, the rate of duty is 0 percent.[61]

7.33. We note that the USITC identified the subheadings of LRWs and LRW parts and their applicable tariff rates under the Harmonized Tariff Schedule of the United States. There is no dispute between the parties in this regard.[62] However, the passage does not refer to the United States' bound tariff rate under its WTO Schedule XX or any other obligations under the GATT 1994. In particular, we note that the United States asserts that the tariff rates under the Harmonized Tariff Schedule of the United States are the tariff concessions that the United States made, which prevented it from increasing applied tariffs so as to modulate the increase in imports. However, the USITC report does not identify them as the tariff concessions undertaken under the GATT 1994, which prevented it from increasing applied tariffs so as to modulate the increase in imports. Consequently, there is no basis for us to conclude that the USITC report contains a reasoned and adequate explanation of the obligations incurred by the United States under the GATT 1994 with respect to LRWs and LRW parts, within the meaning of Article XIX:1(a) of the GATT 1994. In light of this finding, we do not consider it necessary to address Korea's additional argument that the USITC did not establish a link between

[55] Korea's response to Panel question No. 46, paras. 214-218 (quoting Panel Reports, *Dominican Republic – Safeguard Measures*, para. 7.146; and *Ukraine – Passenger Cars*, para. 7.96).

[56] Korea's first written submission, para. 73; second written submission, para. 77; and response to Panel question No. 46, para. 214.

[57] Korea's response to Panel question No. 49, para. 221; second written submission, para. 73.

[58] Korea's response to Panel question No. 49, para. 221; second written submission, paras. 74-76.

[59] United States' second written submission, para. 20.

[60] United States' second written submission, para. 21 (referring to Appellate Body Report, *Korea – Dairy*, para. 84).

[61] USITC report, (Exhibit KOR-1), p. I-24. (fn omitted)

[62] Korea's response to Panel question No. 49, para. 221; second written submission, para. 74; United States' response to Panel question No. 45, para. 81; and second written submission, para. 19.

the effect of those obligations and the increase in imports causing or threatening to cause serious injury to the domestic industry.

7.34. Based on the foregoing, we find that the USITC acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards. Considering our findings on these provisions, we do not find it necessary to address Korea's consequential claim under Article 1.

7.2.4 Conclusion

7.35. In light of the above, we find that the USITC acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards because its report does not contain a reasoned and adequate explanation on "unforeseen developments" and the "obligations incurred" by the United States, within the meaning of Article XIX:1(a) of the GATT 1994. We do not find it necessary to address whether the USITC also acted inconsistently with Article 1 of the Agreement on Safeguards for these same reasons.

7.3 The USITC's definition of the domestic industry

7.36. In the underlying safeguard investigation, the USITC defined the product under consideration (PUC) as LRWs and certain parts of LRWs (covered parts).[63] It specifically excluded belt-driven washers from the PUC.[64] Based on an analysis of physical properties, customs treatment, manufacturing process, uses, and marketing channels, the USITC concluded that the belt-driven washers produced by the domestic industry were like the LRWs that were included within the PUC.[65] Therefore, the USITC included the producers of belt-driven washers within the domestic industry producing the like product, even though it had specifically excluded imported belt-driven washers from the scope of the PUC.

7.37. With respect to covered parts, the USITC noted that the petitioner acknowledged that imported covered parts did not compete with domestically produced covered parts because they may only be installed in specific LRW models for purposes of repairing them.[66] The USITC however determined that domestic covered parts were "like" imported covered parts based on an assessment of their physical properties, customs treatment, manufacturing process, uses[67], and marketing channels.[68] The USITC then stated that "[e]ven if domestically produced parts were not like imported parts … [it] would still define the domestic industry to include domestic production of such parts pursuant to the 'product line' approach".[69] In referring to this product line approach, the USITC stated that it also included covered parts in its definition of the domestic industry based on the vertically integrated nature of domestic parts and LRW production.[70]

7.38. Having defined the domestic like or directly competitive domestic product as LRWs, PSC/belt drive TL LRWs, CIM/belt drive FL LRWs and covered parts, the USITC defined the domestic industry as "all domestic producers of LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts".[71]

7.39. Korea challenges the USITC's definition of the domestic industry on the grounds that:

a. first, the USITC acted inconsistently with Articles 2.1, 3.1, and 4.1(c) of the Agreement on Safeguards by including producers of belt-driven washers in the

[63] The covered LRW parts included the three largest components of a washer, i.e. "(1) [a]ll cabinets, or portions thereof, designed for use in [LRWs]; (2) all assembled tubs designed for use in [LRWs] which incorporate, at a minimum: (a) [a] tub; and (b) a seal; (3) all assembled baskets designed for use in [LRWs] which incorporate, at a minimum: (a) [a] side wrapper; (b) a base; and (c) a drive hub; and (4) any combination of the foregoing parts or subassemblies". (USITC report, (Exhibit KOR-1), pp. 7 and I-7).

[64] USITC report, (Exhibit KOR-1), pp. 8 and I-8-I-9.

[65] USITC report, (Exhibit KOR-1), pp. 15-16.

[66] USITC report, (Exhibit KOR-1), p. 16.

[67] The USITC stated that "[d]omestically produced and imported covered parts share the same general functionality *when installed in LRWs*". (USITC report, (Exhibit KOR-1), p. 17 (emphasis added)).

[68] USITC report, (Exhibit KOR-1), pp. 16-17. The USITC considered that like products need not be directly competitive. (Ibid. fn 78 and p. 16).

[69] USITC report, (Exhibit KOR-1), p. 17. See also, ibid. p. 19.

[70] USITC report, (Exhibit KOR-1), p. 19.

[71] USITC report, (Exhibit KOR-1), p. 19.

domestic industry while excluding such washers from the PUC without providing a reasoned and adequate explanation in support of this decision;

b. second, the USITC acted inconsistently with Articles 2.1 and 4.1(c) in finding that domestically produced covered parts were "like" imported covered parts, even though those parts did not compete[72]; and

c. third, the USITC acted inconsistently with Article 4.1(c) by applying the "product line approach" to define the domestic industry.[73]

7.40. In reviewing Korea's claims, we note that Article 4.1(c) of the Agreement on Safeguards reads as follows:

> For the purposes of this Agreement:
>
> …
>
> (c) [I]n determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

7.41. The text of Article 4.1(c) envisages that in defining the "domestic industry", the first step is to identify the products that are "like or directly competitive" with the PUC.[74] The text of Article 4.1(c) also suggests that an investigating authority must include in its consideration all products that are like or directly competitive with the PUC, and may not exclude certain like or directly competitive products, and ultimately their producers from the domestic industry.[75]

7.42. Article 2.1 of the Agreement on Safeguards reads:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic

[72] In response to our questions, Korea clarified that it challenges the USITC's inclusion of parts within the domestic industry because such parts were not like or directly competitive with the PUC (neither imported LRWs nor imported LRW parts). (Korea's responses to Panel question No. 5, paras. 28-29 and 32-34; and No. 6, paras. 37-40; opening statement at the second meeting of the Panel, para. 33). The USITC did not find that domestic LRW parts were "like or directly competitive" with LRW units, and neither party disputes this fact. Therefore, this part of Korea's claim hinges on whether the USITC properly determined that domestic covered parts were "like or directly competitive" with imported covered parts. The USITC found that domestic covered parts were like (but not directly competitive with) imported covered parts. We address Korea's challenge against this finding in section 7.3.2 below.

[73] Korea also claims that as a consequence of the improper definition of the domestic industry, the USITC's determination of serious injury and causation is equally flawed and was inconsistent with Articles 4.2(a) and 4.2(b) of the Agreement on Safeguards. (Korea's first written submission, paras. 231-233). Korea repeats these claims in the sections of its submissions challenging the USITC's findings on serious injury and causation. (Korea's first written submission, paras. 321-327 and 457-461). We address these consequential claims in sections 7.5.4 and 7.6.3 below, and do not find it necessary to separately address them in this section of the Report.

[74] The parties agree with this approach, which has been adopted in previous DSB reports. (See, e.g. Appellate Body Report, *US – Lamb*, paras. 84 and 87; and Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.174; see also Korea's first written submission, para. 169; and United States' first written submission, para. 124). We use the term "domestically produced good" to refer to "like or directly competitive" goods.

[75] This was the approach taken in Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.191 and 7.199. The parties agree that an investigating authority may not exclude domestic goods that are like or directly competitive with the PUC. (Korea's first written submission, paras. 172-174; second written submission, para. 132; response to Panel question No. 2, para. 13; United States' first written submission, paras. 127, 163, and 165; and second written submission, para. 34).

> production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.[76]

7.43. Article 3.1 of the Agreement on Safeguards, set out in paragraph 7.9 above, requires that investigating authorities publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

7.44. Article 4.2(a) of the Agreement on Safeguards reads:

> In the investigation to determine whether increased imports have caused or threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

7.45. Finally, Article 4.2(b) of the Agreement on Safeguards reads:

> The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

7.3.1 Inclusion of belt-driven washers within the scope of the domestically produced good

7.46. In the underlying investigation the USITC excluded belt-driven washers from the PUC. Korea does not challenge the USITC's definition of the PUC.[77] The USITC determined that domestically produced LRWs (including belt-driven washers) were "like" the LRWs included in the PUC.[78] Korea also does not challenge the USITC's likeness determination in this regard. Having found belt-driven washers to be "like" the PUC, the USITC included such washers within the scope of the domestic industry.

7.47. While Korea does not challenge either the USITC's PUC definition, or its determination that belt-driven washers were "like" the LRWs included in the PUC, Korea claims that the USITC acted inconsistently with Article 4.1(c) of the Agreement on Safeguards by including belt-driven washers in the scope of the domestic industry, while expressly excluding them from the PUC without providing a reasoned and adequate explanation in support of this decision.[79] The United States rejects Korea's arguments in this regard.[80]

7.48. The question that we must resolve is whether the USITC acted inconsistently with Article 4.1(c) by including belt-driven washers within the scope of the domestic industry on the basis of its finding that such washers were "like" LRWs included in the PUC, even though such washers were expressly excluded from the PUC.

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[76] Fn omitted.

[77] Korea acknowledges that the Agreement on Safeguards does not impose disciplines on how an investigating authority may define the PUC. (Korea's response to Panel question No. 2, para. 12).

[78] The USITC stated that domestically produced belt-driven washers were "like, or at least directly competitive with" imported LRWs. (USITC report, (Exhibit KOR-1), p. 15). During these Panel proceedings, the United States clarified that despite the reference to "like, or at least directly competitive", the USITC did not evaluate whether belt-driven washers and imported LRWs were "directly competitive". (United States' response to Panel question No. 4, para. 1).

[79] Korea also makes an additional claim under Article 2.1. Considering that the factual basis of Korea's claim under Article 2.1 is the same as its claims under Articles 3.1 and 4.1(c), we focus the present analysis on Korea's claims under Articles 3.1 and 4.1(c).

[80] United States' first written submission, paras. 159-169; second written submission, paras. 31-35.

7.49. Article 4.1(c) defines a "domestic industry" as "producers … of the like or directly competitive products". As noted above, the starting point in defining the domestic industry is the identification of products that are "like or directly competitive" with the PUC.[81] Having identified the domestically produced product that is "like or directly competitive" with the PUC, Article 4.1 then requires investigating authorities to define the domestic industry as "producers as a whole" of that product, or "those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products".

7.50. In the underlying investigation, as noted above, having found domestically produced belt-driven washers to be "like" the PUC, the USITC included them within the scope of the domestically produced good. Korea contends that the USITC thereby acted inconsistently with Article 4.1(c) because the USITC created a deliberate mismatch between the PUC and the domestically produced good by excluding belt-driven washers from the PUC and including them in the domestically produced good.[82] Korea also notes in this regard that the lack of parallelism between the PUC and the domestically produced good created a material risk of distortion in the serious injury and causation determinations.[83] In response to our questions, where we sought to understand the textual basis of Korea's claim under Article 4.1(c), Korea acknowledged that the domestic industry must include all producers of products that are like or directly competitive with the PUC.[84] However, Korea maintains that where an investigating authority excludes certain models from the PUC and includes producers of those models in the domestic industry, such investigation would not be objective.[85] This is because, according to Korea, each successive stage of a safeguard investigation is related to, and often dependent on, the outcomes of preceding stages, which must inform the interpretation of the provisions relating to each stage.[86] Korea points to the requirement to undertake an investigation that is not biased but "systematic" and "careful" under Article 3.1 to support its assertion.[87]

7.51. We agree with Korea that the definition of the domestic industry affects subsequent stages of an investigating authority's determination (such as the serious injury and causation determinations). However, the Agreement on Safeguards provides a specific definition of the domestic industry in Article 4.1(c), and requires that the subsequent stages of the investigation be conducted based on a domestic industry defined in accordance with this provision. Neither Article 4.1(c) nor any other provision of the Agreement on Safeguards (including the provisions governing the subsequent

[81] See para. 7.41 above. See also Appellate Body Report, *US – Lamb*, paras. 84 and 87; and Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.174.

[82] Korea's first written submission, paras. 197-201 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 416); response to Panel question No. 2, para. 15. In our view, the findings of the Appellate Body report that Korea relies on do not apply to this case. The issue before the Appellate Body was whether excluding otherwise eligible domestic producers from the scope of the domestic industry was inconsistent with Article 4.1 of the Anti-Dumping Agreement. The Appellate Body found that such exclusion was inconsistent and stated that an investigating authority bears the obligation to ensure the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and consequently distorting its analysis of the state of the industry. (Appellate Body Report, *EC – Fasteners (China)*, paras. 414-416 and 427-430). However, the issue here is whether, having determined that belt-driven washers were "like" imported LRWs, the USITC erred by including producers of belt-driven washers in the domestic industry, having excluded them from the PUC. Further, Korea submits that the USITC failed to define the like domestic product as that "identical" to the PUC. (Korea's second written submission, para. 133 (referring to Panel Report, *Korea – Certain Paper*, paras. 7.219-7.220)). However, the Agreement on Safeguards does not require that the domestic product be *identical* to the PUC; rather, the requirement is that the domestic product be "like or directly competitive" with the PUC.

[83] Korea's first written submission, paras. 202-205 (referring to Appellate Body Report, *US – Steel Safeguards*, paras. 440-444 and 466-468). We note that the concept of "parallelism" as applied in the Appellate Body reports that Korea cites was developed in the context of whether investigating authorities that have conducted investigations considering imports from *all sources* may exclude imports from certain sources from application of a safeguard measure. The Appellate Body found that investigating authorities would have to establish that the imports covered by the safeguard measures satisfy, in and of themselves, conditions for application of the measures (such as increased imports). (Appellate Body Reports, *US – Steel Safeguards*, paras. 439-444; *US – Wheat Gluten*, paras. 95-96). The facts in this dispute, and indeed the issue at hand, are different from that addressed in those Appellate Body reports.

[84] Korea's response to Panel question No. 2, paras. 10 and 13 (referring to Panel Reports, *Dominican Republic – Safeguard Measures*, para. 7.191; and *EC – Salmon (Norway)*, para. 7.115).

[85] Korea's response to Panel question No. 2, para. 14.

[86] Korea's response to Panel question No. 2, para. 5.

[87] Korea's response to Panel question No. 2, para. 14 (referring to Appellate Body Report, *US – Wheat Gluten*, paras. 53-54, in turn cited in Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.185).

conduct of the investigation, such as Articles 4.2(b) and 4.2(c)), impose any additional requirements precluding what Korea describes as a "mismatch" between the PUC and the domestically produced good. Article 4.1(c) requires that the domestic industry be defined on the basis of producers of goods that are "like or directly competitive" with the PUC. To the extent the domestic industry is defined based on the producers of like or directly competitive products, there is no additional requirement under Article 4.1(c) for a "match" between the PUC and the domestically produced good. Indeed, accepting Korea's position would mean that the investigating authority would have to exclude a producer of like or directly competitive goods from the scope of the domestic industry because the domestic product, while like or directly competitive, is essentially not the same as (or to use Korea's words, does not "match") the goods included in the PUC. This is at odds with the text of Article 4.1(c). We consider that if Article 4.1(c) were intended to preclude investigating authorities from defining the domestic industry on the basis of goods that are like or directly competitive but not a "match", the provision would have been drafted differently.

7.52. We also note Korea's reliance on Article 3.1 of the Agreement, which provides that authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. Korea argues that this provision requires an investigating authority to make an objective examination and to provide reasoned and adequate explanations in support of its determination.[88] However, in our view, Article 3.1 does not provide any basis to impose substantive obligations on Members that are not provided under the Agreement on Safeguards.[89] Korea has not shown how the USITC's inclusion of belt-driven washers, which the USITC found to be like or directly competitive (a finding that Korea does not challenge) with the PUC, was inconsistent with Article 4.1(c) or any other substantive provision of the Agreement on Safeguards.

7.53. Based on the foregoing, we reject Korea's claims alleging that the USITC acted inconsistently with Articles 3.1 and 4.1(c) of the Agreement on Safeguards by including belt-driven washers in the scope of the domestically produced good. Considering that the factual basis of Korea's claim under Article 2.1 is the same as its claim under Articles 3.1 and 4.1(c), we also reject Korea's claim under this provision.

7.3.2 Likeness of domestically produced parts and imported parts of LRWs

7.54. In the underlying investigation, the USITC defined the PUC to include LRWs as well as certain covered parts of LRWs. The USITC defined the domestic industry based on producers of LRWs and certain covered parts of LRWs. The USITC included such domestically produced parts in the scope of the domestic industry based on its finding that such domestically produced parts of LRWs were *like* imported parts. However, the USITC also noted that, as the domestic industry petitioner acknowledged, imported LRW parts did not compete with domestically produced parts because they could only be installed in specific imported LRW models, for purposes of repairing them.[90] The parties disagree on whether the USITC properly found imported and domestically produced parts to be

[88] Korea's response to Panel question No. 3, paras. 20 and 23.

[89] Indeed, Korea appears to base its arguments on a general standard of "objectivity" that it seeks to derive from Article 3.1 of the Agreement on Safeguards, rather than on the text of Article 4.1(c) of the Agreement on Safeguards. In particular, Korea contends that it does not preclude that in certain situations there could be a good reason for having a domestic industry that includes certain product types that are not part of the covered imported product. However, per Korea when the mismatch is deliberate and when it is clear that this mismatch affected both the analysis of increased imports and the analysis of injury and causation, and when no plausible explanation of any kind is offered for this mismatch, a violation exists. (Korea's second written submission, para. 133). Korea does not refer to anything in the text of Article 4.1(c) that would support its view that even in scenarios where an investigating authority defines the domestic industry on the basis of domestically produced goods that are like or directly competitive with the PUC, we can find a violation under Article 4.1(c) because the mismatch between the PUC and the domestically produced good is "deliberate" and the mismatch affects the injury analysis and causation. Indeed, considering that determinations regarding the domestic industry obviously affect an investigating authority's injury and causation determinations, and that a decision regarding the PUC and the domestic industry is part of an active and deliberate decision-making process, the distinction drawn by Korea between a situation where there is a deliberate mismatch, which affects the injury and causation determination, and another situation that does not, is unclear. If the drafters of the Agreement on Safeguards intended WTO panels to distinguish between such situations, notwithstanding the text of Article 4.1(c), one would have expected additional rules in the Agreement on Safeguards to this effect.

[90] USITC report, (Exhibit KOR-1), p. 16.

like products, notwithstanding its finding that imported parts and domestically produced parts did not compete.

7.55. Korea contends that the USITC acted inconsistently with Articles 2.1 and 4.1(c) by finding such domestically produced parts to be "like" imported parts, even though they did not compete.[91] Korea notes in this regard that the USITC did not explain in its report how two groups of products that are not in a competitive relationship could nonetheless be considered "like".[92] In particular, Korea asserts that the USITC failed to address the abundant information on the record concerning the lack of competition between imported parts and domestic parts.[93] According to Korea, likeness is a subset of the concept of directly competitive products, and the determination of whether products are "like" is fundamentally "a determination about the nature and extent of a competitive relationship between and among products".[94] Korea argues that the conjunction "or" in the phrase "like or directly competitive products" indicates that the domestic industry may consist of producers of products in a "very close" or at least a "direct" competitive relationship with the PUC.[95] Thus, according to Korea, whereas "likeness" implies close to perfect substitutability ("a degree of competition that is higher than merely significant"), "directly competitive or substitutable" products would be those that compete to a lesser degree.[96]

7.56. The United States rejects Korea's arguments. The United States contends that the text of the Agreement on Safeguards makes clear that a domestic article "like" an imported article subject to investigation need not be "directly competitive" with the imported article. The United States observes in this regard that Articles 2.1 and 4.1(c) of the Agreement on Safeguards define "domestic industry" in the disjunctive as the producers of like "or" directly competitive products. Pointing to this use of the disjunctive "or", the United States maintains that investigating authorities may define the domestic industry to include producers of like products, or producers of directly competitive products.[97] For the United States, this means that not every domestically produced product that is "like" an imported product subject to investigation will be "directly competitive" with that imported product. According to the United States, Korea's construction of the word "like" to mean "close to perfect a substitute", "perfectly competitive", or "in intense competition" would mean that all domestic producers of "like" products would necessarily also produce "directly competitive" products, which would read the term "like" out of Article 4.1(c) of the Agreement on Safeguards.[98]

7.57. The question we must resolve is whether the USITC provided a reasoned and adequate explanation to support its determination that imported and domestically produced parts were like, notwithstanding its finding that they did not compete. In doing so, we (a) first consider the legal obligations imposed under Article 4.1(c), which requires an investigating authority to define the domestic industry based on the producers of "like or directly competitive" products, and specifically the nature of obligations imposed in relation to a likeness assessment; and (b) then evaluate, based on the explanations provided by the USITC in its report, whether the USITC complied with such obligations.

7.58. We note in this regard that Article 4.1 defines the domestic industry as producers of "like or directly competitive" products. The parties disagree on the meaning of the conjunction "or" in this phrase. In our view, it is possible that the use of the conjunction "or" in Article 4.1(c) indicates that

[91] Korea's first written submission, paras. 217-230.

[92] Korea's first written submission, para. 222.

[93] Korea's first written submission, paras. 218-224 (referring to Large Residential Washers, Joint Prehearing Brief on Behalf of Respondents Regarding Injury (30 August 2017) (excerpts) (Excerpt from LG and Samsung's prehearing injury brief), (Exhibit KOR-11), pp. 32-36; and USITC report, (Exhibit KOR-1), p. 16).

[94] Korea's first written submission, paras. 225-226 (quoting Appellate Body Reports, *EC – Asbestos*, para. 99; and *Philippines – Distilled Spirits*, para. 170; and *EC – Seal Products*, para. 5.82).

[95] Korea's opening statement at the second meeting of the Panel, paras. 43-44; see also closing statement at the first meeting of the Panel, para. 26.

[96] Korea's second written submission, para. 139; response to Panel question No. 5, para. 30. See also Korea's opening statement at the second meeting of the Panel, para. 37. Korea subsequently clarified that it is challenging the USITC's definition of the domestic industry because "no competitive overlap whatsoever existed between the imported and domestic parts", and not because the imported and domestic parts are not "close to perfect substitutes". (Korea's opening statement at the second meeting of the Panel, para. 42).

[97] United States' first written submission, paras. 176-178; response to Panel question No. 10, para. 8; and second written submission, paras. 40 and 47.

[98] United States' second written submission, paras. 47 and 50; opening statement at the second meeting of the Panel, para. 11; closing statement at the second meeting of the Panel, para. 8; and response to Panel question No. 67(b), para. 4.

the concept of likeness is distinct from the concept of direct competitiveness, as the United States submits. However, that term might also indicate, as Korea argues, that an investigating authority is permitted to include products (for the purpose of defining the domestic industry) that, even though they are not like imported products (because for instance they have different physical characteristics), are nevertheless directly competitive with imported products. Therefore, the use of the conjunction "or" does not dispositively answer the question before us, which is whether two products that have been found to not compete may nonetheless be considered "like". Instead, the answer to that question depends on how the term "like" is to be understood in the context of Article 4.1(c). Consistent with the rule of interpretation set out under Article 31 of the Vienna Convention, we interpret Article 4.1(c) in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty object and purpose.

7.59. The Agreement on Safeguards does not define the term "like". The Oxford English Dictionary defines "like" as "[o]f similar or identical shape, size, colour, character, etc., to something else; having the same or comparable characteristics or qualities as some other person or thing; similar; resembling; analogous".[99] The United States also refers to the Webster Dictionary definition of "like", which is "the same or nearly the same (as in nature, appearance, or quantity)".[100] We also note that the Anti-Dumping Agreement and the SCM Agreement, which require investigating authorities in anti-dumping and countervailing duty investigations respectively to define the domestic industry based on producers of like products, define like product as a product (a) which is identical, i.e. alike in all respects to the PUC; or (b) in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the PUC. These definitions do not resolve the issue of whether, and if so how and to what extent, competitive relations between imported and domestic products need to be considered as part of a likeness determination.[101] However, when we interpret Article 4.1(c) in the context of Article 4 of the Agreement on Safeguards as a whole, and specifically Articles 4.2(a) and 4.2(b), the meaning of likeness in Article 4.1(c) becomes clearer.

7.60. Article 4 of the Agreement on Safeguards is titled "[d]etermination of serious injury or threat thereof", and sets out the negotiated rules governing such determination. In particular, Article 4.1(a) defines "serious injury" as a significant overall impairment in the position of the domestic industry. Article 4.2(a), in turn, provides that in "the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry" the investigating authorities shall evaluate relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry. Article 4.2(b) then requires demonstration of a causal link between increased imports and serious injury to the domestic industry. These provisions show that the domestic industry must be defined in a manner that would allow the investigating authority to subsequently determine whether there is a causal link between increased imports and serious injury to the domestic industry. Indeed, it is clear from the text of Article 4.1(c) ("in determining injury or threat thereof") that the domestic industry is defined for purposes of determining injury or threat to it from increased imports.[102]

7.61. Korea argues in this regard that the demonstration of a causal link required under Article 4.2(b) between increased imports and serious injury to the domestic industry cannot be made if imported and domestically produced goods are not in competition with one another.[103] Japan and

[99] Oxford English Dictionary online, definition of "like", meaning A.1.a https://oed.com/view/Entry/108302?rskey=BJNhyu&result=3#eid (accessed 16 August 2021).

[100] United States' first written submission, para. 126; second written submission, para. 39 (both quoting *Webster's Third New International Dictionary Unabridged* (1981), p. 1310).

[101] We note that the definition of "like" in Article 2.6 of the Anti-Dumping Agreement suggested to the panel in *Korea – Pneumatic Valves* that it would be expected that allegedly dumped imports compete with the domestic like product. In that panel's view, if they did not, it would be "difficult to imagine on what basis a domestic industry could properly allege that dumped imports were causing injury to the domestic industry producing the like product, so as to justify the initiation of an investigation". (Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.275).

[102] We also note that Article 2.1 requires a Member to determine that a product that is subject to a safeguard measure is imported under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. This provision links the increased imports under consideration to their ability to cause or threaten to cause serious injury, an analysis undertaken under Article 4. Article 2.1, read together with Article 4 as a whole, therefore supports our understanding that the domestic industry must be defined in a manner that would permit the subsequent determination of serious injury or threat.

[103] Korea's response to Panel question No. 10, para. 51.

the European Union as third parties take the view that causation of injury requires that a competitive relationship exist between the imported and the domestically produced goods.[104]

7.62. The United States contends in this regard that the Agreement on Safeguards requires a determination of the effect of the imported product as a whole on the domestic producers as a whole, and does not require separate analyses or determinations of each discernible subset of the imported product and the domestically produced good.[105] The United States also submits that where the PUC comprises a range of products, an investigating authority could determine that increased imports are causing serious injury even though a subset of imported products do not compete with a subset of products produced by the domestic industry.[106] In particular, per the United States, when certain types of subject imports within the PUC increase while other types do not, an investigating authority must consider the pertinent conditions of competition in assessing whether increased imports seriously injured the domestic industry.[107] In the United States' view, such conditions of competition might include the degree of substitutability between each type of imported and domestically produced good, the product mix of imported and domestically produced goods, and the effects of any indirect competition between increased subject imports and domestically produced goods that are not otherwise directly competitive with the imports.[108] The United States illustrates that such type of indirect competition could exist where imports of LRW parts that do not directly compete with either domestic parts or finished products may nevertheless have an indirect impact on domestic producers of parts and finished products if they are assembled into finished products in domestic screwdriver operations that do not change the fundamental character of the parts.[109]

7.63. In resolving Korea's claim, we note that the USITC did not find LRWs and LRW parts to be part of the same domestic like product. Instead, the USITC included LRW parts in the definition of the domestic industry based on its finding that imported LRW parts were like domestically produced parts. Therefore, we determine whether the USITC's finding that domestically produced parts were "like" imported parts was consistent with Article 4.1(c) of the Agreement on Safeguards.[110]

7.64. In making that determination, we do not need to exhaustively define what "like" under Article 4.1(c) could or could not mean, especially considering the drafters chose to not define the term in the Agreement on Safeguards. Instead, we need to determine whether Article 4.1(c) precluded the USITC from finding that imported and domestic parts were like products, given its finding that the two did not compete. Interpreting Article 4.1(c) in the context of Article 4 as a whole suggests to us that products that are not in any type of competitive relation with each other could not cause serious injury or threat thereof to one other. In particular, we note that Article 4.1(c) opens with the phrase "in determining injury or threat thereof", which, along with overall context provided by Article 4, specifically Articles 4.2(a) and 4.2(b), suggests that the domestic industry must be defined in a manner that allows the investigating authority to determine whether increased imports have caused or are threatening to cause serious injury to that industry. To the extent an investigating authority finds that two products are not in any competitive relation, we do not see how a domestic industry that is defined in a manner that excludes the possibility of subsequently determining that increased imports have caused or threatened to cause serious injury to that

[104] Japan's third-party response to Panel question No. 1, paras. 1-3; European Union's third-party response to Panel question No. 1, paras. 3-4.

[105] United States' response to Panel question No. 10, para. 9.

[106] United States' response to Panel question No. 11, para. 14.

[107] United States' response to Panel question No. 11, para. 14.

[108] United States' response to Panel question No. 11, para. 14.

[109] United States' response to Panel question No. 11, para. 14.

[110] We note that in its third-party statement, the European Union argued that because LRW parts are used to repair the respective LRW units, the market for LRW parts may constitute an "aftermarket", while the market for LRW units would be the "primary market". The European Union considered that it is possible that the interaction between the primary market (LRW units) and the aftermarket (LRW parts) form one "system market", so that competition would take place between LRW systems. In its view, if one single domestic market exists for LRW units and parts, within that market, imported and domestic LRW parts would be "directly competitive" with each other because competition would follow from the competition at the system level. (European Union's third-party submission, paras. 34-40). We note that the USITC did not take such "system market" approach in the underlying investigation. Therefore, whether such approach would be consistent with Article 4.1(c) is not an issue in the matter before us.

domestic industry (defined on the basis of producers of the like product, which here is covered parts) would be consistent with Article 4.1(c).[111]

7.65. That being said, we recognize that competition in a market can manifest itself in various ways. Indeed, competition is not limited to situations where imported and domestic products are close to perfectly substitutable. Thus, to the extent Korea takes the view that "like" under Article 4.1(c) requires close to perfect substitutability between imported and domestic products, we disagree. We see no textual basis for such a view. To the extent an imported product that is not perfectly substitutable with the domestically produced good has the capacity to cause serious injury to that good through some form of competitive impact, we do not see any basis to interpret "like" in Article 4.1(c) to exclude such goods. Instead, an investigating authority is entitled as part of its causation determination to examine whether that imported product did cause injury to the domestic industry through that competitive effect. We do not consider that the drafters of the Agreement on Safeguards would have intended the domestic industry to be defined in a way that would preclude the investigating authority from making such a causation determination. However, while we recognize that competition can manifest itself in various ways, we do not consider that "like" under Article 4.1(c), interpreted in the context of Article 4 as a whole and Article 2.1, covers products that have been found not to have any competitive relation with imported products.

7.66. In the underlying investigation, the USITC specifically found that imported and domestically produced parts did not compete. We note that the United States alludes to different ways in which conditions of competition could manifest in the market, including situations where imports of LRW parts that do not directly compete with either domestic parts or finished products may nevertheless have an indirect impact on domestic producers of parts and finished products if they are assembled into finished products in domestic screwdriver operations that do not change the fundamental character of the parts. However, the USITC did not undertake any such analysis alluded by the United States as part of its likeness analysis.[112]

7.67. Based on the foregoing, we find that the USITC did not find imported covered parts to be like domestically produced covered parts in a manner consistent with Article 4.1(c) of the Agreement on Safeguards in defining the domestic industry. Having reached this finding, we do not consider it necessary to make additional findings under Article 2.1 of the Agreement on Safeguards.

7.3.3 Product line approach

7.68. Korea contends that the USITC's decision to include parts in its definition of the domestic industry was partly based on the "product line approach".[113] Korea further contends that the USITC's application of the product line approach to define the domestic industry was inconsistent

[111] We also note as stated above, that in *Korea – Pneumatic Valves*, the panel considered that with respect to Article 2.6 of the Anti-Dumping Agreement, if allegedly dumped imports did not compete with the domestic like product, it would be "difficult to imagine on what basis a domestic industry could properly allege that dumped imports were causing injury to the domestic industry producing the like product, so as to justify the initiation of an investigation". (Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.275).

[112] See e.g. United States' response to Panel question No. 67(a), paras. 1-2. The United States clarified that the USITC did not undertake an analysis of any indirect competition between domestically produced and imported parts as part of its likeness analysis because LG and Samsung, the two Korean producers, had not yet commenced production of LRWs at their planned US LRW production facilities as of the date of the USITC's vote on injury. The United States explains that the USITC reasonably considered the likelihood of indirect competition from imports of covered parts in recommending safeguard remedy be imposed on parts. We also note that the United States suggests that the USITC found that domestic and imported covered parts competed as they "offer[ed] alternative ways of satisfying the same consumer demand in the marketplace". (United States' comments on Korea's response to question No. 67, fn 12 (referring to USITC report, (Exhibit KOR-1), p. 17)). However, we recall that the USITC stated that covered parts did not compete. Moreover, at the cited section of the USITC report, the USITC stated that "[d]omestically produced and imported covered parts share the same general functionality *when installed in LRWs*" (emphasis added). This statement does not imply that covered parts competed in the market. As the USITC noted, covered parts may only be installed in specific LRW models. (USITC report, (Exhibit KOR-1), p. 16).

[113] Korea's first written submission, para. 213; second written submission, para. 144; and response to Panel question No. 7, para. 44 (quoting USITC report, (Exhibit KOR-1), p. 19).

with Article 4.1(c).[114] According to Korea, inputs may not be included in the definition of the domestic industry unless they themselves constitute "like or directly competitive" products.[115]

7.69. The United States rejects Korea's contentions. First, the United States argues that the USITC did not apply the product line approach to define the domestic industry. Instead, the USITC defined the domestic industry based on producers of the like products alone, and only after doing so did the USITC explain that the product line approach supported its definition of the domestic industry.[116] Second, the United States maintains that the product line approach was consistent with Article 4.1(c) of the Agreement on Safeguards.[117]

7.70. In resolving this aspect of Korea's claim, we first determine whether the USITC applied the product line approach to define the domestic industry in the underlying investigation; and then, consider whether the USITC's application of the product line approach in the underlying investigation was consistent with the Agreement on Safeguards.

7.3.3.1 Whether the USITC applied the product line approach to define the domestic industry

7.71. In determining whether the USITC applied the product line approach to define the domestic industry in the underlying investigation, we note that the USITC found domestically produced parts to be like imported parts. The USITC then stated that "[e]ven if domestically produced parts were not like imported parts within the scope of the investigation, [it] would still define the domestic industry to include domestic production of such parts pursuant to the 'product line' approach discussed in the following section".[118] The USITC described the "product line approach" as the approach through which it included in the domestic industry all domestic facilities and workers involved in the production of a product like or directly competitive with the imported article, "including the various stages that might be involved in such production".[119] The USITC also provided the following explanation in relation to the product line approach:

> *In addition to finding that domestic covered parts are like imported covered parts, we include domestic covered parts production in our definition of the domestic industry based on the vertically integrated nature of domestic parts and LRW production*. … In this investigation, virtually all domestically produced LRWs are assembled from covered parts produced domestically in the same facilities as the LRWs. Accordingly, the production facilities producing assembled LRWs necessarily include the facilities for producing covered parts. *For this reason also, we include all domestic producers of covered parts in our definition of the domestic industry*.[120]

7.72. From the excerpts from the USITC report quoted above, we note that: first, the USITC stated that even if domestic and imported parts were not like, it would still define the domestic industry to include domestic production of parts pursuant to the product line approach.[121] Second, the USITC stated that "[i]n addition to finding that domestic covered parts are like imported covered parts, [the USITC] include[d] domestic covered parts production in [the] definition of the domestic industry *based on the vertically integrated nature of domestic parts and LRW production*".[122] The USITC then explained that in the LRW investigation, "virtually all domestically produced LRWs are assembled from covered parts produced domestically in the same facilities as the LRWs", and that "production facilities producing assembled LRWs necessarily include the facilities for producing covered parts". It added that "[f]or this reason also", the USITC included all domestic producers of covered parts in its definition of the domestic industry.[123] These statements indicate, as Korea argues, that the USITC

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[114] Korea's first written submission, paras. 213-215; second written submission, paras. 145-146 (referring to Appellate Body Report, *US – Lamb*, paras. 77 and 90).
[115] Korea's first written submission, para. 214 (referring to Appellate Body Report, *US – Lamb*, paras. 77 and 90).
[116] United States' responses to Panel question No. 8, para. 3; No. 9(a), paras. 4-5; and No. 9(b), para. 7.
[117] United States' first written submission, paras. 182-183; response to Panel question No. 9(a), para. 6.
[118] USITC report, (Exhibit KOR-1), p. 17.
[119] USITC report, (Exhibit KOR-1), p. 19.
[120] USITC report, (Exhibit KOR-1), p. 19. (fn omitted; emphasis added)
[121] USITC report, (Exhibit KOR-1), p. 17.
[122] USITC report, (Exhibit KOR-1), p. 19. (emphasis added)
[123] USITC report, (Exhibit KOR-1), p. 19.

did indeed apply the product line approach as one of the bases for its decision to include domestically produced parts in the scope of the domestic industry. Therefore, we now turn to examine whether the USITC acted inconsistently with Article 4.1(c) in applying the product line approach in the underlying investigation.

7.3.3.2 Whether the USITC acted inconsistently with Article 4.1(c) in applying the product line approach

7.73. Korea argues that the USITC's application of the product line approach was inconsistent with Article 4.1(c). Relying on previous DSB reports, Korea argues that inputs cannot be included in the definition of the domestic industry unless they themselves constitute "like or directly competitive products".[124] The United States argues that the USITC's product line analysis was justified under Article 4.1(c) because in its view, Article 4.1(c) requires investigating authorities to define a domestic industry as "producers *as a whole* of the like or directly competitive products".[125] According to the United States, where the domestic producers of a product manufactures various components internally for assembly into the article, nothing in the Agreement on Safeguards requires investigating authorities to limit their definition of the domestic industry to only the final assembly operations of those producers.[126]

7.74. The question before us is whether the USITC's application of its product line approach in the underlying investigation was inconsistent with the United States' obligations under Article 4.1(c), which requires the domestic industry to be defined based on domestic producers of "like or directly competitive" products.

7.75. We note in this regard that Article 4.1(c) states that the domestic industry shall be understood to mean "producers as a whole" of such like or directly competitive products. However, unlike the United States, we do not consider that the term "producers as a whole" permits investigating authorities to define the domestic industry on the basis of producers of intermediate products that are not "like or directly competitive" with the PUC. The term "producers as a whole" is followed by the phrase "or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". Read together with that subsequent phrase, we understand the term "producers as a whole" to address the number and the representative nature of producers making up the domestic industry. That is, an investigating authority may define the domestic industry based on, either (a) producers as a whole of the like or directly competitive products, or (b) producers whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products. Our views in this regard are consistent with previous DSB reports that also considered that the phrase "as a whole" does not imply that producers of other products, which are not themselves like or directly competitive with the imported product, may be included in the definition of the domestic industry.[127] Unless the input products are "like or directly competitive" with the imported PUC, we find no textual basis under Article 4.1(c) to include the producers of such inputs within the scope of the domestic industry. This is because, as we have explained, according to Article 4.1(c), the only textual basis for defining the domestic industry is on the basis of producers of like or directly competitive products.

7.76. Based on the foregoing, we find that the USITC's application of the product line approach was inconsistent with Article 4.1(c) of the Agreement on Safeguards.

7.3.4 Conclusion

7.77. In light of the above, with respect to Korea's claims under Articles 2.1, 3.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards challenging the USITC's definition of the domestic industry:

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[124] Korea's first written submission, paras. 214-215 (referring to Appellate Body Report, *US – Lamb*, paras. 77 and 90).

[125] United States' response to Panel question No. 9(a), para. 6 (emphasis added); second written submission, para. 54.

[126] United States' response to Panel question No. 9(a), para. 6.

[127] Appellate Body Report, *US – Lamb*, paras. 90-91. See also ibid. paras. 86-87.

a. We find that the USITC acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because it included LRW parts in the definition of the domestic industry based on (i) its finding of likeness between imported and domestically produced LRW parts, and (ii) its application of the product line approach. We do not find it necessary to address whether the USITC also acted inconsistently with Article 2.1 for these same reasons.

b. We reject Korea's claim under Article 4.1(c) of the Agreement on Safeguards, as well as Articles 2.1 and 3.1 of the Agreement on Safeguards challenging the USITC's inclusion of belt-driven washers in the definition of the domestic industry.

c. We do not find it necessary to address here Korea's claims that as a consequence of the improper definition of the domestic industry, the USITC's determination of serious injury and causation was also inconsistent with Articles 2.1, 3.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards.

7.4 The USITC's determination of increased imports

7.78. Korea claims that the USITC's examination of the increase in imports is inconsistent with Article 2.1 as well as Article 3.1 of the Agreement on Safeguards.[128] Specifically, Korea submits[129] that the USITC (a) erred in cumulatively assessing imports of LRWs and imports of LRW parts in its increased imports analysis[130]; (b) failed to consider the increase in imports relative to domestic consumption (i.e. the market share of subject imports) as part of its increased imports assessment[131]; and (c) failed to provide a reasoned and adequate explanation in support of its determination of increased imports.[132]

[128] In paragraph 164 of its first written submission, which summarizes Korea's claims challenging the USITC's increased imports analysis, Korea contends that the USITC's increased imports analysis was inconsistent with Article XIX:1(a) of the GATT 1994. However, Korea did not make a claim under Article XIX in its panel request or the "request for findings" section of its first written submission. (Korea's panel request, pp. 2-5). In response to our questions, Korea clarifies that is not making a separate claim under Article XIX:1(a) of the GATT 1994 when it challenges the USITC's determination on increased imports. (Korea's response to Panel question No. 13, para. 67).

[129] Korea also submits that the USITC failed to account for the price- and non-price-based aspects of the conditions of competition in the market into its increased imports analysis (although the United States rejects that submission by noting that the USITC did, in fact, thoroughly examine how the conditions of competition supported its conclusion regarding increased imports). (Korea's first written submission, para. 157; United States' first written submission, paras. 216-220). We note that in support of its submission, Korea makes the same type of arguments that it does in the context of causation. For instance, in support of its submission, Korea contends that the USITC ignored the fact that imported LRWs included washers with distinctive features for which there was no domestic competitor. Thus, according to Korea, increased imports did not displace US domestic products, but only expanded demand in new product categories. (Korea's first written submission, para. 157). Korea makes the same type of arguments while challenging the USITC's failure to conduct a non-attribution analysis with respect to the deterioration of US brands, which we address below. We also address Korea's arguments in relation to price-based aspects of competition when addressing Korea's arguments challenging the price analysis that the USITC conducted as part of its causation determination. However, Korea does not show how the alleged failure to incorporate the price and non-price based aspects of competition into the increased imports analysis results in a violation of Article 2.1 or Article 3.1 of the Agreement on Safeguards. Therefore, to the extent Korea contends that the USITC failed to incorporate price and non-price-based aspects of the conditions of competition in its increased imports analysis or to analyse the conditions of competition as part of its increased imports analysis, Korea has not made its case under Articles 2.1 and 3.1.

[130] Korea's first written submission, para. 131; second written submission, para. 116.

[131] Korea's first written submission, paras. 135-137.

[132] Korea's first written submission, para. 150; second written submission, para. 118. We note a degree of overlap in arguments made by Korea in sections V.3.2, V.3.3, and V.3.4 of its first written submission. For example, V.3.3 of the first written submission is titled "[t]he USITC failed to evaluate the trends in imports over the period of investigation". However, Korea also makes arguments in relation to the USITC's trends analysis in section V.3.2 of its first written submission. (Korea's first written submission, para. 138). Similarly, while section V.3.4. is specifically titled "[t]he USITC failed to provide a reasoned and adequate explanation in support of its determination", Korea's argument in other sections also focus on the USITC's alleged failure to provide a reasoned and adequate explanation in support of its determination. (See, e.g. Korea's first written submission, paras. 138 and 141). We address Korea's arguments collectively as part of our assessment of whether the USITC provided a reasoned and adequate explanation to support its increased imports determination.

7.79. The United States asks us to reject Korea's claims.

7.80. In reviewing Korea's claims, we note that Article 2.1 of the Agreement on Safeguards reads as follows:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.[133]

7.81. Article 2.1 of the Agreement on Safeguards thus sets out the conditions for the application of safeguard measures. In particular, a Member applying a safeguard measure must determine that the product "is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions" as to cause or threaten to cause serious injury to the domestic industry. We also recall that pursuant to Article 3.1 of the Agreement on Safeguards investigating authorities are required to publish a report that sets forth findings and reasoned conclusions reached on all pertinent issues of fact and law. Accordingly, the investigating authorities are required to set out their findings and reasoned conclusions on increased imports in their published reports.

7.4.1 The USITC's cumulation of LRW parts and LRWs in its increased imports analysis

7.82. Korea contends that the USITC acted inconsistently with Article 2.1 by cumulating imports of LRWs and LRW parts for the purpose of its increased imports analysis.[134] Korea acknowledges that the Agreement on Safeguards does not impose disciplines on the definition of the PUC.[135] However, Korea argues that the absence of such disciplines does not mean that an investigating authority may group together different products without examining whether, given the conditions of competition, any increase in imports of these products can cause serious injury to the domestic like products.[136] In particular, relying on the phrase "under such conditions" in Article 2.1, Korea contends that if an imported product (i.e. LRW parts) does not compete directly with a domestic product (i.e. domestic LRW parts or domestic LRWs), any increase in imports may not be regarded as occurring "under such conditions" as to cause or threaten to cause serious injury to the domestic industry.[137] For Korea, "[i]t follows" from this understanding of the phrase "under such conditions" that investigating authorities are not allowed to cumulate two different products in assessing the increase in imports, if only one of these two different products is in a competitive relationship with the domestic product.[138] The United States agrees that the USITC relied on import data that included both LRWs and covered LRW parts.[139] However, the United States asserts that the USITC appropriately considered LRWs and covered parts in the aggregate because the PUC included both LRWs and covered parts.[140]

7.83. The question before us is whether the USITC acted inconsistently with Article 2.1 by cumulatively assessing imports of LRWs and LRW parts. We note in this regard that the USITC defined the PUC to cover LRWs and LRW parts. While Korea argues that the USITC was not permitted to cumulate imports of LRWs and LRW parts in its increased imports analysis because imported LRW parts did not compete with domestic LRWs and LRW parts, and thus could not have injured the domestic industry, it does not challenge the USITC's definition of the PUC to cover LRWs and

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[133] Fn omitted.
[134] Korea's first written submission, paras. 131-132.
[135] Korea's second written submission, para. 117.
[136] Korea's second written submission, para. 117.
[137] Korea's first written submission, para. 117; opening statement at the first meeting of the Panel, para. 33; and second written submission, para. 117.
[138] Korea's first written submission, para. 117; opening statement at the first meeting of the Panel, para. 33; and second written submission, para. 117.
[139] United States' first written submission, para. 199 and fn 405; opening statement at the first meeting of the Panel, para. 16.
[140] United States' first written submission, para. 199. The United States relies on the text of Article 2.1 as well as the DSB report in *Dominican Republic – Safeguard Measures* in arguing that having defined the PUC as LRWs and LRW parts, the USITC was entitled to use a data set for the PUC (overall), rather than for separate products (such as LRWs and LRW parts) within the overall PUC. (United States' first written submission, para. 199 (referring to Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.236)).

LRW parts.[141] Because the USITC defined the PUC to include LRWs and LRW parts, we do not consider that the USITC was precluded under Article 2.1 of the Agreement on Safeguards from cumulatively assessing imports of LRWs and LRW parts.

7.84. To the extent Korea's claim is premised on its view that imports of LRW parts did not occur "under such conditions" to cause serious injury to the domestic industry because imported LRW parts did not compete with domestic LRWs or LRW parts, and thus could not have caused injury to the domestic industry, in our view Korea's argument goes to the question of causation, rather than of increased imports. We note that previous DSB reports have understood the phrase "under such conditions" to refer to the substance of the causation analysis, and specifically, to the type of analysis an investigating authority would conduct under Article 4.2 of the Agreement on Safeguards.[142] Previous DSB reports have also considered that the conditions under which imports occur have no bearing on whether there have been increased quantities of imports, and thus an analysis of the conditions under which imports occur does not form an integral part of the analysis of the quantities in which imports occur.[143] We agree with these reports, which reflect our own understanding of Article 2.1.

7.85. Based on the foregoing, we reject Korea's claim that the USITC acted inconsistently with Articles 2.1 and 3.1 by cumulating imports of LRWs and LRW parts as part of its increased imports analysis.

7.4.2 The significance of the increase in imports relative to domestic *consumption*

7.86. Korea contends that the USITC failed to properly examine whether the increase in imports was qualitatively significant because it did not assess the significance of the increase in imports relative to domestic consumption, i.e. in terms of market share.[144] In response, the United States argues that Article 2.1 refers to an increase in the import volume absolute or relative to domestic production, and does not require investigating authorities to also find an increase in the market share of subject imports.[145]

7.87. We note that Article 2.1 provides that "a Member may apply a safeguard measure to a product only if that Member has determined … that such product is being imported into its territory in such increased quantities, absolute or relative to domestic *production*".[146] Article 2.1 does not provide that an investigating authority must assess the market share, i.e. the share of imports relative to total domestic *consumption*, as part of an increased imports analysis. Thus, the requirement of increased imports under Article 2.1 is satisfied if the increase is either in absolute terms or relative to domestic production.[147]

7.88. Based on the foregoing, we reject Korea's claim that the USITC acted inconsistently with Articles 2.1 and 3.1 by failing to examine the significance of the increase in imports relative to domestic consumption, i.e. in terms of market share.

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[141] Indeed, Korea acknowledges that the Agreement on Safeguards does not impose specific disciplines governing how an investigating authority should define the PUC. (Korea's second written submission, para. 117).

[142] Panel Report, *Argentina – Footwear (EC)*, para. 8.250; Appellate Body Report, *US – Wheat Gluten*, paras. 76-78. See also Panel Report, *Ukraine – Passenger Cars*, para. 7.190.

[143] Panel Report, *Ukraine – Passenger Cars*, para. 7.190.

[144] Korea's first written submission, paras. 135-137 and 150; opening statement at the first meeting of the Panel, para. 28.

[145] United States' first written submission, para. 204; second written submission, para. 66. The United States also disputes Korea's assertions that the market share of the subject imports remained the same throughout the POI as consumption increased, including in interim 2017 compared with interim 2016. (United States' first written submission, paras. 205-206; response to Panel question No. 14(a), paras. 22-25).

[146] Fn omitted; emphasis added.

[147] We note that market share must be assessed as part of the investigating authority's analysis of serious injury under Article 4.2(a), which explicitly lists "the share of the domestic market taken by increased imports" (i.e. in terms of consumption) as one of the mandatory injury factors that investigating authorities must evaluate. Indeed, in previous DSB reports, market share assessments have not been considered relevant to an enquiry on whether a product is being imported in such increased quantities absolute or relative to domestic production. (Appellate Body Report, *US – Steel Safeguards*, para. 382; Panel Report, *Ukraine – Passenger Cars*, para. 7.190).

7.4.3 The USITC's explanation regarding its determination on increased imports

7.89. Korea contends, relying on previous DSB reports, that in determining whether imports have increased in such increased quantities as to cause or threaten to cause serious injury to the domestic industry within the meaning of Article 2.1, an investigating authority must consider (a) whether the increase in imports was recent enough, sudden enough, sharp enough, and significant enough; and (b) the trends in imports or changes in imports over the entire period of investigation (POI).[148] Korea asserts that it is not sufficient under Article 2.1 to compare the changes in imports from the start point of the POI to the end point of the POI, and that an investigating authority must consider the intervening trends over the POI.[149] However, per Korea the USITC failed to (a) evaluate and explain the trends in import volumes over the POI, including the rate and significance of the increase[150]; and (b) account for the most recent trends in imports, which according to Korea included a deceleration of the rate of increase in imports since 2015 and decline in imports in interim 2017 relative to interim 2016.[151]

7.90. The United States asserts that the USITC provided a reasoned and adequate explanation consistent with Articles 2.1 and 3.1 of how the facts supported its finding that imports increased in absolute terms and relative to domestic production. The United States submits in this regard that the USITC examined trends in each year of the POI, as well as the rate and amount of increase in imports over this period.[152] In particular, the United States explains that the USITC considered the year-on-year increase in the volume of subject imports (from 2012-2013, 2013-2014, 2014-2015, and 2015-2016), found that subject imports doubled during the POI, and characterized the rate of increase in subject import volume as "steady".[153] The United States does not dispute that there was a deceleration of the rate of increase in imports since 2015 and a decline in imports in interim 2017 relative to interim 2016.[154] With respect to the deceleration of the rate of increase in imports between 2015 and 2016, the United States responds that the USITC addressed this trend in the serious injury section of its report. Specifically, the United States alleges that the USITC found that the level of imports in 2016 was restrained by the imposition of provisional anti-dumping duties on LRWs from China.[155] With respect to the decline in imports towards the end of the POI, the United States responds that the USITC explained that the absolute volume of imports remained substantial in interim 2017 and was only down from interim 2016 due to supply disruptions related to LG's and Samsung's transfer of production from China to Thailand and Viet Nam and Samsung's recall of 2.8 million units.[156]

7.91. In assessing whether the USITC's increased imports determination complied with the obligation under Article 2.1 to determine that the product is being imported in "such increased quantities", we note that Article 2.1 provides that a Member may apply a safeguard measure to a product only if that Member has determined that such product is being imported into its territory in such increased quantities (absolute or relative to domestic production) and under such conditions as to cause or threaten to cause serious injury to the domestic industry. Like previous DSB reports, we understand the use of the present tense in the phrase "is being imported" in Article 2.1 to mean that the increase in imports within the meaning of Article 2.1 must be sudden and recent.[157] Interpreting Article 2.1 in the context of Article 4.2(a) of the Agreement on Safeguards suggests to

[148] Korea's first written submission, paras. 125-126.
[149] Korea's second written submission, para. 88.
[150] Korea's first written submission, para. 144; second written submission, para. 90. See also, Korea's opening statement at the first meeting of the Panel, para. 32; response to Panel question No. 73, para. 37; and comments on the United States' response to Panel question No. 72(c), para. 59.
[151] Korea's first written submission, paras. 138 and 141; second written submission, para. 90. See also, Korea's opening statement at the first meeting of the Panel, para. 32; opening statement at the second meeting of the Panel, para. 26; response to Panel question No. 73, paras. 38-39; and comments on the United States' response to Panel question No. 72(c), para. 63.
[152] United States' first written submission, paras. 193 and 207.
[153] United States' first written submission, para. 207 and fn 435; second written submission, para. 68. See also, United States' opening statement at the first meeting of the Panel, para. 17; and response to Panel question No. 72(c), para. 17.
[154] United States' first written submission, para. 201; second written submission, para. 58; and responses to Panel question No. 72(a), para. 15; and No. 72(c), para. 19.
[155] United States' response to Panel question No. 72(c), para. 19.
[156] United States' first written submission, para. 193 (referring to USITC report, (Exhibit KOR-1), pp. 30 and 38); second written submission, para. 63. See also, United States' opening statement at the first meeting of the Panel, para. 17.
[157] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.

us that an assessment of increased imports must evaluate the rate and amount of the increase in imports based on intervening trends during the POI (as opposed to only comparing the end points).[158] However, the use of the phrase "is being imported" does not suggest to us that an investigating authority cannot find increased imports within the meaning of Article 2.1 when imports decline in the most recent period.[159] Instead, we agree with a previous DSB report that whether a decrease in imports at the end of the POI prevents a finding of increased imports will depend on whether, despite the later decrease, a previous increase results in the product (still) "being imported in (such) increased quantities".[160] Factors that an investigating authority must take into account are the duration and the degree of the decrease at the end of the relevant POI, as well as the nature, for instance the sharpness and the extent, of the increase that occurred beforehand.[161] However, ultimately a determination of increased imports is not a mathematical or technical determination, but rather a determination that must be made on a case-by-case basis.[162] In reviewing such determination, we must, consistent with our standard of review, examine whether the USITC's explanation was reasoned and adequate in light of the record evidence before the USITC.

7.92. We note in this regard that in the underlying investigation the USITC found as follows:

> In absolute terms, imports of LRWs increased steadily from *** units in 2012 to *** units in 2013, *** units in 2014, *** units in 2015, and *** units in 2016, a level *** percent higher than in 2012. Imports of LRWs were *** units in interim 2017, as compared to *** units in interim 2016. At the same time, imports increased steadily relative to the domestic industry's production from *** percent in 2012 to *** percent in 2013, *** percent in 2014, *** percent in 2015, and *** percent in 2016. Imports relative to the domestic industry's production were *** percent in interim 2017, as compared to *** percent in interim 2016.[163]

7.93. The changes in the volume of imports as well as the percentage changes in imports have been redacted from this extract. These redactions were made by the USITC. The United States declined to provide to us, on the grounds of business confidentiality, an unredacted version of these findings or an indexed version that at least identified the percentage changes in imports over the POI.[164]

7.94. From the redacted version of the USITC finding we note that the USITC found that imports doubled during the POI, and that imports of LRWs "remained a substantial *** units in interim 2017, though down from *** units in interim 2016 due to the aforementioned supply disruptions related to LG and Samsung's transfer of production from China to Thailand and Vietnam and Samsung's recall".[165] Thus, the USITC found that imports declined in interim 2017 relative to interim 2016.

7.95. We begin our analysis by noting that it is Korea's burden as the complainant to make a *prima facie* case of violation of Articles 2.1 and 3.1, although each party bears the burden of proving their factual assertions. In our view, Korea has made a *prima facie* case in this regard. We note Korea's argument that the USITC did not evaluate and explain the trends in import volumes over the POI, including the rate and significance of the increase. Indeed, while the USITC found that imports doubled over the POI and characterized the year-on-year increase in imports over the POI as "steady", the USITC does not indicate how the USITC evaluated the trends in imports over the

[158] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.
[159] Appellate Body Report, *US – Steel Safeguards*, para. 367.
[160] Panel Reports, *US – Steel Safeguards*, para. 10.163.
[161] Panel Reports, *US – Steel Safeguards*, para. 10.163.
[162] See, e.g. Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[163] USITC report, (Exhibit KOR-1), p. 20. (fn omitted; redacted original)
[164] In Panel question No. 70, we asked the United States to provide the percentage year-on-year increase in imports over the entire POI. We informed the United States that in answering that question it could treat import volumes in 2012 (the first year of the POI) as 100 (indexed) and map the percentage changes in imports over the result of the POI. We also asked the United States to comment on what sort of additional procedures, beyond the BCI procedures that we had already adopted in these proceedings, it considered necessary to provide use with this information while safeguarding its confidentiality. The United States declined to provide us with the information requested in question No. 70 on grounds of business confidentiality. (United States' response to Panel question No. 70, para. 8). The United States also informed us that it was unable to offer alternative procedures that would adequately preserve the USITC's institutional ability to collect business confidential information in its investigations. (United States' response to Panel question No. 71, para. 10).
[165] USITC report, (Exhibit KOR-1), p. 38. (redacted original)

POI, including the rate and significance of the increase. In determining whether the United States has rebutted Korea's *prima facie* case, we note the United States' assertion that the USITC provided a reasoned and adequate explanation of the development of imports trends, including the rate and amount of increase.[166] In particular, the United States submits that the percentage year-on-year changes were provided in table C-2 of the staff report and thus considered by the USITC.[167] The United States also submits that the USITC considered the absolute volume of subject imports in each year of the POI and found that imports of LRWs had increased steadily during the POI.[168] In our view, however, the United States has not proved its factual assertions.

7.96. In particular, the United States did not provide us with an unredacted version of table C-2 or point to specific parts of the unredacted version of the USITC report that explain how the USITC considered the percentage year-on-year changes over the POI.[169] Therefore, while the United States asserts that the USITC found imports to increase steadily over the POI based on its consideration of the absolute volume of subject imports in each year of the POI, the United States did not provide us with the USITC's record evidence to support this assertion.[170] In addition, as we noted in paragraph 7.91 above, an evaluation of whether a decrease in imports at the end of the POI prevents a finding of increased imports will depend on whether, despite the later decrease, a previous increase results in the product still being imported in such increased quantities. Factors that an investigating authority must take into account in this evaluation are, *inter alia*, the degree of the decrease at the end of the relevant POI, as well as the nature, for instance the sharpness and the extent, of the increase that occurred beforehand. We do not see from the narrative description in the USITC report how the USITC took into account the degree of the decrease at the end of the relevant POI considering the increase beforehand. Consequently, we consider that the United States has not proved its factual assertions and not rebutted a *prima facie* case of violation, which Korea has established.

7.97. Based on the foregoing, we find that the USITC failed to provide a reasoned and adequate explanation in support of its finding on increased imports and thus acted inconsistently with Article 2.1 as well as Article 3.1 of the Agreement on Safeguards.

7.4.4 Conclusion

7.98. In light of the above:

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[166] United States' first written submission, section D.3.c and para. 207.

[167] United States' first written submission, fn 435. See also United States' response to Panel question No. 72(c), para. 17.

[168] United States' response to Panel question No. 72(c), para. 17.

[169] Instead, in response to our questions, the United States provided us with a "directional version" of table C-2. That version of table C-2 does not contain any figures (percentage or absolute) but only shows whether imports decreased or increases in a particular year of the POI. We do not consider that the "directional version" of table C-2 proves the factual assertions made by the United States set out above. (United States' response to Panel question No. 16, para. 27).

[170] We note in this regard that Korea and the United States referred to two separate annexes (annexes 2A and 2D) in the petition filed by Whirlpool. In response to Korea's reliance on the data set out in annex 2D, the United States presents arguments on why we should not rely on that data. (United States' second written submission, paras. 59-60). In response to the United States' statement that we could consider the public data in annex 2A, which reflected Whirlpool's best estimate of subject import volumes, and which showed similar trends to that used by the USITC, Korea contests the reliability of the data in annex 2A. (Korea's comments to United States' response to Panel question No. 70, paras. 38-40; see also United States' response to Panel question No. 70, para. 9). Therefore, the reliability of the data in annexes 2D and 2A is contested. In any case, we do not consider it appropriate to rely on this data because the United States confirms that the USITC did not rely on the data provided in annex 2A, and instead relied on import data reported by LG, Samsung, and other importers. (United States' second written submission, para. 61). We also note the United States' argument that because US importers LG and Samsung accounted for the vast majority of US imports of LRWs, Korea is in a position to provide information regarding the imports made by these two companies. (United States' comments on Korea's response to Panel question No. 69, para. 11). However, we do not consider that it would be appropriate for us to rely on a data set provided by LG and Samsung as a proxy for the import volume data considered by the USITC, especially because the USITC relied on import volume data not just from LG and Samsung but also from other importers. (United States' second written submission, para. 61).

a. We find that the USITC acted inconsistently with Articles 2.1 and 3.1 of the Agreement on Safeguards because it failed to provide a reasoned and adequate explanation in support of its finding on increased imports.

b. We reject Korea's claim that the USITC acted inconsistently with Articles 2.1 and 3.1 of the Agreement on Safeguards by (i) cumulating imports of LRWs and LRW parts as part of its increased imports analysis; (ii) failing to examine the significance of the increase in imports relative to domestic consumption; and (iii) failing to account for the price and non-price based aspects of the conditions of competition in the market in its increased imports analysis.

7.5 The USITC's serious injury determination

7.99. Korea challenges the USITC's determination regarding serious injury to the domestic industry under Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c), and, consequently, Article 11.1(a) of the Agreement on Safeguards. In particular, Korea submits as follows:

a. The USITC failed to evaluate *all* the injury factors set out in Article 4.2(a) as part of its serious injury finding, specifically[171]:

   i. the rate and amount of increase in imports in absolute and relative terms; and

   ii. the share of the domestic market taken by increased imports.

b. The USITC failed to make an objective assessment of profits.[172]

c. The USITC failed to make an objective assessment of the share of the domestic market taken by increased imports.[173]

d. The USITC's serious injury finding was vitiated by its flawed definition of the domestic industry on two grounds:

   i. As a consequence of Korea's claims concerning the USITC's definition of the domestic industry, the USITC's serious injury finding is also flawed.[174]

   ii. When examining profitability, the USITC excluded financial data relating to a producer whom it had included in its scope of the domestic industry.[175]

e. The USITC failed to undertake an objective examination of the significant overall impairment of the domestic industry and based its serious injury determination on declining profitability alone.[176]

7.100. The United States asks us to reject Korea's claims.

7.101. We note that Article 4.1(a) of the Agreement on Safeguards defines "serious injury" as "a significant overall impairment in the position of a domestic industry". Article 4.2(a), in turn, provides that in the investigation to determine whether increased imports have caused serious injury to the domestic industry, the investigating authorities shall evaluate *all relevant factors* of an objective and quantifiable nature having a bearing on the situation of that industry, *in particular*,

[171] Korea's first written submission, paras. 260-269.
[172] Korea's first written submission, paras. 278-298.
[173] Korea's first written submission, paras. 307-319.
[174] Korea's first written submission, paras. 321-327.
[175] Korea's first written submission, paras. 328-330.
[176] Korea's first written submission, paras. 270-277. See also ibid. paras. 299-306. In section VII.3.4 of its first written submission, Korea claims that the USITC failed to provide a compelling explanation of how and why the domestic industry suffered serious injury despite the positive trends. In that section, Korea presents arguments similar to those in section VII.3.2 of the same submission, where Korea claims that the USITC failed to undertake an objective examination of the "significant overall impairment" of the domestic industry and based its serious injury finding on declining profitability alone. Therefore, we address both sets of arguments in section 7.5.5 of this Report.

the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. The use of the word "all" suggests therefore that an investigating authority must, at a minimum, evaluate each of the factors listed in Article 4.2(a).[177] Moreover, the use of the phrase "in particular" indicates that an investigating authority must also evaluate factors not listed in Article 4.2(a) that are nonetheless relevant to the state of the domestic industry.[178]

7.102. While an investigating authority must evaluate all relevant factors having a bearing on the situation of the domestic industry, neither Article 4.2(a) nor any other provision of the Agreement on Safeguards requires that all the relevant factors need to show negative trends. Therefore, an authority may find that the domestic industry has been seriously injured where some, or even the majority of the factors do not, by themselves, trend negatively.[179] Where some of the factors trend positively while others trend negatively, it is for the investigating authority to assess and weigh the evidence before it, and reasonably and adequately explain how the facts on record support its determination.[180]

7.103. In reviewing the adequacy of such an explanation, we note that Article 4.2(c) of the Agreement on Safeguards requires investigating authorities to publish promptly, and in accordance with Article 3 of the Agreement on Safeguards, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. Article 3.1, in turn, requires authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. We shall therefore base our evaluation of Korea's claims on the report published by the USITC.

7.5.1 Evaluation of *all* the injury factors set out in Article 4.2(a) as part of the serious injury finding

7.104. Korea contends that the USITC acted inconsistently with Articles 3.1, 4.1(a), 4.2(a), and 4.2(c), because it failed to evaluate the following two factors set out in Article 4.2(a) as part of its injury analysis: (i) the rate and amount of the increase in imports, and (ii) the share of the domestic market taken by increased imports.[181]

7.105. Korea acknowledges that the two factors were reflected in the USITC report. However, Korea maintains that the USITC noted the developments in these factors in quantitative terms in the context of its analysis of increased imports and causation, but did not "evaluate" them as part of the serious injury analysis (i.e. in section IV.D of the USITC report).[182] Korea maintains that the USITC's failure to "evaluate" the two factors reflects a failure to examine the "explanatory force" of the increased imports as part of the serious injury determination. Korea also asserts that the USITC merely described the increase in imports as "steady", noted that imports nearly doubled over the POI, and increased their penetration of the US market.[183] According to Korea, by doing so, the USITC failed to satisfy the required standard of evaluation.[184] Korea contends that an "evaluation" of the relevant factors includes an examination of how imports interrelate with the various injury factors

[177] The parties to this dispute agree with this understanding. (Korea's first written submission, para. 243; United States' first written submission, para. 225). See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 136.

[178] We agree in this regard with Panel Report, *US – Lamb*, para. 7.139.

[179] The parties agree with this understanding. (Korea's response to Panel question No. 22, para. 117; United States' first written submission, para. 246). We note that this understanding is also consistent with Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.

[180] We agree in this regard with Panel Report, *US – Wheat Gluten*, para. 8.85.

[181] Korea's first written submission, paras. 260, 262, and 269.

[182] Korea's first written submission, paras. 260 and 262 (referring to USITC report, (Exhibit KOR-1), pp. 38-40); opening statement at the first meeting of the Panel, paras. 53-54. See also Korea's response to Panel question No. 24(a), paras. 134-135; and second written submission, paras. 154-156. Korea states that it does not make a "formalistic complaint about the specific section of the USITC Report in which these factors were examined". However, it also submits that contrary to the United States' assertion that the USITC "incorporat[ed] its evaluation" of the two factors in its serious injury determination, "the page numbers referred to do not concern the serious injury examination, but relate to the 'increased imports' and 'substantial cause' sections. There was no 'incorporation' of these factors into the relevant serious injury examination". (Korea's second written submission, paras. 155-156).

[183] Korea's response to Panel question No. 24(a), para. 143.

[184] Korea's response to Panel question No. 24(a), paras. 141 and 143.

so as to understand whether the imports have an "explanatory force" for the occurrence of the serious injury.[185] Further, Korea argues that as part of the "evaluation", an investigating authority must assess the relevance and weight of each of the relevant factors with a view of assessing the overall impairment in the position of the domestic industry.[186, 187]

7.106. The United States argues that Korea's submissions are incorrect. In the United States' view, Korea assumes that an evaluation of all the factors listed in Article 4.2(a) must appear together in a section of the investigating authority's report devoted to serious injury.[188] The United States maintains that contrary to Korea's arguments, Articles 3.1 and 4.2(c) do not specify a particular structure or order of analysis for the reports published by investigating authorities, and the USITC satisfied its obligations by examining the two factors in the sections of its report addressing increased imports and causation.[189] With regard to the *rate and amount of increase in imports*, the United States maintains that the USITC considered the evolution of the absolute volume of subject imports and found that imports of LRWs had increased steadily during the POI (in each year of the 2012-2016 period), and overall, had nearly doubled during the POI.[190] The United States also argues that the USITC examined the *share of the domestic market taken by increased imports* during the POI, and found that subject imports significantly increased their penetration of the US market during the POI.[191]

7.107. The question before us is whether the USITC "evaluated" (a) the rate and amount of increase in imports, and (b) the share of the domestic market taken by increased imports during the POI. We note that Korea acknowledges that these two factors were reflected in the USITC report.[192] However, Korea contends that the USITC's discussion regarding these two factors did not amount to an "evaluation" within the meaning of Article 4.2(a). Korea submits in this regard that when evaluating the injury factors in Article 4.2(a), an investigating authority may not limit itself to setting out the trends, but must also consider the relationship between imports and injury factors as well as show that imports had explanatory force for the development of these factors.[193] In response to our question on how such an analysis of explanatory force, which Korea argues is required as part of a serious injury analysis under Article 4.2(a), differs from a causation analysis under Article 4.2(b), Korea contends that an explanatory force analysis requires investigating authorities to examine whether there is a relationship between imports and serious injury, with a focus on the coincidence in the trends between imports and the examined injury factors.[194]

7.108. As we discuss in the context of our analysis of Korea's causation claims, we note that the USITC conducted its causation analysis in two stages. Under the first stage, the USITC conducted, *inter alia*, an analysis of the coincidence in trends between subject imports and injury factors. Korea challenges the USITC's coincidence in trends analysis as part of its causation claims. Since Korea explains that its claim under Article 4.2(a) similarly concerns the alleged failure of the USITC to consider the coincidence in trends between imports and the examined injury factors, we consider it

[185] Korea's response to Panel question No. 24(a), paras. 138 and 145; second written submission, para. 159.

[186] Korea's first written submission, paras. 266-268; response to Panel question No. 24(a), para. 142.

[187] We also note that in section VII.3.5 of its first written submission, Korea claims that the USITC failed to objectively evaluate the "share of domestic market taken by increased imports" because in its view the USITC failed to consider arguments the respondents made during the domestic proceedings. In this section of the Report we address Korea's claim based on its argument that the USITC failed to evaluate the "explanatory force" of the share of domestic market taken by increased imports alone. Thereafter, we address Korea's claim that the USITC failed to objectively evaluate the "share of domestic market taken by increased imports" (as presented in section VII.3.5 of its first written submission) at section 7.5.3 below.

[188] United States' first written submission, para. 232.

[189] United States' first written submission, paras. 232-235; opening statement at the first meeting of the Panel, para. 21.

[190] United States' first written submission, para. 229; opening statement at the first meeting of the Panel, para. 21 (referring to USITC report, (Exhibit KOR-1), pp. 20 and 39).

[191] United States' first written submission, para. 230; opening statement at the first meeting of the Panel, para. 21 (referring to USITC report, (Exhibit KOR-1), pp. 38-39).

[192] Korea's first written submission, para. 260. In particular, Korea states that "[w]hile [the] USITC simply notes these developments in quantitative terms in the context of its analysis of increased imports and causation – these factors were not examined at all as part of the serious injury analysis".

[193] Korea's response to Panel question No. 24(b), para. 148. See also Korea's response to Panel question No. 24(a), paras. 138 and 145.

[194] Korea's response to Panel question No. 21(b), paras. 110-111; second written submission, para. 159. The European Union agrees. (European Union third-party response to Panel question No. 3(b), para. 15).

appropriate to review Korea's arguments in the context of its causation claim. It is not necessary for us to review those same arguments in the context of Korea's Article 4.2(a) claim.

7.109. Based on the foregoing, we do not separately address Korea's claim under Article 4.2(a) challenging the USITC's alleged failure to evaluate all injury factors set out in this provision. We also do not address Korea's claim under Articles 3.1, 4.1(a), and 4.2(c) for the same reasons.

7.5.2 The USITC's alleged failure to objectively examine profits and losses

7.110. Korea contends that the USITC failed to undertake an objective examination of the factor "profits and losses", and to support its finding by a reasoned and adequate explanation, therefore acting inconsistently with Articles 3.1, 4.1(a), 4.2(a), and 4.2(c).[195] Korea alleges that the USITC failed to: (i) account for record evidence of joint-selling practices over washers and dryers and related overall profits in the laundry segment[196]; and (ii) engage with evidence that Whirlpool's reported operating losses were inconsistent with its profit margin for its overall North American operations.[197] We address these arguments separately.

Joint-pricing theory

7.111. Korea argues that the USITC had received evidence from Korean respondents that dryers and LRWs collectively form the laundry segment of the US market, and that the US industry prices, markets, and sells these two products jointly (a practice Korea refers to as "joint pricing").[198] Korea submits that dryers cost less to make, and are therefore more profitable than LRWs. Korea contends that because LRWs and dryers were priced at the same level, they were jointly profitable, and therefore, to the extent the domestic industry's profitability of LRW sales were low, the domestic industry obtained significant profits from its sales of dryers.[199] Korea argues that the USITC dismissed the arguments made by Korean respondents (a) simply because dryers are not a like or directly competitive product to the PUC, and (b) based on testimony by the petitioner.[200] Korea maintains that by doing so, the USITC did not adequately engage with the evidence presented by the respondents, or provide a reasoned and adequate explanation addressing this "plausible alternative" presented by the respondents.[201]

7.112. Rejecting Korea's arguments, the United States submits that the USITC explained that the focus of its analysis was the domestic producers of the like or directly competitive product, and that dryers were not "like or directly competitive" with the PUC.[202] The United States argues that in rejecting the respondents' arguments, the USITC evaluated all the record evidence concerning whether Whirlpool and GE sold matching LRWs and dryers at the same net wholesale prices, and found that the evidence did not support, as a factual matter, the Korean respondents' view that US producers offset losses on washers with profits on matching dryers.[203] The United States maintains that there was evidence both for and against the Korean respondents' theory of joint pricing, and the USITC found the evidence against that theory more compelling.[204] The United States also submits that the USITC found that even if the joint-pricing theory were true, the greater profitability of dryers could not explain the domestic industry's worsening operating and net losses on sales of LRWs during the POI.[205]

7.113. The parties' arguments raise two issues that we must consider in resolving this claim: (a) whether the USITC was required to evaluate "profitability" with regard to products (dryers) that were not "like or directly competitive" with the PUC; and, if so, (b) whether Korea has demonstrated

[195] Korea's first written submission, paras. 278 and 298.
[196] Korea's first written submission, paras. 279-291.
[197] Korea's first written submission, para. 292.
[198] Korea's first written submission, paras. 280-284.
[199] Korea's second written submission, para. 178.
[200] Korea's first written submission, paras. 287 and 290; second written submission, para. 176.
[201] Korea's first written submission, paras. 287-291; opening statement at the first meeting of the Panel, paras. 61-64; and second written submission, paras. 176-186.
[202] United States' first written submission, para. 254.
[203] United States' first written submission, para. 255; opening statement at the first meeting of the Panel, para. 24.
[204] United States' first written submission, para. 257.
[205] United States' first written submission, para. 259.

that the USITC failed to provide a reasoned and adequate explanation for rejecting the arguments and evidence presented by Korean respondents.

7.114. We note that Article 4.1(c) defines the domestic industry on the basis of producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products. This definition of the domestic industry applies for the purposes of the Agreement on Safeguards, including when the investigating authority determines whether the domestic industry, as defined under Article 4.1(c), has suffered serious injury. It follows that, in undertaking that analysis, investigating authorities are required to evaluate the injury factors having a bearing on the domestic industry by reviewing data relating specifically to those "like or directly competitive products" that comprise the domestic industry.

7.115. Korea does not argue that dryers are like or directly competitive with the PUC (which comprised LRWs and not dryers). We also note that the USITC did not define the domestic industry to include producers of dryers. Therefore, in determining whether the domestic industry, comprising producers of the like product at issue (i.e. LRWs), was suffering serious injury, the USITC was not required to analyse performance indicators (including profitability) for the dryer segment, which was not a like product within the meaning of Article 4.1(c) (or a "directly competitive" product). That the producers forming part of the domestic industry also produced other products that were profitable is irrelevant to the situation of the domestic industry.[206] Therefore, we are not persuaded by Korea's argument that the USITC was required to consider profitability of the laundry segment as a whole (including dryers).

The profit data relied upon by the USITC

7.116. Korea contends that the USITC failed to meaningfully assess the respondents' arguments and evidence that Whirlpool's reported operating losses were inconsistent with the profit margin for Whirlpool's overall North American operations, and therefore contradicted the USITC's finding that the domestic industry suffered significant operating losses.[207] According to Korea, the USITC did not meaningfully explain how Whirlpool's geographically segmented data, including sales, general, and administrative (SG&A) expenses, were appropriately allocated to the production of LRWs.[208]

7.117. The United States responds that the USITC provided a reasoned and adequate explanation for rejecting the respondents' argument.[209] In rejecting the respondents' argument, the USITC stated that the focus of its analysis was the producers of products that were like or directly competitive with the PUC. Therefore, because Whirlpool's financial results for its North America segment were primarily based on sales of products other than LRWs (with LRWs accounting for only 13.1% to 13.5% of the North America segment's total revenue during the 2012-2016 period) the USITC did not find those results informative.[210] Moreover, the United States notes that the USITC verified, using appropriate methodologies from a previous investigation, that the financial data reported by Whirlpool was reasonable and complied with applicable guidelines.[211]

7.118. The issue before us in this regard is whether the USITC properly assessed the evidence submitted by the Korean respondents contesting Whirlpool's profit data. In its report, the USITC noted that the focus of its analysis was the domestic industry producing the domestic like product. It is therefore reasonable that the USITC found Whirlpool's financial results for North America uninformative, given that LRWs (the like product at issue), only accounted for 13.1% to 13.5% of the North America segment's total revenue. Korea does not explain why this explanation provided

[206] In this regard, we note Korea does not argue that profits made on washers were allocated to dryers. Instead, Korea's argument is that the USITC should have examined the profitability for dryers and washers as a whole because they were complementary goods. (See e.g. Korea's first written submission, paras. 290-291).

[207] Korea's first written submission, paras. 292-295 and 297 (referring to Excerpt from LG and Samsung's prehearing injury brief, (Exhibit KOR-11), p. 71; and Large Residential Washers, Prehearing Brief of the Government of the Republic of Korea (29 August 2017), (Exhibit KOR-9), p. 11).

[208] Korea's first written submission, para. 294; second written submission, paras. 187-188.

[209] United States' first written submission, para. 260.

[210] United States' first written submission, paras. 260-261 (referring to USITC report, (Exhibit KOR-1), fn 210).

[211] United States' first written submission, para. 262; second written submission, fn 169 (referring to USITC report, (Exhibit KOR-1), fn 210). See also United States' opening statement at the first meeting of the Panel, para. 25.

by the USITC was not adequate. Korea also asserts that the USITC did not meaningfully explain how Whirlpool's geographically segmented financial data, including its SG&A expenses, were appropriately allocated to the production of LRWs.[212] Korea appears to take issue with the USITC's explanation that it had verified Whirlpool's financial results, including SG&A expenses using appropriate methodologies in a previous investigation, arguing that the USITC "merely applied 'the same methodology'" in the underlying investigation.[213] However, Korea does not explain why, specifically, the USITC's verification of Whirlpool's financial results and its explanation for rejecting Korean respondents' arguments were inadequate.

7.119. Therefore, we reject Korea's argument that the USITC failed to account for record evidence of joint-selling practices over washers and dryers and related overall profits in the laundry segment, or to engage with evidence that Whirlpool's reported operating losses were inconsistent with its profit margin for Whirlpool's overall North American operations. Based on the foregoing, we reject Korea's claims under Articles 3.1 and 4.2(a) of the Agreement on Safeguards that the USITC allegedly failed to objectively examine "profit and loss". Considering that the factual basis of Korea's claim under Articles 4.1(a) and 4.2(c) is the same as its claim under Articles 3.1 and 4.2(a), we also reject Korea's claims under Articles 4.1(a) and 4.2(c) of the Agreement on Safeguards.

7.5.3 The USITC's alleged failure to objectively examine the share of domestic market taken by increased imports

7.120. Korea submits that the USITC acted inconsistently with Article 4.2(a) because it failed to objectively evaluate the factor "share of domestic market taken by increased imports" because it failed to consider that the domestic industry was unable to serve a newly emerging market segment due to its inferior innovation.[214] According to Korea, the US LRW market is based on two types of demand: (a) replacement demand, which accounted for two-thirds of total demand; and (b) non-replacement demand, which accounted for one-third of total demand, and that is triggered by consumers' demand for new and more innovative LRWs.[215] Korea maintains that Korean respondents' LRWs had unique brands, innovation, and design, which enabled them to serve demands that the domestic LRWs could not serve effectively.[216] Korea argues that this issue was particularly important because the domestic industry's overall market share did not shrink during the POI.[217] Korea maintains that the USITC should have done "more evaluation" to address arguments made by the Korean respondents that the US LRW market was segregated based on differences in consumer demand.[218]

7.121. The United States responds that the USITC considered and properly rejected the respondents' arguments on innovation. Pointing to the USITC report, the United States asserts that the USITC explained that other record evidence undermined the respondents' argument.[219]

7.122. We note that the USITC found that the record as whole did not support the respondents' argument that consumers increasingly favoured imported LRWs over domestic LRWs because of non-price factors.[220] The USITC relied on certain data to conclude that there was a moderate to high degree of substitutability between imported LRWs and domestic LRWs. The USITC observed that (a) all responding purchasers (which accounted for nearly all of the purchases of LRWs during the POI) reported that the subject imports were either always or usually interchangeable with domestically produced LRWs[221]; and (b) most responding purchasers reported that domestic LRWs were either comparable or superior to imported LRWs in terms of most non-price factors, including

[212] Korea's second written submission, para. 188.
[213] Korea's second written submission, para. 188; response to Panel question No. 29, para. 170.
[214] Korea's first written submission, paras. 307 and 319.
[215] Korea's first written submission, paras. 310 and 314; second written submission, para. 201.
[216] Korea's first written submission, paras. 314-316 and 318.
[217] Korea's first written submission, para. 317.
[218] Korea's first written submission, para. 309.
[219] United States' first written submission, paras. 264-265 (referring to USITC report, (Exhibit KOR-1), pp. 27 and 29-30). See also United States' first written submission, para. 267 (referring to USITC report, (Exhibit KOR-1), p. 42 and fn 261); and opening statement at the first meeting of the Panel, para. 26.
[220] USITC report, (Exhibit KOR-1), pp. 29-30.
[221] USITC report, (Exhibit KOR-1), pp. 27 and 29.

whether quality met or exceeded industry standards.[222] The USITC also noted that both the domestic producers (Whirlpool and GE) and Korean exporters (Samsung and LG) reported introducing numerous innovative features in their LRWs during the POI, and that both domestic and imported LRWs were rated highly in publications and surveys during this period.[223] The USITC concluded that, based on the evidence it evaluated, the US LRW market encompassed a broad range of brands and models offering diverse features and innovations, with no LRW supplier possessing a clear edge over other LRW suppliers in terms of brand, design, performance, features, innovations, and other non-price factors.[224] The USITC also explained that the respondents' argument that sales of LRWs were driven by features and innovations favoured by customers was undermined by the extent to which imported LRWs were priced lower than domestically produced LRWs, and the declining prices of the imported LRWs that respondents identified as innovative.[225]

7.123. Korea maintains that the USITC failed to examine whether there was a new market segment stemming from different consumer demands, which could only be served by imported LRWs.[226] According to Korea, imported LRWs had specific attributes which distinguished those products from other LRWs, and the USITC's only rationale for rejecting the respondents' arguments was that the domestic industry also produced LRWs with innovations that were exclusive to those producers.[227] However, we note that Korean respondents had made arguments before the USITC based on such distinctions between imported and domestically produced LRWs. The USITC, as we have noted in paragraph 7.122 above, rejected these arguments based on its conclusion that imported and domestic LRWs were substitutable. Moreover, while Korea asserts that "more evaluation was required", it does not engage with the USITC's explanation, or demonstrate that the USITC's explanation was not reasoned and adequate in light of the evidence on its record. Therefore, we reject Korea's argument that the USITC's finding was not one that an unbiased and objective investigating authority could have reached on the basis of the record evidence.

7.124. Based on the foregoing, we reject Korea's claim under Article 4.2(a) that the USITC failed to objectively examine the share of the domestic market taken by increased imports.

7.5.4 The effect of the USITC's domestic industry definition on its serious injury findings

7.125. Korea claims that the USITC's definition of the domestic industry vitiated its serious injury finding based on two grounds[228]:

a. First, Korea contends that because the USITC's serious injury finding was based on an improperly defined domestic industry, this serious injury finding was inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c) of the Agreement on Safeguards.[229]

b. Second, Korea argues that the USITC's serious injury assessment was not objective because, when examining the profitability of the domestic industry, the USITC excluded the financial data of Alliance Laundry Systems (Alliance), the only domestic producer of belt-driven washers (which was part of the domestic industry), thereby relying on

[222] USITC report, (Exhibit KOR-1), pp. 27 and 29-30. The USITC also observed that consumer reports ranked domestic LRWs among three of the top five and four of the top ten recommended FL LRW models, and six of the top ten recommended impeller-based TL LRW models. Reviewed.com ranked domestic LRWs among six of the top ten TL LRW models and among four of the top ten FL LRW models. Further, the USITC found that the respondents' own customer survey data showed that a higher percentage of consumers identified domestically produced LRWs (Maytag and Whirlpool) as "good brand names" for washers than imported LRWs (LG and Samsung) in 2016, and that a higher percentage of consumers also identified domestically produced LRWs (Amana and GE) as "good brand names" for LRWs than LG that year. (USITC report, (Exhibit KOR-1), p. 30 (referring to Excerpt from LG and Samsung's prehearing injury brief, (Exhibit KOR-11), p. 101).

[223] USITC report, (Exhibit KOR-1), pp. 29-30.

[224] USITC report, (Exhibit KOR-1), p. 30.

[225] USITC report, (Exhibit KOR-1), p. 42. See also United States' first written submission, para. 267; and opening statement at the first meeting of the Panel, para. 26.

[226] Korea's first written submission, paras. 309-316; second written submission, paras. 202-203 and 208-209.

[227] Korea's second written submission, para. 203 (referring to USITC report, (Exhibit KOR-1), pp. 76-77).

[228] Korea also invokes Article 4.1(b) of the Agreement on Safeguards in making its submissions here. However, Korea does not specifically request a finding under Article 4.1(b). (Korea's first written submission, para. 573; second written submission, para. 333). We thus do not make separate findings under Article 4.1(b).

[229] Korea's first written submission, paras. 321-327.

> unrepresentative financial data; while including data pertaining to producers of belt-driven washers in examining other injury factors, such as the market share of the domestic industry.[230] Korea claims that by doing so, the USITC acted inconsistently with Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c) of the Agreement on Safeguards.[231]

7.126. With respect to the first set of Korea's claims, the United States contends that because in its view the USITC properly defined the domestic industry, Korea's claims should fail.[232] We recall that in paragraph 7.77 above we have found that the USITC acted inconsistently with Article 4.1(c) of the Agreement on Safeguards by including producers of domestic covered parts in the domestic industry. Accordingly, we do not consider it necessary to make additional findings on whether, because of the USITC's definition of the domestic industry, the serious injury determination was also inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c) of the Agreement on Safeguards.

7.127. Regarding Korea's second set of claims, the United States argues that the USITC was justified in excluding financial data of the US producer of belt-driven washers (Alliance) when examining the "profits and losses" of the domestic industry because (a) Alliance submitted its questionnaire response late in the investigation, rendering the USITC unable to ensure its financial data were reliable[233]; and (b) the financial data used by the USITC covered almost all of the domestic industry's operations and were therefore sufficiently representative.[234] The United States submits that having defined the domestic industry to include domestic producers of belt-driven washers, the USITC was required to consider data relating to these producers as part of its serious injury analysis, to the extent that those data were found to be reliable. According to the United States, an investigating authority that uses unreliable financial data to analyse serious injury cannot make reasoned conclusions on pertinent issues of law and fact (as required under Article 3.1), and unreliable data is not an objective measure of the industry's financial performance (as required under Article 4.2(a)).[235] The United States asserts that when a domestic producer reports unreliable financial data, the investigating authority may make inferences based on the available information on the domestic industry's financial performance, which in this case consisted of financial data reported by other domestic producers, that accounted for the majority of domestic sales of the like product.[236, 237]

7.128. We note that Article 4.2(a) requires an evaluation of all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry, which includes the profits and losses by the domestic industry. Therefore, having defined the domestic industry to include belt-driven washers, the USITC was required to consider the profit and loss data of producers of belt-driven washers as part of its evaluation under Article 4.2(a). However, an investigating authority must also satisfy itself that the data that form the basis for its findings are reliable.[238]

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[230] Korea's first written submission, para. 330; second written submission, para. 215; and response to Panel question No. 74, paras. 51-52.

[231] Korea's first written submission, para. 332.

[232] United States' first written submission, para. 269.

[233] United States' first written submission, para. 272; responses to Panel question No. 28(a), paras. 43-45; and No. 75(a), paras. 22-25.

[234] United States' first written submission, para. 273; responses to Panel question Nos. 27-28, paras. 42-47; No. 75(a), para. 27; and No. 75(b), para. 31; and comments on Korea's response to Panel question No. 74, paras. 18 and 22.

[235] United States' response to Panel question No. 28(a), paras. 43-44.

[236] United States' responses to Panel question No. 28(a), para. 45; and No. 75(a), para. 27.

[237] In its third-party statement, the European Union takes the view that while, in principle, the USITC was required to consider data pertaining to producers of belt-driven washers in its injury analysis (having included them in the scope of the domestic industry), if an investigating authority does not have reliable data from the producer of such washers, it can comply with the obligations of Articles 4.1(a) and 3.1 if the available data are sufficiently representative of the domestic industry. According to the European Union, the investigating authority would need to provide a reasoned and adequate explanation why it did not consider data relating to those producers, and the Panel would have to consider whether the data without belt-driven washers were sufficiently representative to give a true picture of the domestic industry. (European Union's third-party response to Panel question No. 4, paras. 17-18).

[238] We note that in *US – Lamb*, the Appellate Body considered that, while the text of Article 4.2(a) (that investigating authorities evaluate all relevant factors of an *objective and quantifiable nature*) refers to the factors to be evaluated and not the underlying data, those factors can only be of an "objective and quantifiable

7.129. In our view, when an investigating authority finds data provided by one of the domestic producers with respect to one or more of the factors having a bearing on the situation of the domestic industry is unreliable, the investigating authority may well make its evaluation based on the available facts, which would include replacing the unreliable information with other verifiable information available. The investigation is not paralysed simply because certain information proves unreliable. However, as part of its obligation to provide reasoned conclusions on pertinent issues of law and fact (including the evaluation of the factors set out in Article 4.2(a)), the investigating authority would be required to explain in its published report (a) the reason why the data in relation to those factors was considered unreliable (and thus unusable); (b) how the investigating authority conducted its evaluation under Article 4.2(a) despite the unreliability of the data (for instance, whether it replaced the missing information, and if yes, with what); and (c) whether the available data based on which the investigating authority made its examination under Article 4.2(a) was sufficiently representative (and thus provided the investigating authority with a sufficient factual basis) to draw reasoned conclusions concerning the situation of the "domestic industry". In reviewing Korea's claim, consistent with our standard of review, we examine whether the USITC provided reasoned and adequate explanations with respect to the parameters set out in points (a)-(c) above.

7.130. We note that the USITC stated that it excluded Alliance's financial data because Alliance "was unable to provide usable financial results".[239] The United States submits that the USITC provided the specific reasons why it was unable to use Alliance's financial data in footnote 12 to page III-8 of the USITC report.[240] However, we note that those reasons are redacted from the USITC report, and that the United States has failed to provide an unredacted version.[241] The United States also asserts that the USITC was not able to ensure that Alliance's data were reliable because Alliance submitted its questionnaire response late in the investigation.[242] However, the United States does not substantiate its factual assertions by pointing to relevant parts of the USITC report and thus does not show the USITC's reasoning for excluding Alliance's financial data from its profitability analysis. Therefore, we find that the USITC failed to provide a reasoned and adequate explanation for not using Alliance's financial data in evaluating the profitability of the domestic industry. Having reached this finding, we do not consider it necessary to evaluate whether the USITC based its findings on data that were representative of the "domestic industry".

7.131. Based on the foregoing, we find that the USITC acted inconsistently with Articles 4.2(a) and 3.1 of the Agreement on Safeguards by excluding the profit and loss data of the producer of belt-driven washers from the profit data used to determine the profitability of the domestic industry. Having reached this finding, we do not consider it necessary to make additional findings under Articles 2.1, 4.1 (a), and 4.2(c) of the Agreement on Safeguards.

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nature" if they allow a determination to be made on the basis of "objective evidence", as required by Article 4.2(b). Therefore, per the Appellate Body, the words "factors of an objective and quantifiable nature" imply an evaluation of objective data that enables the measurement and quantification of those factors. (Appellate Body Report, *US – Lamb*, para. 130).

[239] United States' response to Panel question No. 75(b), para. 29; USITC report, (Exhibit KOR-1), fn 205 to p. 33.

[240] United States' response to Panel question No. 75(b), para. 30; USITC report, (Exhibit KOR-1), fn 12 to p. III-8.

[241] We note in this regard that we specifically asked the United States to "provide the unredacted version of the USITC's report where the USITC provides all of its reasons regarding why it did not use the financial data in this regard, including that set out in footnote 205 of page 33 of the USITC's report, (Exhibit KOR-1)". (Panel question No. 27). We also asked the United States to point to the relevant parts of the USITC report where the USITC found Alliance's financial to be flawed and therefore unusable. (Panel question No. 75(a)). However, the United States declined to provide the requested information, on the ground that the specific reasons why the USITC found this data to be unusable are confidential. The United States maintains that disclosing the specific reasons is not permitted under its domestic law. (United States' response to Panel question No. 75(b), para. 30). We recall that we adopted rules for protection of BCI in these proceedings. We also asked the United States what additional procedures, beyond those we adopted, it considered necessary to provide the information we sought, while safeguarding the confidentiality of that information. (Panel question Nos. 71 and 75(b)). The United States did not propose any such alternative procedures. (United States' response to Panel question No. 71, para. 10).

[242] United States' response to Panel question No. 75(a), paras. 22-26.

7.5.5 The USITC's alleged failure to undertake an objective examination of the significant overall impairment of the domestic industry and its decision to base its serious injury determination on declining profitability alone

7.132. Korea contends that the USITC acted inconsistently with Articles 3.1, 4.1(a), 4.2(a), and 4.2(c) because it failed to undertake an objective examination of the significant overall impairment of the domestic industry and based its serious injury determination on declining profitability alone.[243] According to Korea, the USITC determined that the domestic industry had suffered serious injury based on only one of the eight factors listed in Article 4.2(a), namely profits and losses.[244] Korea does not exclude the possibility that there could be situations where one injury factor trends negatively and supports a determination of serious injury.[245] However, Korea contends that in the underlying investigation the USITC accorded decisive importance to the factor profits and losses and failed to provide any reasoned and adequate explanation of why, despite the overwhelming majority of factors trending positively, the position of the domestic industry was nonetheless impaired as a whole.[246]

7.133. The United States rejects Korea's contention that the USITC based its serious injury finding on only one negatively trending factor, i.e. profits and losses. Rather, the United States maintains that the USITC found that six factors exhibited trends indicative of injury, including three of the eight factors listed in Article 4.2(a).[247] The United States also argues that the USITC explained how its evaluation of all relevant factors supported its determination, including why the relevant factors showing seemingly positive or neutral trends did not detract from its determination that the domestic industry had suffered serious injury.[248]

7.134. We recall that at paragraph 7.131 above, we have found that the USITC's exclusion of the financial data of the producers of belt-driven washers when evaluating the profit and loss of the domestic industry was inconsistent with Article 4.2(a). Consequently, in making its overall finding of serious injury, the USITC relied on an intermediate finding (of profitability), which was inconsistent with Article 4.2(a). We therefore do not consider it necessary to address Korea's claim that the USITC failed to undertake an objective examination of the significant overall impairment of the domestic industry.

7.135. Based on the foregoing, we do not find it necessary to evaluate Korea's claim under Article 4.2(a) that the USITC failed to undertake an objective examination of the significant overall impairment of the domestic industry and based its overall finding of serious injury on one factor alone. We also do not address Korea's claim under Articles 3.1, 4.1(a), and 4.2(c) for the same reasons.

7.5.6 Conclusion

7.136. With respect to Korea's claims under Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c) of the Agreement on Safeguards challenging the USITC's findings on serious injury suffered by the domestic industry:

a. We find that the USITC acted inconsistently with Articles 4.2(a) and 3.1 of the Agreement on Safeguards by excluding the profit and loss data of the producer of belt-driven washers from the profit data used to determine the profitability of the domestic industry. We do not find it necessary to separately address whether the USITC also acted inconsistently with Articles 2.1, 4.1(a), and 4.2(c) for these same reasons.

[243] Korea's first written submission, paras. 270 and 306.
[244] Korea's first written submission, paras. 270 and 273.
[245] Korea's response to Panel question No. 22, para. 117.
[246] Korea's first written submission, para. 273.
[247] The United States argues that the following six factors were indicative of injury: (a) import volume doubled during the POI; (b) the penetration of subject imports in the US market significantly increased; (c) the financial performance of the domestic industry "precipitously" declined; (d) the domestic industry's sales prices declined; (e) the cost of goods sold (COGS) to net sales ratio increased; and (f) the capital and R&D expenditures of the domestic industry declined. (United States' first written submission, para. 247 (referring to USITC report, (Exhibit KOR-1), pp. 33, 36-37, 39, 42-43, and V-28)).
[248] United States' first written submission, paras. 237, 241-243, 246, and 249-251.

b. We reject, for the reasons set out in paragraph 7.119 above, Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC allegedly failed to objectively examine "profit and loss".

c. We reject Korea's claims under Article 4.2(a) of the Agreement on Safeguards that the USITC allegedly failed to objectively examine the share of the domestic market taken by increased imports.

d. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC failed to evaluate all injury factors set out in Article 4.2(a).

e. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 2.1, 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that are consequential to Korea's claims challenging the USITC's definition of the domestic industry.

f. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC failed to undertake an objective examination of the significant overall impairment of the domestic industry and based its overall finding of serious injury on one factor alone.

7.6 The USITC's causation determination

7.137. In the underlying investigation the USITC conducted a two-stage analysis as part of its causation determination.[249] Under the first stage, the USITC assessed whether there was a causal link between the increased imports and the serious injury suffered by the domestic industry.[250] Under the second stage, the USITC examined whether factors other than increased imports might have explained that serious injury.[251] Korea makes arguments challenging both stages of the USITC's determination under Articles 2.1, 3.1, 4.2(b), and 4.2(c) of the Agreement on Safeguards. In addition, Korea makes consequential claims contending that because the USITC's analysis of increased imports and its definition of the domestic industry were inconsistent with the Agreement on Safeguards, the USITC's causation determination, which relied on these two separate analyses, was also inconsistent with the Agreement on Safeguards.[252]

7.138. We review Korea's causation claims under Article 4.2(b) of the Agreement on Safeguards.[253] We note in this regard that Article 4.2(a) of the Agreement on Safeguards provides that in an investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this agreement, investigating authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, including in particular those set out in Article 4.2(a). Article 4.2(b), in turn, provides that the determination referred to in Article 4.2(a) shall not be made unless the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. Article 4.2(b) also states that when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports. To ensure that injury caused by such factors is not attributed to increased imports, investigating authorities conduct what is commonly referred to as the non-attribution analysis.

[249] Korea's first written submission, paras. 356-357; United States' first written submission, paras. 275-276.

[250] USITC report, (Exhibit KOR-1), pp. 38-44. United States' first written submission, para. 275; Korea's first written submission, paras. 352-356.

[251] USITC report, (Exhibit KOR-1), pp. 45-51. United States' first written submission, para. 276; Korea's first written submission, paras. 357-361.

[252] Korea's first written submission, paras. 455-461.

[253] In reviewing Korea's claims with respect to causation, we examine whether the USITC acted inconsistently with Articles 3.1 and 4.2(b) of the Agreement on Safeguards. If we find a violation under these provisions, we will not separately address Korea's claims under Articles 2.1 and 4.2(c) because Korea has not presented a separate factual basis for these claims. For the same reasons, if we find no violation under Articles 3.1 and 4.2(b), we will reject the claims under Articles 2.1 and 4.2(c).

7.139. In reviewing Korea's claims, we shall examine whether the USITC examined all pertinent facts and provided a reasoned and adequate explanation of how those facts supported its determination. If we find that the USITC did not do so, we will find that the USITC acted inconsistently with Article 4.2(b). However, in making that determination we will not review the evidence *de novo*, nor substitute our judgement for that of the USITC.

7.140. In section 7.6.1, we discuss the first stage of the USITC's causation determination. In section 7.6.2, we discuss the second stage of the USITC's causation determination.

7.6.1 First stage of the USITC's causation determination

7.141. Under the first stage, the USITC concluded that subject imports caused serious injury to the domestic industry. In reaching this conclusion, the USITC conducted a coincidence in trends analysis, wherein it noted the correspondence between the increased volume of imports and the decreasing performance of the domestic industry.[254] The USITC also conducted a price analysis and assessed the competitive relation between subject imports and domestically produced goods. Korea challenges the following aspects of the USITC's determination under the first stage:

a. the USITC's finding on price effects, which Korea considers to be flawed and incomplete;

b. the USITC's findings on coincidence in trends between imports and injury factors, which, for the reasons set out below, we find are interlinked with the USITC's price analysis; and

c. the USITC's failure to address certain conditions of competition in the domestic market, which per Korea negated the USITC's finding on causation.

7.142. The United States rejects Korea's arguments in this regard.

7.6.1.1 The USITC's price effects analysis

7.143. In the underlying investigation, the USITC made the following finding regarding the adverse price effects of subject imports[255]:

> *We find that the significant and growing quantity of low-priced imports depressed and suppressed prices for the domestic like product*. Given the moderate to high degree of substitutability between subject imports and the domestic like product, and the importance of price to purchasing decisions, the pervasively *lower* prices on imported LRWs would have forced domestic producers to either reduce their own prices or lose retailer floor spots and sales. Between the first and last quarters for which pricing data are available, the domestic industry's prices declined *** percent on sales of product 1, *** percent in sales of product 2, *** percent on sales of product 3, *** percent on sales of product 4, *** percent on sales of product 5, and *** percent on sales of product 6. Demand trends cannot explain these price declines because apparent U.S. consumption of LRWs increased throughout the period of investigation, by *** percent between 2012 and 2016 and another *** percent between the interim periods. Nor can trends in the domestic industry's production costs explain declining domestic like product prices. The industry's average unit COGS and its ratio of COGS to net sales generally increased during the period of investigation, placing the industry in a cost-price squeeze. *Given this, we find that the large and increasing volume of low-priced imported LRWs, at prices that undercut domestic like product prices to a significant degree, depressed and suppressed prices for the domestic like product during the period of investigation.*
>
> Our finding that imported LRWs depressed and suppressed domestic like product prices is also supported by evidence that *low-priced import competition* forced Whirlpool to cut

[254] United States' first written submission, para. 275 (referring to USITC report, (Exhibit KOR-1), pp. 38-39); Korea's first written submission, para. 352.

[255] USITC report, (Exhibit KOR-1), pp. 42-43. (fns omitted; emphasis added; redacted original)

> prices on *** sales to *** in 2014 and to retract announced price increases in 2012 and 2014, despite strong demand growth and rising costs.

7.144. The USITC relied on these findings to conclude as follows[256]:

> We find that imports are a substantial cause of serious injury to the domestic industry. The domestic industry's operating and net losses increased during the period of investigation as a direct consequence of the declining prices on sales of domestically produced LRWs. Between the first and last quarters for which data are available, the domestic industry's average prices on sales of all six pricing products declined by between *** and *** percent, or a weighted-average of *** percent. These price declines, coupled with increasing costs, caused the domestic industry's ratio of cost of goods sold ("COGS") to net sales to increase from *** percent in 2012 to *** percent in 2016, placing the industry in a cost price squeeze. Given strong demand growth, rising costs, and the competitiveness of the domestic industry's LRWs, we find that the only explanation for the domestic industry's declining prices and increasing COGS to net sales ratio is the significant increase in low priced imports of LRWs during the period of investigation.
>
> …
>
> In sum, despite strong demand growth and the competitiveness of domestically produced LRWs, the domestic industry experienced increasing operating and net losses during the period of investigation as its sales prices declined while its costs generally increased. The record shows that the domestic industry's declining sales prices during the period of investigation resulted from low-priced import competition, as increasing quantities of low-priced imports depressed and suppressed prices for the domestic like product. We therefore conclude that imports were a substantial cause of serious injury to the domestic industry.

7.145. We note in this regard that the price data that the USITC used to make its finding on price suppression and depression were based on six product categories that covered various types of LRWs, but not agitator-based TL LRWs, which accounted for half of domestic sales but relatively few imports.[257] The United States confirms in this regard that the USITC did not ask domestic producers to provide price data on agitator-based TL LRWs.[258] In the section of its report where the USITC examined the degree of substitutability between imports and domestically produced LRWs, the USITC acknowledged that agitator-based TL LRWs accounted for half of domestic shipments and few import shipments, but stated that differences in the product mix of imports did not attenuate import competition to a significant degree.[259] In particular, the USITC stated as follows[260]:

> We also find that imported LRWs competed with domestically produced LRWs in all segments of the U.S. market. In making this finding, we recognize that FL LRWs accounted for a higher proportion of import shipments (*** percent in 2016) than domestic industry shipments (*** percent in 2016) and that agitator-based TL LRWs accounted for around half of domestic industry shipments (*** percent in 2016) but few import shipments (*** percent in 2016). These differences in product mix did not attenuate import competition to a significant degree for several reasons. First, imports of FL LRWs and impeller-based TL LRWs, which accounted for nearly all imports, competed directly with domestically produced FL LRWs and impeller-based LRWs, respectively, which accounted for around half of domestic industry shipments in 2016.

[256] USITC report, (Exhibit KOR-1), pp. 38 and 44. (redacted original)

[257] United States' response to Panel question No. 32, para. 49. We note that in the underlying investigation Korean respondents requested the USITC to collect model-specific price information, and, if the USITC were to reject that request, to make two changes in the product category definition. First, to revise the definition of two of the product categories that were defined on the basis of "impeller or infusors" TL LRWs to "impeller" TL LRWs. Second, to collect price data for at least one TL LRW with agitator. (Korea's second written submission, para. 256 (referring to LG's comments on draft questionnaires (12 June 2017), (Exhibit KOR-35), pp. 24-25)).

[258] United States' response to Panel question No. 76(e), para. 45.

[259] USITC report, (Exhibit KOR-1), p. 32.

[260] USITC report, (Exhibit KOR-1), p. 32. (redacted original)

> Imports of FL LRWs also competed with domestically produced TL LRWs to the extent that consumers cross-shopped FL and TL LRW models, and all responding purchasers reported that consumers are sometimes or frequently willing to switch between TL and FL LRWs based on relative pricing. Finally, pricing product data show that imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based TL LRWs.

7.146. Korea challenges under Article 4.2(b) the USITC's price effects findings on which the USITC based its causation determination. In this regard, Korea makes arguments challenging the USITC's findings regarding the increase in costs incurred by the domestic industry, as well as the adverse effect of subject imports on domestic prices. In addressing these arguments, we note that the Agreement on Safeguards does not specifically require a price analysis. However, where, as in the case of the underlying investigation, the investigating authority's finding on causation is based on a finding of adverse price effects, we must examine, as part of our review of the causation determination, whether the investigating authority examined all pertinent facts, and provided a reasoned and adequate explanation as to how those facts supported its finding of adverse price effects.

7.6.1.1.1 The USITC's findings regarding the costs incurred by the domestic industry

7.147. In the underlying investigation, as we noted above, the USITC found that the domestic industry's average cost of goods sold (COGS) and its ratio of COGS to net sales generally increased during the POI, placing the industry in a cost-price squeeze.[261] Regarding average COGS, the USITC noted that the average COGS increased between 2012-2013 and 2013-2014 before declining in 2015 and 2016 to a level certain percentage higher than in 2012.[262] The USITC noted that this average COGS was higher in interim 2017 than in interim 2016.[263] The USITC found that the ratio of COGS to net sales increased steadily from 2012-2013, 2013-2014, 2015-2016, and again from interim 2016 to interim 2017.[264]

7.148. Korea contends that the USITC's findings that "costs generally increased", and that the ratio of COGS to net sales was increasing over the POI, were either not supported by, or actually contradicted by, the record.[265] In particular, Korea states that rising costs of the domestic industry and the alleged cost-price squeeze was not supported by the facts on the record.[266] In support of its statement, Korea notes the following:

a. costs were actually declining in 2015 and 2016[267];

b. average unit COGS declined in 2014-2015 and 2015-2016[268]; and

c. the domestic industry's raw material costs were at their lowest at the end of the POI, and there was no overall substantial change in the cost share of essential inputs during the examined period.[269]

7.149. In response, the United States clarified that the COGS-to-net-sales ratio was increasing in every year of the 2012-2016 period as well as in interim 2017 (compared to interim 2016).[270] The United States acknowledged that costs were decreasing in 2015 and 2016, but noted that the USITC found that the average unit COGS remained higher in 2016 than in 2012, and increased in most of the periods examined by the USITC.[271] The United States also explained that the fact that raw material costs did not increase as a share of total COGS does not contradict the USITC's finding that raw material costs increased on a per unit basis.[272] Instead, per the United States, it only shows

[261] USITC report, (Exhibit KOR-1), p. 43.
[262] USITC report, (Exhibit KOR-1), fn 264.
[263] USITC report, (Exhibit KOR-1), fn 264.
[264] USITC report, (Exhibit KOR-1), fn 264.
[265] Korea's first written submission, paras. 377-378; response to Panel question No. 31, para. 182.
[266] Korea's first written submission, para. 378.
[267] Korea's first written submission, para. 378.
[268] Korea's first written submission, para. 378.
[269] Korea's first written submission, para. 378.
[270] United States' first written submission, para. 290.
[271] United States' first written submission, para. 288.
[272] United States' first written submission, para. 289.

that the increase in raw material costs coincided with an increase in other costs making up the total COGS.[273]

7.150. We note that the degree of cost-price squeeze (or the ratio of COGS to net sales) may increase even in scenarios (a) where the cost goes down, such as when the decrease in costs is accompanied by a more significant decrease in price; or (b) where the price goes up, such as where the increase in price is accompanied by a more significant increase in costs. Thus, a decline in costs does not necessarily exclude the possibility of a cost-price squeeze. Moreover, the cost of raw materials as a percentage of overall costs of goods sold may remain constant even when the costs of raw materials increase, such as when the raw material costs increase, but increase as much as, or less than, increase in other elements that make up the overall COGS.

7.151. Therefore, to clarify Korea's position on this matter, we asked Korea whether it disputed the USITC's finding that the domestic industry's ratio of COGS to net sales was increasing over the POI (Panel question No. 31). In its response, Korea repeated its arguments on why a finding of cost-price squeeze was contradicted by (a) decline in costs and COGS in 2015 and 2016, and (b) cost of raw materials and essential inputs at the end of the POI.[274] Korea did not engage with the United States' arguments on why these other findings did not contradict a finding on cost-price squeeze. Therefore, taking into account the explanations provided by the United States set out in paragraph 7.149 above and the arguments made by Korea, we reject Korea's argument that the USITC's finding that the domestic industry's ratio of COGS to net sales increased over the POI was not supported by the record evidence.

7.6.1.1.2 The USITC's finding regarding the depressive and suppressive effects of imports on prices of domestically produced goods

7.152. Korea's arguments challenging the USITC's finding regarding the depressive and suppressive effect of subject imports on domestic like product prices raise issues regarding the six product categories that the USITC used to compare the prices of subject imports and the domestic like product, as well as the asserted exclusion of agitator-based TL LRWs from the USITC's price analysis.

Issues raised by Korea regarding the six product categories

7.153. Korea raises the following issues regarding the six product categories used by the USITC[275]:

a. The six product categories included multiple models with different price ranges.

b. The price data were unrepresentative because they were adopted from an earlier anti-dumping investigation on LRWs from China and not updated:

   i. Many large-capacity options were not included in the LRW price data.

   ii. Product category 1 covered models that were no longer being sold by the domestic industry during the end of the POI, and neither were they among LG's top-volume FL LRWs.

c. The USITC did not provide information on how it made its price comparisons, including whether it made adjustments for any differences between products in the same product category.

7.154. With regard to the six product categories adopted by the USITC, which according to Korea included multiple models with a range of features and consequent wide variations in price in any specific quarter, Korea submits that the price data was too broad and that the USITC should have required price data for each model within each product category.[276] The United States submits that by obtaining sales prices on six strictly defined pricing products, the USITC ensured that it compared

[273] United States' first written submission, para. 289.
[274] Korea's response to Panel question No. 31, paras. 180-182; second written submission, paras. 240-241.
[275] Korea's first written submission, paras. 399-404.
[276] Korea's first written submission, para. 399.

prices of domestic and imported LRWs possessing similar capacities and the same configuration, lid material, and colour.[277]

7.155. We note that the USITC specifically considered and rejected the Korean respondents' argument on this point as follows[278]:

> We are unpersuaded by respondents' argument that the pricing product definitions are overbroad because each definition encompasses many different models with different features at different points in their life cycles, resulting in pricing data that is allegedly unrepresentative of the model-specific prices considered by purchasers. … In defining pricing products, the Commission must strike a balance between product definitions that are narrow enough to permit apples-to-apples comparisons of directly competitive products but broad enough to yield reasonable coverage of domestic producer and importer shipments. Even if the factors cited by respondents served to reduce somewhat the similarity of the domestically produced and subject imported LRWs on which pricing data were reported, they also increased pricing product coverage without reducing the similarity of the compared LRWs to an unacceptable level.

7.156. Korea recalls the arguments made by the Korean respondents in the USITC's investigation regarding the use of broad comparison baskets (reflected in the six product categories). However, Korea does not adequately engage with the reasons that the USITC gave for rejecting those arguments. In particular, Korea does not show (as it would be expected to as the complainant) why the USITC's reasoning set out above was flawed. Because Korea fails to do so, it has failed to establish a basis for this aspect of its claim.[279]

7.157. With regard to the representativeness of the product categories, Korea contends that these product categories were adopted from an earlier anti-dumping investigation on *LRWs from China*, and not updated to reflect the scope of products in the marketplace for the safeguard investigation. Korea contends in particular that (a) product category 1 comprises a type of FL LRWs that was no longer offered by Whirlpool or GE, and were not among LG's top volume FL LRWs; and (b) many popular large-capacity options were not included in the price data.[280] The United States submits that the USITC collected sufficient price data from domestic producers and importers in nine quarters of the POI, and that these data showed subject imports underselling domestic goods in seven of the nine comparisons.[281] Regarding LRWs with large-capacity options, the United States submits that the USITC addressed in footnote 255 of its report the respondents' argument that many large-capacity options were not included in the LRW price data.[282] The United States also notes in this regard that the appropriate time for the respondents to propose product categories based on large capacities would have been in their comments on draft questionnaires.[283] However, the United States notes that the respondents did not do so.[284]

7.158. To the extent Korea submits that models covered in product category 1 were no longer being sold by domestic industry by the end of the POI, Korea does not demonstrate how that distorted the USITC's price effects finding. We note that while the United States does not dispute that price data was not necessarily collected for models covered in this product category for the last quarter of the POI, the United States submits (and Korea does not dispute) that the USITC collected sufficient

[277] United States' first written submission, para. 304.
[278] USITC report, (Exhibit KOR-1), fn 255.
[279] In addition, in the absence of any specific rules in the Agreement on Safeguards determining how an investigating authority should make price comparisons, investigating authorities have a certain degree of discretion in determining how they make such price comparisons, provided such comparisons provide a sufficient factual basis to make objective findings. Nothing in the Agreement on Safeguards prohibits an investigating authority from making price comparisons based on product categories that group products based on characteristics such as capacity or configuration, or requires price comparisons on a more granular, model-specific basis. While an investigating authority is free to make price comparisons on such a model-specific basis, absent any showing that the methodology that the USITC chose (i.e. the adoption of the six product categories) did not allow the USITC to make a proper determination of price effects with respect to the products covered by those product categories, Korea has not established that the USITC acted inconsistently with Article 4.2(b) or any other provision of the Agreement on Safeguards.
[280] Korea's first written submission, para. 400.
[281] United States' response to Panel question No. 37(a), para. 68.
[282] United States' response to Panel question No. 37(b), para. 69.
[283] United States' response to Panel question No. 37(b), paras. 70-71.
[284] United States' response to Panel question No. 37(b), paras. 70-71.

price data for this category, which allowed it to make price comparisons in nine quarters of the POI.[285] Having defined the PUC and the domestic like product to include models of LRWs covered in product category 1, in our view the USITC was entitled to make its price comparisons based on the price data available for this product category.[286]

7.159. With regard to popular large-capacity options allegedly not being included in the price data, Korea has not explained how the non-inclusion of such large-capacity options distorted the price effects finding, or otherwise made the price data before the USITC unrepresentative. In this regard, we also note the United States' submission that the Korean respondents did not propose any additional product category to the USITC that corresponded to models with larger capacity options. The record from the underlying investigation supports the United States' explanation. In particular, the record shows that LG (supported by Samsung) strongly recommended that the USITC collect data on a model-specific basis, and submitted that if the USITC were to reject that recommendation it should make two changes to the pricing product definition (with none of the two changes relating to larger capacity options).[287] To the extent that Korea's arguments here challenge the alleged failure to consider models with larger capacity (as opposed to challenging the USITC's decision to not make model-specific comparisons), we consider that the Korean respondents' failure during the USITC's investigation to propose a pricing category with larger capacity further undermines Korea's arguments in this dispute.

7.160. Finally, we turn to Korea's argument that the USITC did not provide information on how it made its price comparisons, including whether it made any adjustments for any differences between products in the same pricing product category.[288] In this regard, we note that the USITC explained in the underlying investigation that it made its comparisons across six pricing product categories. We are not persuaded that this explanation was not reasoned and adequate in light of the record evidence. We note that Korea states that the evidence on the USITC's record included "extensive and reliable information" demonstrating that sales prices of imported washers were not frequently or consistently lower than the sales prices of US produced washers.[289] But in making this statement, Korea does not cite any evidence on the USITC's record. Instead, Korea gives an "example" of the pricing analysis in the Ashenfelter report that Korean respondents filed before the USITC, which per Korea demonstrated the inadequacy of relying on the six pricing product categories for price trends or comparisons.[290] In particular, in its submission, Korea cites pages 87-91 of Exhibit KOR-11, which refer to the Ashenfelter report, but does not explain what exactly in those pages supports its argument.[291] We note that as a complainant it is incumbent on Korea to show how relevant parts of the record of the USITC's investigation support its arguments. It is not our task to review any given exhibit, identify what could be potentially relevant to the complainant's claim, and then make the case for the complainant by assessing whether the potentially relevant parts in the exhibit support its claim. We therefore reject Korea's arguments in this regard.

Representativeness of the USITC's price analysis – treatment of agitator-based TL LRWs

7.161. Korea contends that the USITC's price analysis was not representative of the price effects of imports in the US market as a whole. Korea asserts that due to the exclusion from the price comparison analysis of agitator-based TL LRWs which, in addition to constituting half of domestic sales, were sold at lower price points than other models, the USITC's price analysis did not reflect the actual picture of the US LRWs market.[292] Korea asserts that having found agitator-based TL LRWs to be like products, which competed with imported LRWs, the USITC erred in excluding such type of TL LRWs from the price analysis.[293] Therefore, per Korea, because the USITC excluded agitator-based TL LRWs from its price comparison analysis, its findings regarding the depressive and

[285] United States' response to Panel question No. 37(a), para. 68.
[286] Indeed, the alternative would have been to simply ignore any imports or domestic sales of this product type and forego collection of price data with respect to this product category.
[287] LG's comments on draft questionnaires (12 June 2017), (Exhibit KOR-35), pp. 19 and 24.
[288] Korea's first written submission, paras. 402-403.
[289] Korea's first written submission, para. 403.
[290] Korea's first written submission, para. 403.
[291] Korea's first written submission, para. 403. See also Korea's second written submission, para. 245.
[292] Korea's first written submission, para. 396; response to Panel question No. 77, para. 85.
[293] Korea's response to Panel question No. 33, para. 184; second written submission, para. 238.

suppressive effect of subject imports on domestic like product prices were not reasoned or adequate.[294]

7.162. The United States contends that the USITC based its analysis regarding the effects of subject imports on representative price data.[295] In particular, the United States contends that the non-inclusion of agitator-based TL LRWs did not render the USITC's price data unrepresentative given that half of domestic shipments and nearly all of subject imports comprised LRWs other than agitator-based TL LRWs.[296] The United States also asserts that as part of its findings on price effects, the USITC reasonably concluded, relying on a wide array of objective evidence, that subject imports competed with domestically produced agitator-based TL LRWs, and that they adversely affected the sales of agitator-based TL LRWs.[297]

7.163. The question before us is whether the USITC provided a reasoned and adequate explanation in support of its finding that subject imports depressed and suppressed prices of the domestic like product as a whole (including agitator-based TL LRWs).

7.164. We note that it remains undisputed that half of all sales made by the domestic industry were those of agitator-based TL LRWs, while the price analysis based on the six product categories covered other types of LRWs. Given that the agitator-based models accounted for one-half of domestic shipments and virtually no imports, we consider that the USITC was required to analyse the price effects of imports on this part of the US market and the domestic like product. In this regard, we note the United States' submission that imported LRWs were sold at nearly all price points in the US market "including the lower price points covering most agitator-based TL LRWs", meaning that agitator-based TL LRWs competed in the "lower-priced" segment of the market.[298] Given the fact that agitator-based TL LRWs accounted for half of domestic sales but virtually no imports, and that the domestic models of this type competed at the lower end of the price spectrum for LRWs in the US market, we consider the other evidence that the USITC relied on to support its findings of adverse price effects with respect to domestically produced agitator-based TL LRWs. In this regard, we consider (a) what constituted the "wide array of evidence" on which the USITC based its conclusion, as part of its price effects analysis, that subject imports competed with domestically produced agitator-based TL LRWs; and (b) what was the nature of the analysis conducted by the USITC of the effects of such competition on the domestic industry. Answers to these questions will be informative as to the representativeness of the USITC's price analysis concerning the depressive and suppressive effect of imported LRWs on the domestic industry as a whole, including agitator-based TL LRWs.

7.165. With respect to the "wide array" of evidence that, per the United States, the USITC relied on to conclude that subject imports competed with domestically produced agitator-based TL LRWs, and adversely affected the sales of agitator-based TL LRWs, we do not find in the USITC report, for the reasons set out below, a reasoned and adequate explanation of how such evidence supported the USITC's finding that subject imports depressed and the suppressed the prices of agitator-based TL LRWs.

7.166. We note that the "wide array of evidence" the United States refers to are evidence contained in footnotes 201 and 202 of the USITC report. The USITC cited this evidence to support its findings, set out in paragraph 7.145 above, that "[i]mports of FL LRWs [] competed with domestically produced TL LRWs to the extent that consumers cross-shopped FL and TL LRW models, and all responding purchasers reported that consumers are sometimes or frequently willing to switch between TL and FL LRWs based on relative pricing", and that "pricing product data show that imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based TL LRWs". However, we do not see an adequate explanation in the USITC report as to how such findings or evidence could have supported the USITC's finding regarding the depressive and suppressive effect of subject imports on prices of agitator-based

[294] See e.g. Korea's first written submission, paras. 376, 381, and 394-396; response to Panel question No. 77, para. 85.
[295] United States' second written submission, para. 100.
[296] United States' first written submission, para. 301.
[297] United States' second written submission, paras. 102-104 (referring to USITC report, (Exhibit KOR-1), p. 32 and fns 201-202).
[298] United States' first written submission, para. 81.

TL LRWs.[299] Indeed, we specifically asked the United States whether the USITC's findings regarding the depression and suppression of domestic like product prices included agitator-based TL LRWs (and if so, to point us to the evidence on the USITC's record that showed that low-priced imports depressed and suppressed prices of domestically produced agitator-based TL LRWs). The United States said "no".[300]

7.167. In addition, to the extent the types of evidence set out in these footnotes refer to the price data that the USITC collected in the anti-dumping investigation on LRWs from China, we do not consider that this price data provided the USITC with a proper basis in the context of the safeguard investigation to find that imported LRWs suppressed or depressed the prices of agitator-based TL LRWs.[301] First, the POI in LRWs from China ended several months before the end of the POI in the underlying safeguard investigation. Second, while LRWs from China was focused on injury caused by imports from one source, this was not the case in the underlying safeguard investigation. Data from LRWs from China thus would not have been informative on the potential price effects of the much broader category of imports covered by the underlying safeguard investigation. Nor do we find other evidence cited in these footnotes that could have supported the USITC's finding regarding the depressive and suppressive effect of subject imports on agitator-based TL LRWs.[302]

[299] For instance, in finding that subject imports depressed and suppressed prices of domestic like products, the USITC stated that "given the moderate to high degree of substitutability between subject imports and the domestic like product, and the importance of price to purchasing decisions, the pervasively lower prices on imported LRWs would have forced domestic producers to either reduce their own prices or lose retailer floor spots and sales". (USITC report, (Exhibit KOR-1), pp. 42-43). To the extent the USITC's finding of price depression and suppression was based on pervasively lower prices of subject imports, we note that the price data that showed "imported LRWs were priced lower than domestically produced LRWs in most quarterly comparisons" did not include agitator-based TL LRWs, and thus, the USITC could not have concluded based on that evidence that prices of subject imports were pervasively lower than agitator-based TL LRWs. (USITC report, (Exhibit KOR-1), p. 42; United States' comments on Korea's response to Panel question No. 76(a), para. 25). In addition, while the USITC stated that its finding regarding the depressive and suppressive effect of subject imports was "also supported" by evidence that low-priced import competition forced Whirlpool to cut prices, we do not see from the USITC report how this finding pertained to agitator-based TL LRWs. In particular, we recall, as set out above, that when we specifically asked the United States whether the USITC's findings regarding the depression and suppression of domestic like product prices included agitator-based TL LRWs, the United States said no. (United States' response to Panel question No. 35(a), para. 59).

[300] United States' response to Panel question No. 35(a), para. 59.

[301] United States' responses to Panel question No. 76(b), para. 32; and No. 34(a), paras. 51-56. In particular, the United States notes that in LRWs from China, the USITC found that subject imports of pricing product 9, an impeller-based TL LRW, undersold domestically produced agitator-based top load LRWs with a capacity of 3.6 cubic feet even though the subject imported model was more fully featured and should have therefore commanded a higher price, that the USITC relied on a confidential exhibit that the petitioner provided to it (and that has not been provided to us in these panel proceedings) that the petitioner described as based on proprietary information collected in LRWs from China and the safeguard investigation. (United States' response to Panel question No. 76(b), paras. 33-34 (referring to USITC report, (Exhibit KOR-1), p. 32 and fn 202; and USITC hearing transcripts, (Exhibit USA-12), p. 142)).

[302] In particular, the United States submits that the USITC supported its finding that subject imports competed at nearly all price points with "some evidence that that lower prices on more fully featured subject imports adversely affected the sales volumes and prices of less fully featured domestically produced LRWs" including agitator-based TL LRWs. (United States' response to Panel question No. 34(a), para. 55 (referring to USITC report, (Exhibit KOR-1), fn 202)). The evidence appears to refer to responses from purchaser surveys that price reduction on imported highly featured-TL impeller LRWs, or FL LRWs affected the price of US-produced TL LRWs always, usually, or sometimes. (United States' response to Panel question No. 34(a), para. 55 and fns 93-94 (referring to USITC report, (Exhibit KOR-1), pp. 32-33, fn 202, and p. V-14-15)). However, while we would agree as a general matter that lower prices on more fully featured subject imports could shift sales away from less full featured domestically produced agitator-based TL LRWs absent price cuts on the less fully featured model, the USITC report does not point to any specific data or analysis to support this proposition. Indeed, we note that the USITC did not ask domestic producers to provide price data on agitator-based TL LRWs. In addition, while the United States initially submitted that the USITC compared the average unit values (AUVs) of domestic industry shipments for different types of LRWs, including agitator-based TL LRWs, to importer sales prices based on the six product categories, the USITC declined to provide us the results of any such price comparisons. (United States' response to Panel question No. 76(c), para. 37). Instead, the United States later clarified that the USITC had not used the AUV data to make price comparisons, or to conduct a full-fledged price effects analysis. (United States' comments on Korea's response to Panel question No. 76(a), para. 25).

7.168. Based on the foregoing, we do not see from the USITC report sufficient evidence and explanation supporting its conclusion that subject imports depressed and suppressed the prices of the domestic like product as a whole, including agitator-based TL LRWs.[303] We thus do not consider that the USITC provided a reasoned and adequate basis for finding that subject imports depressed and suppressed prices of the domestic like product as a whole, specifically in relation to agitator-based TL LRWs.[304]

7.6.1.2 The USITC's analysis on coincidence in trends

7.169. We recall that, as part of its coincidence in trends analysis, the USITC noted the correspondence between increased volume of imports and the decreasing performance of the domestic industry (as reflected in the injury factors, including those set out in Article 4.2(a) of the Agreement on Safeguards).

7.170. Korea asserts that the domestic industry showed negative trends only with respect to "profit and loss" (suffering operating losses), and that the USITC failed to provide a reasoned and adequate explanation supporting its causation determination in light of positive developments with respect to many of the injury factors set out in Article 4.2(a).[305] The United States submits that negative developments in any one, or any combination, of the relevant factors set out in Article 4.2(a) may establish causation between increased imports and serious injury under the Agreement on Safeguards.[306] Noting the importance of profitability as an indicator of the domestic industry's overall situation, the United States contends that a focus on prices and profitability does not by itself establish an inconsistency with Article 4.2(a) of the Agreement on Safeguards.[307] The United States also denies that the USITC ignored alleged positive trends, in particular relating to market share.[308] With respect to market share, the United States notes that the USITC found that the domestic industry defended its market share by reducing prices to compete with significant and increased volumes of low-priced imports.[309] Therefore, per the United States, the relative stability of the domestic industry's market share did not detract from the coincidence of increased imports and the declining financial performance of the domestic industry.[310] In addition, the United States submits that the USITC explained why other factors showing neutral or positive trends did not detract from its causal link analysis and that Korea does not explain why in its view the USITC failed to address those trends.[311]

7.171. We find the USITC's finding on coincidence in trends to be directly linked to its findings on price effects. In this regard, we note that the USITC found coincidence in trends between increased

[303] See, e.g. Panel Report, *China – GOES (Article 21*.5 – *US)*, para. 7.111. In the context of reviewing the investigating authority's price effects finding under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, the panel expressed the view that if subject imports and domestically produced goods did not compete, it was unlikely that subject imports would suppress or depress domestic prices. However, the panel considered that it did not necessarily follow that just because subject imports and domestic products did compete on price, increases in subject import volume would necessarily have a suppressive or depressive effect on the prices of the domestic product. Instead, according to this panel, it would be incumbent on an investigating authority to show how its factual findings concerning price competition supported its conclusions regarding the suppressive or depressive effect of subject imports on the prices of the domestic like product.

[304] In reaching this conclusion, we note Korea's argument that having found agitator-based TL LRWs to be like products, which competed with imported LRWs, the USITC erred in excluding such type of TL LRWs from the price analysis. (Korea's second written submission, para. 238). We also note in this regard that while the United States argues that price data should be collected on product definitions that are narrow enough to permit apples-to-apples price comparisons, it also recognizes that in some cases it may be possible for an investigating authority to make representative price comparisons involving a product type that is produced domestically to the sales price of the imported product that competes most directly with the domestic product, despite physical differences that would prevent them from satisfying the same product definition. (United States' response to Panel question No. 35 (c), para. 62). In our view, to the extent an investigating authority finds prices of an imported product to be lower than the price of a domestically produced good, the authority must support such a finding with evidence showing that this is indeed the case, even if there are physical dissimilarities between them.

[305] Korea's first written submission, paras. 365-366.

[306] United States' first written submission, para. 281.

[307] United States' first written submission, para. 281.

[308] United States' first written submission, para. 282.

[309] United States' first written submission, para. 282.

[310] United States' first written submission, para. 282.

[311] United States' first written submission, paras. 283-284.

imports and losses suffered by the domestic industry. The USITC's finding on profit and loss, in turn, was linked to its price effects finding, wherein the USITC found that significant and growing quantity of low-priced imports depressed and suppressed prices of the domestic like product.[312] In particular, with respect to losses suffered by the domestic industry, the USITC noted that (a) the domestic industry's operating and net losses increased during the POI as a direct consequence of the declining prices on sales of domestically produced LRWs; and (b) the domestic industry defended its market share, in part, by reducing its sales prices in response to competition from the increasing volume of low-priced imports of LRWs.[313] With respect to the USITC's explanations concerning market share, we again note that the explanation relies on the USITC's conclusion that the domestic industry defended its market share by reducing prices to compete with significant and increased volumes of low-priced imports.

7.172. We have already found that the USITC acted inconsistently with Article 4.2(b) in relation to its finding regarding the depressive and suppressive effect of low-priced imports on prices of the domestic industry. The WTO-inconsistency of the price effects analysis vitiates the basis for the USITC's finding on coincidence in trends.

7.173. Based on the foregoing, we find that the USITC did not make its finding on coincidence in trends in a manner consistent with Article 4.2(b) of the Agreement on Safeguards.

7.6.1.3 The USITC's analysis of non-price related aspects of competition

7.174. Korea makes arguments challenging (a) the differences in the product mix between imported and domestic LRWs in the underlying investigation, and (b) the USITC's analysis of the conditions of competition between domestic and imported LRW parts.

7.6.1.3.1 Differences in the product mix between imported and domestic LRWs

7.175. On product mix, Korea contends that the USITC failed to acknowledge that there were differences in the product mix between imported and domestic LRWs during the POI.[314] Korea states that domestic sales were comprised largely of agitator-based TL LRWs, for which demand was declining, whereas imported LRWs comprised more distinctive and innovative FL and impeller-based TL LRWs, for which demand was rising.[315] Per Korea, given the significance of these agitator-based TL LRWs in domestic sales, and their obvious decline in terms of demand during the POI, the USITC should have examined the impact that the difference in product mix would have on the domestic industry's profitability, which it failed to do.[316] The United States responds that (a) the USITC thoroughly explained that differences in product mix did not attenuate import competition to a significant degree; and (b) the USITC provided a thorough explanation for rejecting the respondents' argument that US LRW brands suffered in the eyes of consumers due to domestic producers' reliance on sales of agitator-based TL LRWs.[317]

7.176. We note in this regard that Korea's arguments on the differences in product mix between imported and domestic LRWs focus on how competition was affected by the domestic industry relying on sales of what Korea considers to be under-performing agitator-based TL LRWs, whereas imported LRWs included other types of washers with distinctive and innovative features. Korea makes essentially the same points when presenting its arguments on the second stage of the USITC's causation determination with regard to the alleged deterioration of US brands. Thus, we address the issues raised by Korea when reviewing the parties' submissions in respect of that second stage of the USITC's causation determination. In this section, we focus on Korea's arguments regarding competition between imported and domestically produced parts of LRWs.

7.6.1.3.2 Competition between imported and domestic parts

7.177. In the underlying investigation, the USITC did not make any specific finding that imported parts of LRWs caused injury to the domestic industry producing parts of LRWs. Instead, per the

[312] USITC report, (Exhibit KOR-1), pp. 42-44.
[313] USITC report, (Exhibit KOR-1), pp. 38 and 40.
[314] Korea's first written submission, para. 412.
[315] Korea's first written submission, paras. 413-414.
[316] Korea's first written submission, para. 413.
[317] United States' first written submission, paras. 308-309.

United States, the USITC made its causation findings with respect to LRWs and LRW parts in the aggregate.[318]

7.178. Korea contends that the USITC failed to demonstrate that the conditions of competition were such that increased imports of parts caused serious injury, considering that the USITC's causal link analysis focused on the substitutability between imported and domestic LRWs, and it omitted any analysis in respect of the fact that imported LRW parts did not compete with domestic LRW parts.[319] The United States submits that the USITC was required to consider the impact of increased imports of LRWs on producers as a whole of the like product, including parts, and not the impact of imported parts on producers of domestic parts.[320] The United States takes the view that it would not have made any sense for the USITC to consider the impact of imports of covered parts on domestic producers of covered parts in light of the USITC's recognition that imports of covered parts did not compete with domestically produced covered parts.[321] Thus, per the United States, in establishing a causal link between subject imports and the domestic industry's serious injury, the USITC focused its analysis on the locus of competition between subject imports and the domestic industry, which was the US market for LRWs.[322]

7.179. We note that the USITC found domestically produced parts to be "like" imported parts.[323] We have already concluded in paragraphs 7.67 above that the USITC acted inconsistently with Article 4.1(c) in finding domestically produced parts to be "like" imported parts. Considering we have upheld Korea's claim under Article 4.1(c) that the USITC acted inconsistently with this provision by finding domestic parts to be like imported parts notwithstanding its finding that they did not compete, we do not need to separately address Korea's claim challenging the USITC's alleged failure to conduct a causation determination in relation to such parts.

7.180. Based on the foregoing, we do not separately address this aspect of Korea's claim under Article 4.2(b).

7.6.1.4 Conclusion regarding the first stage of the USITC's causation determination

7.181. In light of the above, we find that the USITC acted inconsistently with Articles 4.2(b) and 3.1 of the Agreement on Safeguards because it (a) did not provide a reasoned and adequate explanation in support of its finding that subject imports depressed and suppressed prices of the domestic like product as a whole; and (b) did not make a finding on coincidence in trends in a manner consistent with Article 4.2(b). We do not find it necessary to separately address whether the USITC also acted inconsistently with Articles 2.1 and 4.2(c) for these same reasons.

7.182. We also do not find it necessary to address Korea's claims under Article 4.2(b), as well as Articles 2.1, 3.1, and 4.2(c) of the Agreement on Safeguards regarding the USITC's analysis of non-price related aspects of competition.

7.6.2 Second stage of the USITC's causation determination

7.183. Having found a causal link between subject imports and the serious injury to the domestic industry under the first stage of its causation determination, the USITC examined under the second stage whether factors other than subject imports explained the serious injury to the domestic industry. The respondents argued before the USITC that (a) joint pricing of dryers and washers by the domestic industry; and (b) deterioration of US brands were other factors causing injury to the domestic industry. In addressing the respondents' argument, the USITC applied what the parties refer as the substantial cause test under US law.

7.184. The substantial cause test, set out in US law 19 USC S 2252(b)(1)(A) and (B), (Exhibit KOR-24), provides that, when certain conditions set out in US law are met, the USITC is

[318] United States' response to Panel question No. 38, para. 72.
[319] Korea's first written submission, para. 409.
[320] United States' first written submission, para. 307.
[321] United States' first written submission, para. 307.
[322] United States' first written submission, para. 307.
[323] USITC report, (Exhibit KOR-1), p. 17. The United States confirms that the USITC's finding was based on likeness between imported parts and domestic parts. (United States' first written submission, paras. 149 and 178).

required to conduct an investigation to determine whether an article is being imported into the United States in such increased quantities as to be *a substantial cause of serious injury*, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article (19 USC S 2252(b)(1)(A)). Substantial cause, in turn, is defined by 19 USC S 2252(b)(1)(B) as a cause *which is important and not less than any other cause*. In the underlying investigation, applying these provisions of US law, the USITC found that neither (a) the domestic industry's joint pricing of LRWs and dryers, nor (b) the deterioration of US brands was an important cause of injury to the domestic industry.

7.185. Korea challenges the USITC's application of the substantial cause test in the underlying investigation, arguing that the substantial cause test is flawed and inadequate in terms of ensuring that the injurious effect of all known factors is properly separated and distinguished from the injurious effects of subject imports.[324] In addition, Korea challenges the USITC's rejection of the respondents' arguments concerning the injurious effect of (a) joint pricing of dryers and washers and (b) deterioration of US brands. In doing so, Korea contends that (i) considering the USITC explained that these two factors were not "important causes of injury to the domestic industry", the USITC acknowledged that these factors were responsible for some injury to the domestic industry and thus should have separated and distinguished the injurious effect of these factors, which it did not; and (ii) in any case, to the extent the USITC found that these factors had no injurious effect, the USITC's relevant analysis and findings were flawed.[325]

7.186. The United States rejects Korea's claims. The United States submits that while the USITC stated that neither joint pricing nor deterioration of US brands was an important cause of injury to the domestic industry, the USITC effectively found that these factors were not causing *any* injury to the domestic industry.[326] The United States refers to different parts of the USITC report in support of its view. The United States also submits that the USITC reasonably and adequately explained that these two factors did not cause any injury to the domestic industry.

7.187. In reviewing Korea's claim, we note that the second sentence of Article 4.2(b) provides that "[w]hen factors other than increased imports are causing injury to the domestic industry at the same time [as increased imports], such injury shall not be attributed to increased imports". Investigating authorities are thus required, through a non-attribution analysis, to ensure that the injurious effects of other factors are not attributed to increased imports. However, Article 4.2(b) only requires a non-attribution analysis "when" factors other than increased imports are causing injury to the domestic industry at the same time. Accordingly, investigating authorities are not required to conduct a non-attribution analysis when other factors are not causing injury at the same time as increased imports. We agree with previous DSB reports that when investigating authorities determine that there are no other factors causing injury at the same time as increased imports, they must provide a reasoned and adequate explanation supporting that determination.[327] Therefore, we proceed as follows:

a. First, we will review Korea's claim challenging the USITC's rejection of the Korean respondents' argument that joint pricing and deterioration of US brands were "other factors" causing injury to the domestic industry. In doing so, we will:

    i. examine whether, as Korea contends, the USITC acknowledged that these two factors were causing injury to the domestic industry; and

    ii. if we find that the USITC's finding was that these factors were not causing *any* injury to the domestic industry, whether the USITC provided a reasoned and adequate explanation in support of that finding.

b. Second, we will review Korea's claim challenging the USITC's application of the substantial cause test.

[324] Korea's first written submission, section VIII.3.3.1 and para. 425.
[325] Korea's opening statement at the first meeting of the Panel, para. 80; second written submission, para. 269; and response to Panel question No. 78, para. 96.
[326] United States' first written submission, para. 316.
[327] See, e.g. Panel Report, *Ukraine – Passenger Cars*, para. 7.334.

7.6.2.1 The USITC's rejection of the Korean respondents' joint-pricing theory

7.6.2.1.1 Whether the USITC found joint pricing to be a factor causing injury to the domestic industry

7.188. Korea notes the USITC's finding that the domestic industry's joint pricing of LRWs and dryers was not an important cause of injury to the domestic industry, much less a more important cause than imports.[328] This statement suggests to Korea that the USITC acknowledged that joint pricing contributed to the injury suffered by the domestic industry, albeit in a manner not more important than imports. The United States submits that the USITC used the language of this test to comply with US statutory requirements. However, according to the United States, when providing its detailed analysis of this factor the USITC explained that joint pricing could not explain any of the serious injury sustained by the domestic industry.[329]

7.189. In assessing whether the USITC found that joint pricing was a factor causing injury to the domestic industry, we review the USITC's analysis on joint pricing as a whole, rather than focusing just on those parts of the USITC's report where it was referring to the substantial cause test. Our review of the USITC report shows that while the USITC framed its enquiry in terms of US statutory language by noting that joint pricing was not a factor that was an important cause of injury to the domestic industry, the USITC found joint pricing to not be a factor causing injury to the domestic industry. For instance, the USITC stated that (a) the record did not support the respondents' assertion that Whirlpool and GE purposely priced their LRWs to sell at a loss on the expectation that profitable sales of matching dryers would compensate[330]; and (b) the respondents' "joint pricing" theory could not explain the domestic industry's dramatically worsening operating and net losses during the POI.[331] We conclude on the basis of our review of the USITC report that the USITC found that joint pricing was not a factor causing injury to the domestic industry, such that the USITC was not required to undertake any non-attribution analysis in respect of this alleged factor.

7.6.2.1.2 Whether the USITC provided a reasoned and adequate explanation that joint pricing was not causing any injury to the domestic industry

7.190. Korea argues that the domestic industry sold matching LRWs and dryers at the same minimum advertised price, but because dryers cost less than LRWs to produce, the practice of selling both at the same price allowed the domestic industry to compensate lower profits on LRWs with higher profits on dryers.[332] Korea contends that the USITC improperly rejected the respondents' argument on joint pricing, and ignored compelling evidence presented by them, while relying largely on statements by the domestic industry that they did not, or could not, use profits on sales of dryers to compensate for losses on LRWs.[333] Korea contends in this regard that in rejecting the Korean respondents' arguments on joint pricing, the USITC largely relied on statements by the petitioners while ignoring the evidence presented by the Korean respondents.[334] Korea also challenges the USITC's explanation on the following two grounds:

a. an alleged disconnect between Whirlpool's record profits from its North American operations and its losses on US sales of LRWs[335]; and

b. an alleged failure by the USITC to provide any support for its explanation that, if the respondents' joint-pricing theory was true, Whirlpool should have been able to maintain at least a modest level of profitability of LRWs.[336]

7.191. The United States notes that the USITC made its determination after considering the evidence, which included sworn testimonies from representatives of the US domestic industry, and

[328] Korea's first written submission, para. 422.
[329] See, e.g. United States' first written submission, fn 693.
[330] USITC report, (Exhibit KOR-1), p. 45.
[331] USITC report, (Exhibit KOR-1), p. 51.
[332] Korea's first written submission, para. 429.
[333] Korea's first written submission, para. 430.
[334] See, e.g. Korea's response to Panel question No. 78, para. 97.
[335] Korea's first written submission, para. 435.
[336] Korea's first written submission, para. 431.

rejecting arguments made by the respondents in the underlying investigation. In this regard, the United States refers to extracts from the USITC report that show that the USITC considered the evidence presented by respondents in the underlying investigation, which Korea mistakenly asserts the USITC ignored or did not address.[337] With regard to Korea's argument based on the supposed disconnect between Whirlpool's record profits from its North American operations and losses on sales of LRWs in the US market, the United States notes that Whirlpool's products other than LRWs could have contributed towards the profitability of Whirlpool's North American operations.[338]

7.192. The question before us is whether Korea has demonstrated that the USITC did not provide a reasoned and adequate explanation in support of its finding that joint pricing was not a cause of any injury to the domestic industry.

7.193. We note that in finding that the record did not support Korean respondents' assertion that Whirlpool and GE purposely priced their LRWs to sell at a loss on the expectation that profitable sales of matching dryers would compensate for it, the USITC relied on testimony by officials of Whirlpool that it expected to make profits from the washers sector itself, and not to subsidize LRWs with profits from other products.[339] The USITC also noted the GE's statement that it did not and could not use profits on sales of dryers to compensate for losses on sales of LRWs because GE did not produce dryers domestically, but rather imported them pursuant to a contract manufacturing agreement that precluded outsized profits on sales of dryers.[340] The USITC stated that the record did not unambiguously support the respondents' claim that Whirlpool and GE sold matching pairs of LRWs and dryers for the same net wholesale price. The USITC supported this statement by noting that both companies maintained that LRWs and matching dryers were seldom sold together at wholesale, and never at the same net wholesale price.

7.194. With respect to the USITC's rejection of the Korean respondents' arguments on joint pricing, Korea asserts that the testimony of the petitioner was the beginning and end of the USITC's analysis on joint pricing.[341] Korea refers in this regard to evidence that was presented by Korean respondents to the USITC, and asserts that the USITC did not address the evidence.[342] The United States rejects this argument. The United States asserts, by referring to footnote 277 of the USITC report, that the USITC expressly referred to the evidence cited by the Korean respondents.[343] Review of the USITC's report, specifically footnote 277 of that report, shows that the USITC did refer to the evidence but questioned its probative value.[344] Thus, the USITC report, specifically footnote 277, contradicts Korea's view that the USITC did not address the evidence presented by the Korean respondents.[345] We note that in footnote 277 the USITC balanced and weighed the evidence provided by the Korean respondents with the testimony provided by the domestic industry petitioners. We do not see, and Korea does not show, why the USITC could not have reached the

[337] United States' first written submission, paras. 319-323.
[338] United States' first written submission, para. 327.
[339] USITC report, (Exhibit KOR-1), pp. 45-46.
[340] USITC report, (Exhibit KOR-1), p. 46.
[341] Korea's second written submission, para. 271.
[342] Korea's first written submission, paras. 432-434.
[343] United States' first written submission, para. 322.
[344] For instance, the USITC noted that documents filed by Samsung did not show "net wholesale pricing" for matching LRWs and dryers, as respondents claimed, because the prices listed were not for actual sales, and the extent to which the wholesale prices listed in the document may be subject to further negotiation was unclear. (USITC report, (Exhibit KOR-1), fn 277).
[345] Korea refers to the expert report of an economist that Korean respondents provided to the USITC, which noted why joint pricing was in line with economic theory, Whirlpool's reference to the laundry segment in its filing with the US Security and Exchange Commission, and to evidence that per Korea demonstrated that relative higher margins on dryers were capable of offsetting lower margins on washers. (Korea's response to Panel question No. 78, para. 99). Korea asserts that the USITC refused to consider the highly plausible alternative explanations regarding joint pricing by the domestic industry based on statements made by the CEO of the petitioner and because under the US statute the focus must be on losses to LRWs. However, we are not persuaded that these undermine the USITC's finding that joint pricing did not explain any injury to the domestic industry. In particular, we have already stated above that the investigating authority needs to determine the serious injury to the domestic industry producing the like or directly competitive product. The USITC found LRWs, not dryers, to be the like product. If a domestic producer suffers losses with respect to the like product at issue, i.e. LRWs, and there is serious injury to the producer on account of losses suffered on the like product, we do not see why higher margins on a product that is not like or directly competitive with the PUC (here, dryers) would undermine that finding. In this regard, we note that the USITC found that the record did not support the respondents' assertion that Whirlpool and GE purposely priced their LRWs to sell at a loss with the expectation that profits from dryers would compensate. (USITC report, (Exhibit KOR-1), p. 45).

conclusions that it did based on balancing and weighing the evidence before it. In our view, provided an investigating authority acts objectively, it is free to balance and weigh the evidence before it in a manner that it deems appropriate, and nothing in the Agreement precludes an investigating authority from relying on (sworn) testimonies provided by the petitioner. Our task is not to second-guess that explanation based on a *de novo* review of the evidence before the USITC, but instead to consider whether its explanation was reasoned and adequate in light of the record evidence. Korea has not persuaded us that it was not.

7.195. Regarding the supposed disconnect between Whirlpool's record profits from its North American operations and its losses on US sales of LRWs, Korea contends that these results would not have been possible unless Whirlpool generated reasonable profits from its laundry segment (which included dryers and LRWs), and asserts that the USITC did not respond to this evidence.[346] While Korea submits that the USITC did not respond to this evidence, the record shows that the USITC did in fact respond to this evidence as follows[347]:

> We are also unpersuaded by respondents' argument that Whirlpool's growing operating losses on sales of LRWs are somehow inconsistent with the increase in Whirlpool's profit margin for its overall North American operations from 4.8 percent in 2012 to 6.5 percent in 2016, as reported in public filings. … Under the statute, 19 U.S.C. § 2252(c)(6)(A)(i), the focus of our analysis is the domestic industry producing LRWs, PSC/belt drive TL LRWs, CIM/belt drive FL LRWs, and covered parts, as the producers as a whole of the like or directly competitive article. Because Whirlpool's financial results for its North America segment are based primarily on sales of products other than LRWs, with LRWs accounting for only 13.1 to 13.5 percent of the North America segment's total revenue during the 2012-16 period, we do not find those results informative.

7.196. This excerpt shows that the USITC explained why Whirlpool's profits from its North American operations, where LRWs accounted for only 13.1-13.5% of total revenue, was not at odds (mathematically speaking) with Whirlpool's losses in the US market on sales of LRWs. Korea has not challenged the explanation provided by the USITC in this regard. Thus, the record does not support Korea's argument that the USITC did not respond to this evidence.

7.197. As regards Korea's argument that the USITC did not provide any support for its statement that if the respondents' joint-pricing theory was true, Whirlpool should have been able to maintain at least a modest level of profitability of LRWs, Korea contends that because the USITC did not provide such support, its rejection was not based on objective evidence.[348] Korea submits in this regard that the essence of its claim is that the USITC's determination on joint pricing was not supported by objective evidence or a reasoned and adequate explanation.[349] We note that the USITC provided the following explanation in its report[350]:

> Respondents' "joint pricing" theory, if true, could at most explain profit margins on sales of LRWs that are consistently lower than profit margins on sales of matching dryers. Under respondents' theory, Whirlpool, the only major domestic producer of matching LRWs and dryers, should have been able to maintain at least a modest level of profitability on its sales of LRWs during the period of investigation, given its operating profit margin of *** percent in 2012, strong demand growth, and the competitiveness of its LRWs. Instead, Whirlpool suffered dramatically worsening operating losses, which widened as a share of net sales from negative *** percent in 2013 to negative *** percent in 2014, narrowed to negative *** percent in 2015, and then widened *** to negative *** percent in 2016, the largest loss of the period. Respondents do not claim that Whirlpool compensated for these increasing losses with increasing profits on sales of matching dryers, nor explain how Whirlpool could have earned increasing profits on sales of dryers when dryer prices would have declined with matching LRW prices during the period of investigation under their "joint pricing" theory.

[346] Korea's second written submission, para. 271.
[347] USITC report, (Exhibit KOR-1), fn 210.
[348] Korea's response to Panel question No. 42, para. 199.
[349] Korea's response to Panel question No. 42, para. 201.
[350] USITC report, (Exhibit KOR-1), pp. 46-47. (fns omitted; redacted original)

7.198. Taking into account the explanation provided above, we are not persuaded that the USITC failed to provide a reasoned and adequate explanation to support its determination. In particular, Korea does not dispute the USITC's explanation that the respondents did not claim that Whirlpool compensated losses on LRWs with profits on sales of matching dryers. The USITC also noted the respondents' failure to explain how Whirlpool could have earned increased profits on dryer sales because if dryers and washers were jointly priced, dryer prices would have reduced with reduction in washer prices. We thus consider that the USITC provided a reasoned and adequate explanation to support its determination.

7.199. Based on the foregoing, we reject Korea's claim that the USITC failed to provide a reasoned and adequate explanation for rejecting the respondents' argument that joint pricing was a cause of injury to the domestic industry.

7.6.2.2 The USITC's rejection of the "deterioration of US brands" theory

7.6.2.2.1 Whether the USITC found deterioration of US brands to be a factor causing injury to the domestic industry

7.200. In the underlying investigation, similar to its analysis on joint pricing, the USITC framed its enquiry in terms of US statutory language by noting that deterioration of US brands was not a factor that was an important cause of injury to the domestic industry. Again, we consider that the USITC's issue-specific analysis shows that the USITC found that the deterioration of US brands was not a factor causing injury to the domestic industry.

7.201. In particular, the USITC stated that the respondents' "brand deterioration" theory did not explain the domestic industry's declining sales prices during the POI, "or any of the resulting injury".[351] This shows that the USITC found that "brand deterioration" did not cause any injury to the domestic industry. Other parts of the USITC report support this understanding.[352] Therefore, we find that the USITC's finding was that deterioration of US brands did not cause any injury to the domestic industry.

7.6.2.2.2 Whether the USITC provided a reasoned and adequate explanation that deterioration of US brands was not a factor causing any injury to the domestic industry

7.202. Korea contends that the combined effect of failing to innovate and the resultant effect of brand deterioration were factors that injured the domestic industry in the POI.[353] Noting that the USITC found that consumer perception of brands is an important factor affecting purchasing decisions of LRWs, Korea submits that there was a shift in consumer demand in the US market over the POI, creating a market segment over which there was no meaningful competition between domestic and imported LRWs.[354] Korea asserts that the respondents were able to serve this newly emerging demand due to their brand, innovation, and design whereas the domestic industry was not, due to their lack of appropriate innovation as well as the deterioration of their brands.[355] In this regard, Korea also notes that the US producers remained highly dependent on sales of agitator-based TL LRWs, which were declining in popularity in the US market. Korea argues that such dependence led to the deterioration of US brands, which in turn contributed to the injury to the domestic industry.[356] However, per Korea, the USITC failed to examine the impact caused by the deterioration of US brands, or to provide an explanation regarding the impact on US brands due to the decline in demand of agitator-based TL LRWs, which formed half of domestic shipments.[357]

7.203. The United States notes Korea's submission that consumer perception of brands is an important factor affecting purchaser decisions of LRWs, but states that the USITC concluded that

[351] USITC report, (Exhibit KOR-1), p. 48.
[352] USITC report, (Exhibit KOR-1), p. 51. The USITC found that the respondents' alleged alternative cause of injury, which included deterioration of US brands was not supported by the record evidence and also that the brand deterioration theory "could explain none of the injury sustained by the [domestic] industry".
[353] Korea's response to Panel question No. 43, para. 206.
[354] Korea's first written submission, paras. 439-441.
[355] Korea's first written submission, paras. 441-442.
[356] Korea's first written submission, para. 444.
[357] Korea's first written submission, paras. 444-445.

purchasers did not find imported LRWs to be superior to domestic ones in terms of brand based on the evidence submitted to it.[358] In this regard, the United States notes that the USITC explained:

a. that its record did not support the respondents' argument that subject imports were superior to domestic LRWs in terms of non-price factors like brand, innovation, and design[359]; and

b. that this argument was also undermined by:

   i. the price data before the USITC that showed that prices of those imported LRW models that respondents considered to be innovative, and thus should have commanded a price premium, were declining; and

   ii. the extent to which imported LRWs were found to be priced below domestic LRWs.[360]

7.204. With regard to Korea's argument concerning the domestic industry's dependence on agitator-based TL LRWs, the United States notes that in addition to finding that this dependence did not prevent the domestic industry from providing highly-rated FL and impeller-based TL LRWs, the USITC also found that the popularity of agitator-based TL LRWs rebounded post 2015 (thereby undermining the respondents' argument that this model's demand was on the decline in the US market).[361] In addition, the United States notes that (a) the USITC rejected the Korean respondents' argument that consumers preferred imported LRWs because they were innovative; and also (b) that the Korean respondents did not argue that the alleged deterioration of US brands contributed towards the decline in the domestic industry's selling price.[362] Instead, the Korean respondents only relied on arguments of brand deterioration to explain the domestic industry's loss of market share during the POI, which in any case the USITC found did not occur considering the domestic industry's market share remained stable throughout the POI.[363]

7.205. The question before us is whether the USITC provided a reasoned and adequate explanation why deterioration of US brands was not a factor causing any injury to the domestic industry.

7.206. In the underlying investigation, the USITC specifically considered and rejected the Korean respondents' argument regarding the injurious effect of the deterioration of US brands on the domestic industry. We find it useful to reiterate that in resolving Korea's claim, our task is not to substitute our judgement for that of the USITC, nor review the evidence *de novo*. Instead, our task is to determine whether the USITC examined all pertinent facts and provided a reasoned and adequate explanation in rejecting the Korean respondents' argument that the alleged deterioration of US brands caused injury to the domestic industry. It is Korea's burden as the complainant to show that the USITC did not do so.

7.207. We note in this regard that in rejecting the respondents' argument on the injurious effect of deterioration of US brands, the USITC stated that (a) the USITC's finding on serious injury was based on the adverse impact of low-priced imports on the domestic industry's prices, as opposed to loss of market share, and the respondents did not argue that deterioration of US brands contributed to declining sales prices; and (b) the record did not support the respondents' contention that consumers increasingly favoured imported over domestically produced LRWs for non-price reasons.[364] In particular, the USITC concluded that the record did not support the respondents' claim that brand deterioration occurred for non-price reasons, and even if it did, the deterioration could explain only a decline in the domestic industry's market share (not the decline in the domestic industry's prices).[365]

7.208. Korea does not dispute the USITC's explanation regarding the absence of arguments from respondents on how deterioration of US brands contributed to declining sales prices. It is also not in

[358] United States' first written submission, para. 331.
[359] United States' first written submission, paras. 331 and 333.
[360] United States' first written submission, para. 334.
[361] United States' first written submission, para. 335.
[362] United States' first written submission, paras. 336-337.
[363] United States' first written submission, paras. 330 and 337.
[364] United States' second written submission, paras. 112-113; USITC report, (Exhibit KOR-1), p. 48.
[365] USITC report, (Exhibit KOR-1), p. 51.

dispute that the USITC found serious injury to the domestic industry resulted from adverse impact of low-priced imports on the domestic industry's sales. Thus, we note that the USITC's explanation in this regard remains unchallenged.

7.209. With regard to whether US consumers increasingly favoured imported over domestically produced LRWs for non-price reasons, the USITC referred to evidence in terms of purchaser surveys, including surveys where most responding purchasers found domestic LRWs to be comparable or superior to imported ones in terms of non-price factors; noted that the record indicated that domestic LRWs were comparable to imported ones in terms of innovation; as well as the favourable ratings of domestically produced LRWs in publications.[366] In this regard, the USITC found based on the evidence before it that the domestic market encompassed a broad range of brands and models offering diverse features and innovations, with no LRW supplier possessing a clear edge over other LRW suppliers in terms of brand, design, performance, features, innovation, and other non-price factors.[367] The USITC also rejected the respondents' argument that US brands suffered in the eyes of the consumers, including because of the domestic industry's reliance on agitator-based TL LRWs.[368] Instead, the USITC noted that the domestic industry's production of agitator-based TL LRWs did not prevent the industry from offering a full range of FL and impeller-based TL LRWs, and that the popularity of agitator-based TL LRWs rebounded after 2015 with US consumption of this product in 2017 approaching 2012 levels.[369] The USITC concluded that the evidence did not support the respondents' arguments that there were significant non-price differences that favoured imported LRWs over domestic ones.[370]

7.210. We are not persuaded that the USITC's explanations in this regard were not reasoned and adequate in light of the record evidence. While Korea makes several arguments in support of its claim, Korea repeats arguments made by respondents before the USITC instead of demonstrating why the USITC's rejection of those arguments was not based on a reasoned and adequate explanation. For instance, Korea focuses on how there was a shift in consumer demand in the US market over the POI, creating a market segment driven by innovation demand that the domestic industry was unable to serve due to their lack of appropriate innovation and the deterioration of their brand.[371] However, as noted above, the USITC specifically addressed and rejected this argument based on, *inter alia*, its finding that the evidence did not support the respondents' arguments that there were significant non-price differences that favoured imported LRWs over domestic ones. Similarly, Korea contends that the fact that half of domestic sales were that of agitator-based TL LRWs "must have meant" that the domestic industry was unable to offer innovative products, and the fact that respondents had no sale of such type of TL LRWs or belt-driven LRWs should "*ipso facto* demonstrate" that they shifted from those market segments to more innovative LRWs.[372] However, our task is not to make such kind of inferences but to assess whether the explanation provided by the USITC was reasoned and adequate. We note that the USITC explained that the domestic industry was capable of offering the full range of FL and impeller-based TL LRWs, and therefore rejected the Korean respondents' arguments that the domestic industry was unable to offer innovative products.[373] While repeating arguments made by Korean respondents, Korea fails to show that the USITC's responses to those arguments were not reasoned and adequate in light of the record evidence.[374]

[366] USITC report, (Exhibit KOR-1), pp. 48-49.

[367] USITC report, (Exhibit KOR-1), p. 30. See also USITC report, (Exhibit KOR-1), p. 48. The USITC referred back to its explanations in section IV.C.4 of its report regarding the comparability of domestic and imported LRWs in terms of non-price factors.

[368] USITC report, (Exhibit KOR-1), p. 50.

[369] USITC report, (Exhibit KOR-1), p. 50.

[370] USITC report, (Exhibit KOR-1), pp. 49-51. The USITC addressed and rejected arguments made by respondents regarding increase in repairs needed by domestically produced LRWs, mold issues in such domestically produced LRWs, and effect on US brands due to Whirlpool failing to differentiate its LRWs from that of Maytag as well as the domestic producer's reliance on agitator-based TL LRWs.

[371] Korea's first written submission, paras. 441-442. See also Korea's response to Panel question No. 44, paras. 207-213.

[372] Korea's second written submission, para. 276.

[373] Instead, Korea asserts that "this is hardly an explanation" to address the impact on brands that results from having half of all sales of a LRW model that is in decline. (Korea's first written submission, para. 445).

[374] Korea also states that the respondents requested the USITC to exclude what it describes as two "exceptionally innovative products" produced by the respondents i.e. Flexwash and Sidekick, from the PUC.

7.211. Based on the foregoing, we reject Korea's claim that the USITC failed to provide a reasoned and adequate explanation rejecting the respondents' argument that deterioration of US brands was a cause of injury to the domestic industry.

7.6.2.3 Substantial cause test

7.212. We note that Korea relied on the language of the substantial cause test to argue that the USITC acknowledged that joint pricing and deterioration of US brands caused some injury to the domestic industry. In paragraphs 7.189 and 7.201 above we have rejected that argument and concluded that the USITC's finding was that joint pricing and deterioration of US brands did not cause *any* injury to the domestic industry. However, Korea also asks us to make a separate finding that the substantial cause test, as applied in the underlying investigation, did not comply with the Agreement on Safeguards.[375]

7.213. We reject Korea's claim in this regard because Korea has not made a *prima facie* case that the USITC's application of the substantial cause test in the underlying investigation was inconsistent with Article 4.2(b) of the Agreement on Safeguards. In particular, Korea does not present sufficient arguments showing how exactly the substantial cause test violates Article 4.2(b).

7.214. We note that Korea contends that the substantial cause test is inadequate in terms of complying with the non-attribution requirement of Article 4.2(b).[376] However, Korea's argument that the substantial cause test is "inadequate" in ensuring that the injurious effects of all known factors are not attributed to subject imports presupposes a finding by the investigating authority that such other factors cause some injury to the domestic industry. If the investigating authority finds that such other factors do not cause any injury to the domestic industry, the need to conduct a non-attribution analysis does not arise. We have concluded that the USITC found that joint pricing and deterioration of US brands did not explain any of the injury to the domestic industry, and thus the USITC was not required to conduct a non-attribution analysis. Thus, to the extent Korea challenges the substantial cause test on the premise that the USITC found these two factors were causing injury to the domestic industry, that premise is unfounded. In the absence of sufficient arguments showing how exactly the substantial cause test violates Article 4.2(b) of the Agreement on Safeguards, we conclude that Korea has not made a *prima facie* case in this regard.[377]

Korea states that the respondents specifically noted that if these two products were excluded the domestic industry's share in the overall US market would have increased since 2012. (Korea's second written submission, para. 275). We note that Korea does not challenge the inclusion of Flexwash and Sidekick in the PUC. In addition, as the United States notes, the USITC found these two products to be like domestically produced LRWs. (United States' second written submission, para. 63 (referring to USITC report, (Exhibit KOR-1), pp. 13-15)). Korea also does not challenge the USITC's findings in this regard. Thus, we do not see, and Korea does not show, how the inclusion or exclusion of Flexwash and Sidekick from the PUC affects Korea's claim challenging the USITC's finding regarding the injurious effect of US brand deterioration. We also note in this regard the United States' submission that Samsung introduced Flexwash LRWs in March 2017 and LG's Sidekick LRWs were new as of the USITC's injury hearing in September 2017. (United States' second written submission, para. 63).

[375] Korea's response to Panel question No. 78, para. 88.

[376] Korea's first written submission, para. 425.

[377] In this regard, Korea relies on the Appellate Body report in *US – Lamb* to support its view. Korea states that in that case the Appellate Body responded to a claim that the application of the substantial cause test in that case violated Article 4.2(b) of the Agreement on Safeguards. (Korea's first written submission, para. 426). However, we note that the Appellate Body found that the USITC in that case did not adequately explain "in its Report" how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports. (Appellate Body Report, *US – Lamb*, para. 188). The Appellate Body did not find the substantial cause to be itself inconsistent with Article 4.2(b). In contrast, in the case before us, we have concluded that the USITC found that joint pricing and deterioration of US brands did not cause any injury, and that the USITC provided a reasoned and adequate explanation to support this finding. Therefore, the question of ensuring that injury caused by other factors are not attributed to increased imports does not arise in the case before us.

7.6.2.4 Conclusion regarding the second stage of the USITC's causation determination

7.215. We reject Korea's claims under Articles 3.1 and 4.2(b), as well as Articles 2.1 and 4.2(c) of the Agreement on Safeguards challenging the USITC's finding that (a) joint pricing of dryers and LRWs and (b) deterioration of US brands, were not factors causing injury to the domestic industry.

7.216. We also reject Korea's claims under Articles 3.1 and 4.2(b), as well as Articles 2.1 and 4.2(c) of the Agreement on Safeguards challenging the USITC's application of the substantial cause test in the underlying investigation.

7.6.3 Consequential claims on causation

7.217. Korea contends that because the USITC's definition of the domestic industry and its determination on increased imports were flawed, the USITC's causation determination, which relied on those flawed findings was also inconsistent with Article 4.2(b), as well as Articles 2.1, 3.1, and 4.2(c). We have already found that certain aspects of the USITC's definition of the domestic industry and its determination on increased imports were inconsistent with its obligations under the Agreement on Safeguards. Therefore, we do not consider any finding of consequential violation under Article 4.2(b), or Articles 2.1, 3.1, and 4.2(c) would assist in resolving the dispute between the parties.

7.218. Based on the foregoing, we do not find it necessary to address Korea's consequential claims under Articles 4.2(b), 2.1, 3.1, and 4.2(c) of the Agreement on Safeguards.

7.7 Claims under Articles 5.1 and 7.1 of the Agreement on Safeguards

7.219. The first sentence of Article 5.1 of the Agreement of Safeguards provides, *inter alia*, that a Member shall apply safeguard measures *only to the extent necessary to prevent or remedy serious injury* and *to facilitate* adjustment. The first sentence of Article 7.1 of this agreement provides that a Member shall apply safeguard measures *only for such period of time* as may be necessary to prevent or remedy serious injury and to facilitate adjustment. Korea makes the following sets of claims under Articles 5.1 and 7.1 of the Agreement on Safeguards[378]:

a. The United States failed to limit the application of the safeguard measure to the alleged serious injury caused by increased imports and not by other known factors[379]:

    i. The United States acted inconsistently with Article 5.1 because it failed to establish that increased imports caused serious injury to the domestic industry, as required by Article XIX:1(a) of the GATT 1994 and Article 4.2(b) of the Agreement on Safeguards, and therefore the resultant safeguard measure was necessary under Article 5.1.

    ii. The United States acted inconsistently with Article 5.1 because it failed to apply the measure only to prevent or remedy injury caused by increased imports and not that caused by other factors.

b. The United States failed to provide a reasoned and adequate explanation to support the form and level of the safeguard measure.[380]

    i. The United States acted inconsistently with Article 5.1 because its imposition of the safeguard measure on LRW parts was not necessary given the absence of competition between imported and domestic LRW parts.[381]

[378] We note that Korea only invokes Article 7.1 of the Agreement on Safeguards when claiming that the United States acted inconsistently with Articles 5.1 and 7.1 because the safeguard measure went beyond what was necessary to facilitate adjustment of the domestic industry. (Korea's first written submission, paras. 509 and 511). With respect to other claims, it only invokes Article 5.1. (See, e.g. Korea's first written submission, paras. 481, 489, 494-495, and 503-504).

[379] Korea's first written submission, section IX.3.1.

[380] Korea's first written submission, section IX.3.3.

[381] Korea's first written submission, paras. 496-497.

ii. The United States acted inconsistently with Article 5.1 because the level of the safeguard measure exceeded what was necessary to remedy serious injury.[382]

c. The United States acted inconsistently with Article 5.1 because it failed to take into account existing import restrictions from anti-dumping and countervailing duties.[383]

d. The United States acted inconsistently with Articles 5.1 and 7.1 because the underlying safeguard measure went beyond what was necessary to facilitate adjustment of the domestic industry.[384]

7.220. The United States asks us to reject Korea's claims.

7.7.1 Korea's claims regarding the United States' alleged failure to limit the application of the safeguard measure to the alleged serious injury caused by increased imports

7.221. Korea claims that the United States acted inconsistently with Article 5.1 because the USITC's causation determination was inconsistent with Article XIX:1(a) of the GATT 1994 and Article 4.2(b) of the Agreement on Safeguards.[385] We note that Korea's claim under Article 5.1 here is essentially a consequential claim and dependent on a finding that the USITC's causation determination was inconsistent with Article XIX:1(a) of the GATT 1994 and Article 4.2(b) of the Agreement on Safeguards. We have found the USITC's causation determination to be inconsistent with Article 4.2(b) of the Agreement on Safeguards. Given those findings under Article 4.2(b), we do not find it necessary to address Korea's claim under Article 5.1 to the extent it is consequential to a finding under Article 4.2(b).

7.222. Korea also claims that the United States acted inconsistently with Article 5.1 because through the application of the USITC's substantial cause test, the USITC attributed to increased imports injury that was caused by other factors, specifically (a) joint pricing of dryers and washers, and (b) deterioration of US brands.[386] We note that this claim under Article 5.1 is premised on its view that the USITC found (a) joint pricing of dryers and washers and (b) deterioration of US brands to be other factors causing injury to the domestic industry. In addressing Korea's non-attribution claims under Article 4.2(b), we have concluded that the USITC's finding was that these factors did not cause any injury to the domestic industry. Given these findings, Korea has not established the premise of its claim under Article 5.1.

7.223. Based on the foregoing, we do not find it necessary to address Korea's claim under Article 5.1 to the extent it is consequential to Korea's claim challenging the USITC's causation determination under Article 4.2(b), which we have upheld. We reject Korea's claim under Article 5.1 to the extent it is premised on its view, which we have rejected, that the USITC found factors other than increased imports were causing injury to the domestic industry.

7.7.2 Korea's claims concerning the form and level of the safeguard measure

7.224. Korea claims, as noted above, that (a) the United States' safeguard measure on LRW parts was not "necessary" under Article 5.1; and (b) the level of the measure on LRWs exceeded what was necessary to remedy serious injury suffered by the domestic industry. The United States asks us to reject both claims.

7.7.2.1 Safeguard measure on LRW parts

7.225. Regarding the safeguard measure on LRW parts, Korea contends that the duty on out-of-quota LRW parts was not necessary to remedy serious injury and facilitate adjustment because there was no competition between domestic and imported LRW parts, or between imported LRW parts and domestically produced LRWs.[387] Korea asserts that a measure can only be "necessary" if it at least contributes in a material way to remedying the serious injury and facilitating

[382] Korea's first written submission, paras. 498-504.
[383] Korea's first written submission, paras. 490-494.
[384] Korea's first written submission, paras. 505-511.
[385] Korea's first written submission, para. 481.
[386] Korea's first written submission, para. 486.
[387] Korea's first written submission, paras. 496-497 and 514.

adjustment, which cannot be the case for non-competing products.[388] The United States submits that allowing limitless imports of low-priced parts would create the risk that Samsung and LG would convert their US production facilities into kit assembly operations of LRWs, which would be in direct competition with LRWs that are produced domestically from domestic parts.[389] Thus, per the United States, inclusion of covered parts in the safeguard measure was necessary to prevent serious injury and facilitate the domestic industry's adjustment to import competition, and did not result in application of the safeguard measure beyond the extent necessary under Article 5.1.[390]

7.226. We note that we have found that the USITC acted inconsistently with Article 4.1(c) in defining the domestic industry to include LRW parts. Based on the foregoing, we do not find it necessary to separately address Korea's claim under Article 5.1 of the Agreement on Safeguards that the duty on out-of-quota LRW parts was not necessary under Article 5.1 to remedy serious injury and facilitate adjustment because there was no competition between domestic and imported LRW parts, or between imported LRW parts and domestically produced LRWs.

7.7.2.2 Level of the safeguard measure

7.227. Korea claims that the level of the measure on LRWs exceeded what was necessary to remedy the alleged serious injury based on the following arguments:

a. Korea challenges the level of the in-quota rate (20%) and out-of-quota rate (50%) maintained by the United States, noting that such rates were introduced even though the facts showed weak, non-existent serious injury and average price underselling of only 14.2%.[391] Korea asserts in this regard that since the USITC found lower domestic prices to be directly responsible for the losses to the domestic industry, limiting the safeguard remedy to the price difference between subject imports and domestic like products would have addressed the domestic industry's serious injury.[392]

b. Korea refers to the statements by two of the four commissioners that in-quota tariff rates would exceed the amount necessary to address serious injury to the domestic industry.[393]

7.228. The United States responds to Korea's arguments as follows:

a. Noting Korea's comparison of the 20% in-quota tariff with the 14.2% weighted-average margin of underselling, the United States submits that such a comparison cannot accurately reflect the likely effect of the tariff on import prices.[394]

b. Regarding Korea's argument that two of the four USITC commissioners recommended against an in-quota tariff, the United States notes that the USITC did not reach an institutional recommendation on this point.[395]

7.229. We note that while Article 5.1 provides that a Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury, it does not provide any rules requiring the authority to ensure that the safeguard remedy matches the degree of price underselling found, which here is the difference between prices of subject imports and domestic like products. Indeed, such a requirement would be at odds with the fact that the Agreement on Safeguards (a) does not even specifically require a price underselling analysis; and (b) permits the imposition of quantitative restrictions (it is unclear to us how exactly as a mathematical matter a quantitative restriction could be designed to match the degree of price underselling, and in any case, the Agreement on Safeguards does not provide rules on this matter). In this regard, the provisions of the Agreement on Safeguards stand in contrast to, for example, the provisions of the Anti-Dumping Agreement, which require authorities to calibrate their remedy by ensuring that the

[388] Korea's first written submission, para. 496.
[389] United States' first written submission, para. 364.
[390] United States' first written submission, paras. 364-365 (referring to USITC report, (Exhibit KOR-1), p. 74).
[391] Korea's first written submission, paras. 499-500.
[392] Korea's response to Panel question No. 55, para. 234.
[393] Korea's first written submission, paras. 502-503.
[394] United States' first written submission, para. 366.
[395] United States' first written submission, para. 367 (quoting USITC report, (Exhibit KOR-1), p. 75).

anti-dumping duty not exceed the margin of dumping established under Article 2 of that agreement (see Article 9.3 of the Anti-Dumping Agreement). Therefore, we do not find any basis in Article 5.1 to require investigating authorities to calibrate their safeguard measures to reflect the degree of price underselling.

7.230. Insofar as Korea relies on the views of the two USITC commissioners who considered that the in-quota tariff rates exceeded the amount necessary to address serious injury to the domestic industry, we note under the internal decision-making process of the USITC, four commissioners of the USITC make their recommendations. We do not consider that the views of two of the four USITC commissioners are instructive on whether the United States' safeguard measure is inconsistent with Article 5.1 of the Agreement on Safeguards.

7.231. Based on the foregoing, we reject Korea's claim under Article 5.1 of the Agreement on Safeguards challenging the form and level of the United States' safeguard measure.

7.7.3 Korea's claim regarding the United States' alleged failure to take into account existing import restrictions from anti-dumping and countervailing duty measures

7.232. Korea contends that the United States' safeguard measure was excessive because it did not account for the protection already afforded to the domestic industry through the imposition of anti-dumping and countervailing measures on LRWs.[396] Korea asserts that although the existing anti-dumping and countervailing measures had the effect of significantly decreasing imports from the covered countries, including Korea, the US President made no attempt to calibrate the measures to take account of those existing measures.[397]

7.233. The United States contends that the Agreement on Safeguards does not obligate a Member to take any particular approach when applying a safeguard measure on products already covered by an anti-dumping or countervailing measure.[398] Nonetheless, the United States submits that the USITC took into account and discussed the impact of existing US anti-dumping and countervailing orders in its report, and contends, *inter alia*, as follows:

a. Referring to the USITC's finding that due to such orders the domestic industry was able to temporarily increase its market share, but not its prices, the United States submits that the depression and suppression of domestic like product prices led to the worsening financial losses of the domestic industry.[399]

b. In addition, contending that Samsung and LG moved production of LRWs to countries not affected by the anti-dumping and countervailing measures, the United States points to data showing that imports of LRWs from countries affected by the anti-dumping and countervailing measures, such as China, declined, whereas imports from other countries such as Thailand and Viet Nam increased.[400]

7.234. We are not persuaded by Korea's arguments in this regard. We note that the Agreement on Safeguards imposes conditions for the imposition of safeguards, including a need for increased imports, and the existence of serious injury caused by those imports. Existing trade remedy measures may affect the level of imports (they could decrease it, particularly from sources affected by the order) and the injury situation of the domestic industry (they could improve the domestic industry's situation). Therefore, to the extent existing trade remedy measures affect those parameters, that effect would be reflected in the relevant data examined by the investigating authority (be it increased imports, or data pertaining to the injury situation of the domestic industry). If the data shows that imports have been declining instead of increasing, or if it shows that the domestic industry is not injured (irrespective of whether this is because of existing trade remedy measures), the substantive conditions for the imposition of safeguard measures would not be met. If, however, an investigating authority finds that the substantive conditions for the safeguard measures are met, despite existing trade remedy measures, nothing in

[396] Korea's first written submission, paras. 490 and 494.
[397] Korea's second written submission, para. 288.
[398] United States' first written submission, paras. 356-357.
[399] United States' first written submission, para. 361.
[400] United States' first written submission, para. 360.

the Agreement on Safeguards requires any calibration of the measures with those existing trade remedy measures.

7.235. We also note in this regard that Article 5.1 refers to the application of safeguard measures only to the extent necessary to prevent or remedy serious injury. Once serious injury is established pursuant to a safeguard investigation, the Member has the right to impose safeguard measures to the full extent necessary to remedy that serious injury. It follows that if the serious injury has been found despite the existing trade remedy measures, nothing in the Agreement on Safeguards would require Members to adjust the safeguard measures to account for existing trade remedy measures. Indeed, if they were to do so, they may not be able to apply safeguard measures to the extent necessary to prevent or remedy the serious injury found. To the extent a complainant considers that the substantive conditions for imposition of such a safeguard measure are not met, the complainant would be expected to make its case under the substantive provisions of the Agreement on Safeguards.

7.236. Based on the foregoing, we reject Korea's claim that the United States acted inconsistently with Article 5.1 of the Agreement on Safeguards in failing to take into account existing import restrictions from anti-dumping and countervailing measures.

7.7.4 Korea's claim that the safeguard measure went beyond what was necessary to facilitate adjustment of the domestic industry

7.237. Korea claims that the United States acted inconsistently with Articles 5.1 and 7.1 of the Agreement on Safeguards because it failed to ensure that the underlying safeguard measure was not more restrictive than necessary to facilitate adjustment.[401] Korea makes two main arguments with respect to its claims. Korea argues that (a) the US Presidential Proclamation (Exhibit KOR-3) imposing the safeguard measure did not explain why the nature and level of the safeguard measure was necessary to facilitate adjustment; and (b) the adjustment plans submitted by the US domestic industry were weak.[402] The United States submits, relying on previous DSB reports, that (a) Article 5.1 does not require a Member applying a safeguard measure to justify that it is applied only to the extent necessary; and (b) Article 5.1 does not require Members to request or consider any adjustment plans from the domestic industry.[403] To resolve Korea's claim, we focus on Korea's arguments regarding the alleged inadequacies of the US Presidential Proclamation and the US domestic industry's adjustment plan.

7.238. Regarding the US Presidential Proclamation, and specifically Korea's argument that this proclamation did not explain why the nature and level of the safeguard measure was necessary to facilitate adjustment, we agree with previous DSB reports that Article 5.1 does not oblige a Member to justify at the time of application that the safeguard measure at issue is applied "only to the extent necessary".[404] Korea acknowledges that no such justification is necessary, but takes the position that this "does not mean that total silence suffices".[405] We do not see any basis in Article 5.1 to impose a standard that is short of a "clear justification" but more than total silence. Indeed, if Article 5.1 does not oblige a Member to justify at the time of application that the safeguard measure at issue is applied "only to the extent necessary" (as we have found it does not), we see no basis to find that the United States acted inconsistently with Article 5.1 because the

[401] Korea's first written submission, paras. 509 and 511.
[402] See, e.g. Korea's first written submission, paras. 506 and 510.
[403] United States' first written submission, paras. 370 and 372 (referring to Appellate Body Report, *US – Line Pipe*, para. 233; and Panel Report, *Korea – Dairy*, para. 7.108).
[404] Appellate Body Report, *US – Line Pipe*, para. 233.
[405] Korea's first written submission, para. 508. In this regard, we asked Korea to clarify its position by explaining what obligation less than "clear justification" but more that "total silence" is imposed by Article 5.1. (Panel question No. 56(a) to Korea after the first substantive meeting). In response to our question, Korea submits that the fact that (i) the USITC report explained that imported and domestic parts were not in competition; and (ii) two USITC commissioners recommended that no in-quota tariffs were necessary, suggests that the United States' safeguard measure was not necessary. Thus, per Korea, a compelling alternative explanation was required to support the adopted measure. (Korea's response to Panel question No. 56(a), para. 237). We note that we have addressed these two issues in (i) and (ii) when dealing with Korea's claim concerning the form and level of the measure. In addition, we note that Korea does not explain whether the compelling explanation that it expects is to be provided by the investigating authority in its report, or by the authority imposing the safeguard duty, or by the respondent in WTO panel proceedings. In any case, we see no basis in Article 5.1 to require such a "compelling explanation" either from the investigating authority, the authority imposing the safeguard duty, or from the respondent in panel proceedings.

US Presidential Proclamation did not explain why the nature and level of the safeguard measure was necessary to facilitate adjustment.

7.239. Regarding the inadequacies of the domestic industry's adjustment plan, which per Korea the USITC failed to properly examine, we agree with a previous DSB report that Article 5.1 does not impose any obligation on an authority to consider an adjustment plan by the domestic industry.[406] We also note in this regard that during the later stages of these panel proceedings Korea took the view that "[w]hile adjustment plans do not have to be provided in each case *per se*, submissions and considerations of such plans may be ***desirable*** as a means of substantiating that a Member complies with Article 5.1".[407] To the extent Article 5.1 imposes no obligation on an investigating authority to consider an adjustment plan, we see no basis for finding that the USITC acted inconsistently with Article 5.1 by not considering such a plan.

7.240. Based on the foregoing, we are not persuaded that the United States failed to ensure that the underlying safeguard measure was not more restrictive than necessary to facilitate adjustment. We accordingly reject Korea's claim under Articles 5.1 and 7.1 of the Agreement on Safeguards that the United States failed to limit the safeguard measure to what was necessary to remedy injury and facilitate adjustment.

7.7.5 Conclusion

7.241. In light of the above:

a. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards that is premised on Korea's view, which we have rejected, that the USITC found factors other than increased imports were causing injury to the domestic industry.

b. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards challenging the form and level of the United States' safeguard measure. To the extent Korea's claim is premised on its view that the duty on out-of-quota LRW parts was not necessary under Article 5.1, for the reasons set out in paragraph 7.226 above, we do not find it necessary to address this aspect of Korea's claim.

c. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards that the United States acted inconsistently with this provision in failing to take into account existing import restrictions from anti-dumping and countervailing measures.

d. We reject Korea's claim under Articles 5.1 and 7.1 of the Agreement on Safeguards that the United States failed to limit the safeguard measure to what was necessary to remedy injury and facilitate adjustment.

e. We do not find it necessary to address Korea's claim under Article 5.1 of the Agreement on Safeguards that is consequential to Korea's claim under Article 4.2(b) challenging the USITC's determination on causation.

7.8 Claims under Articles 12.1 and 12.2 of the Agreement on Safeguards

7.242. Korea makes the following claims under Articles 12.1 and 12.2 of the Agreement on Safeguards:

a. Korea claims that the United States acted inconsistently with Articles 12.1(a), 12.1(b), and 12.1(c) of the Agreement on Safeguards because it failed to make its notifications under these provisions "immediately".

b. Korea claims that the United States acted inconsistently with Article 12.2 of the Agreement on Safeguards because its notifications under Articles 12.1(b) and 12.1(c) failed to provide "all pertinent information" within the meaning of Article 12.2.

[406] Panel Report, *Korea – Dairy*, para. 7.108.
[407] Korea's second written submission, para. 302. (emphasis added)

7.243. Article 12.1 of the Agreement on Safeguards provides as follows:

> A Member shall immediately notify the Committee on Safeguards upon:
>
> (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
>
> (b) making a finding of serious injury or threat thereof caused by increased imports; and
>
> (c) taking a decision to apply or extend a safeguard measure.

7.244. Article 12.2 provides, in relevant part:

> In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization.

7.245. Thus, Article 12.1 requires a Member to "immediately" notify the Committee on Safeguards (Committee) when it:

a. initiates a safeguard investigation within the meaning of Article 12.1(a) (initiation notification);

b. makes a finding of serious injury or threat thereof within the meaning of Article 12.1(b) (serious injury notification); and

c. takes a decision to apply or extend a safeguard measure within the meaning of Article 12.1(c) (decision notification).

7.246. We note that Article 12.1 uses the term "immediately" but does not prescribe a specific timeframe within which a Member needs to make the required notifications. We agree in this regard with previous DSB reports that the word "immediately" implies a certain urgency, and that the degree of urgency required depends on a case-by-case assessment, account being taken of the administrative difficulty involved in preparing the notification at issue and the character of the information supplied.[408] Nonetheless, like previous DSB reports, we consider that the amount of time taken to notify must be kept to a minimum.[409]

7.247. In addition, we note that Article 12.2 requires that the serious injury and decision notifications provide the Committee with "all pertinent information", which shall include evidence of serious injury or threat thereof caused by increased imports, a precise description of the product involved and the proposed measure, the proposed date of introduction, and the expected duration and timetable for progressive liberalization.

7.8.1 Initiation notification

7.248. With respect to the United States' initiation notification, the question before us is whether this notification was made immediately, in the sense of Article 12.1(a). To answer this question, we will consider the duration between the date when the USITC initiated the underlying safeguard investigation and the date the United States notified that initiation to the Committee on Safeguards. We will also take into account any administrative burden involved in preparing the notification at issue and the character of the information supplied.

7.249. Regarding the time taken between initiation and notification under Article 12.1(a), we note Korea's contention that the date of initiation was 5 June 2017. Korea relies in this regard on the

[408] Appellate Body Report, *US – Wheat Gluten*, para. 105.
[409] Appellate Body Report, *US – Wheat Gluten*, para. 105.

United States' notification to the Committee on Safeguards (Exhibit KOR-15), which states that the USITC "initiated the investigation on 5 June 2017".[410] The United States contends that the relevant date of initiation for the purpose of Article 12.1(a) was 8 June 2017, which was the date the USITC publicly announced the institution of the investigation.[411] Therefore, the parties disagree on the date of initiation of the safeguard investigation. However, both parties agree that the United States notified its initiation to the Committee on 12 June 2017.

7.250. We note that even if we consider the date of initiation of the underlying safeguard investigation to be 5 June 2017, as contended by Korea, this would mean that the United States only took seven days to notify the initiation notification. Taking into account the United States' explanation regarding the internal administrative process associated with the preparation of the initiation notification[412] as well as the associated administrative burden[413], we do not consider that the United States' notification of its initiation of the underlying safeguard investigation was not "immediate" under Article 12.1(a).[414]

7.251. Based on the foregoing, we reject Korea's claim that the United States acted inconsistently with Article 12.1(a) of the Agreement on Safeguards.

7.8.2 Serious injury notification

7.252. Korea claims that the United States' serious injury notifications (a) were not immediate under Article 12.1(b) of the Agreement on Safeguards; and (b) did not contain pertinent information within the meaning of Article 12.2 of the Agreement on Safeguards. Therefore, per Korea, the United States acted inconsistently with Articles 12.1(b) and 12.2 of the Agreement on Safeguards. The United States asks us to reject both claims.

7.253. We note in this regard the following timelines, which are relevant in addressing Korea's claims:

a. On 5 October 2017, the USITC commissioners held a public vote on serious injury in which they determined that increased imports caused serious injury to the domestic industry:

   i. On 12 October 2017, the United States notified the Committee on Safeguards under Article 12.1(b) of the WTO Agreement on Safeguards that "there has been a finding of serious injury or threat thereof caused by increased imports".[415] We refer to this

[410] Korea's second written submission, para. 317.
[411] United States' response to Panel question No. 81, para. 51.
[412] The United States explains that the US petitioners filed an amended petition on 5 June 2017 requesting initiation of the underlying safeguard investigation. Upon receiving the amended petition, the USITC commenced its internal process of considering whether the petition was properly filed. It concluded on 7 June 2017 that the petition was properly filed and initiated the investigation effective 5 June 2017. Thus, as of 5 June 2017, the United States Trade Representative (USTR), the agency responsible for filing US notifications was uncertain whether the USITC would consider the amended petition to be properly filed and initiate an investigation on this basis. The USTR was informed on 8 June, through the USITC's letter to USTR, that the investigation had been initiated. (United States' second written submission, paras. 132-133).
[413] With respect to the administrative burden involved in preparing the notification at issue and the character of the information supplied, the United States notes that (a) the USITC and Executive Branch officials needed to coordinate with respect to the notification process; (b) the notification did not just reproduce the text of a previously published notice; (c) the USITC investigation team was required to review the notification, and the process entailed exchanges between different US agencies; and (d) the Executive Branch officials responsible for the safeguard proceedings were involved in two concurrent proceedings (solar and washers). (United States' response to Panel question No. 80, para. 49). Korea contends that the administrative difficulties cited by the United States may offer some insight into why the notification was late, but does not justify it. Korea also contends that the administrative burden cited by the United States is not credible as the United States is an experienced Member and it does not provide evidence of the genuine nature of the alleged concerns. (Korea's comments on the United States' response to Panel question No. 80, para. 111). We have no reason to doubt the genuineness of the burden alluded by the United States and do not consider that such burdens are diminished by a Member's experience with safeguard investigations.
[414] We accordingly do not need to resolve the factual dispute between the parties on whether the safeguard investigation was initiated on 5 June 2017 or 8 June 2017.
[415] Notification under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports: United States of 12 October 2017, G/SG/N/8/USA/10 (13 October 2017) (Original injury notification), (Exhibit KOR-6).

notification as the "original injury notification". The original injury notification stated as follows:

> **1. Provide evidence, citing relevant data and the applicable period of investigation of serious injury or threat thereof caused by increased imports**
>
> On 5 October 2017, the U.S. International Trade Commission (Commission) determined that large residential washers are being imported in such increased quantities as to be a substantial cause of serious injury to the domestic industry.
>
> The initiation that led to this determination was notified to the Committee on Safeguards in G/SG/N/6/USA/12 (dated 12 June 2017).
>
> The Commission is now considering the appropriate remedy to recommend to the President, and will forward its injury findings and remedy recommendations to the President by 4 December 2017. *This report* will include the Commission's injury determination, remedy recommendations, certain additional findings, and the basis for its injury determination, remedy recommendations, and findings as well as the factual information compiled in the Commission's posthearing injury report. The United States will provide a copy of *this report*, excluding confidential business information, to the Committee on Safeguards shortly after it is submitted to the President.[416]

b. On 4 December 2017, the USITC transmitted its report to the US President, while also issuing at this time a public version of the report:

   i. On 9 December 2017, the United States submitted a notification under Article 12.1(b) to the Committee, which supplemented the notification of 12 October 2017 ("supplemental injury notification").

7.8.2.1 Providing all pertinent information

7.254. Korea's claim under Article 12.2 concerns the original injury notification, and not the supplemental injury notification. Korea argues that the United States' original injury notification was inconsistent with Article 12.2 because it did not contain the following "pertinent information": (a) information about increased imports or evidence for finding serious injury caused by increased imports; (b) discussion on the injury factors listed in Article 4.2(a) of the Agreement on Safeguards; and (c) explanation on the causal relation.[417]

7.255. The United States does not dispute that the original injury notification did not contain this information. However, the United States notes that the original injury notification was made with respect to the public vote by the USITC commissioners.[418] The United States explains that when the USITC commissioners held a public vote on serious injury on 5 October 2017, the USITC commissioners had not completed the process of consolidating their individual reasoning, and drafting and finalizing the views of the USITC on serious injury.[419] Thus, the original injury notification on 12 October 2017 notified "all pertinent" information that was available at that time.[420] The United States notes that its supplemental injury notification on 9 December 2017 supplemented the original injury notification with the public version of the USITC report, which contained this information, and observes that it is common practice for Members to supplement

[416] Original injury notification, (Exhibit KOR-6), p. 1. (fns omitted; emphasis added)
[417] Korea's first written submission, para. 562.
[418] United States' first written submission, para. 388.
[419] United States' first written submission, para. 396.
[420] United States' first written submission, para. 396.

notifications under Articles 12.1(b) and 12.1(c) as new information becomes available or they take additional procedural steps.[421]

7.256. In addressing Korea's claim, we note that it remains undisputed that the USITC had not issued its report at the time the United States notified its original injury notification under Article 12.1(b) to the Committee on Safeguards. Since Korea does not challenge the United States' supplemental notification under Article 12.2, it is also undisputed that the United States' supplemental notification contained the pertinent information required under Article 12.2. Thus, the question before us is whether the United States acted inconsistently with Article 12.2 because its first notification under Article 12.1(b) (i.e. the original injury notification) did not contain the pertinent information under Article 12.2, even though the supplemental injury notification under Article 12.2 did present that information.

7.257. In addressing this question, we note that that Article 12.2 refers to "notifications referred to in paragraphs 1(b) ***and*** 1(c)" (in the collective) and identifies the pertinent information that such notifications should contain, without necessarily distinguishing between information contained in an Article 12.1(b) notification and that contained in an Article 12.1(c) notification.[422] Some of the information, such as the "proposed date of introduction" of the measure, that is otherwise pertinent under Article 12.2, may not be available at the time a Member makes its serious injury notification under Article 12.1(b), and may only become available when a Member subsequently decides to apply the safeguard measure. The fact that Article 12.2 does not require Members to provide all pertinent information in notifications under Article 12.1(b) alone suggests that Article 12.2 permits Members to provide the pertinent information identified in Article 12.2 in a staggered manner. Therefore, we do not consider that Article 12.2 precludes a Member from supplementing an initial notification under Article 12.1(b) with additional information. When a Member does make such a supplemental notification under Article 12.1(b), and the initial and supplemental notification collectively identify the pertinent information under Article 12.2, we do not consider that the Member could be said to have acted inconsistently with Article 12.2 because its initial notification, taken alone, does not set out all the pertinent information under Article 12.2.[423] We accordingly are not persuaded by Korea's claim that the United States acted inconsistently with Article 12.2 because its original injury notification did not contain the information identified by Korea.

7.258. Based on the foregoing, we reject Korea's claim that the United States acted inconsistently with Article 12.2 of the Agreement on Safeguards.

7.8.2.2 Immediacy of notification

7.259. Korea contends as follows:

a. The original injury notification of 12 October 2017 was not immediate under Article 12.1(b) because it was made *seven days* after the USITC had made a finding of serious injury through the public vote of the USITC commissioners on 5 October 2017.[424]

b. The supplemental injury notification of 9 December 2017 was not immediate under Article 12.1(b) because[425]:

   i. It was made *two months* after the public vote of the USITC commissioners.

   ii. Even if the publication of the USITC report on 4 December 2017 was the triggering event for assessing whether the United States made an immediate notification under

[421] United States' first written submission, paras. 398-399; response to Panel question No. 86(a), para. 56.

[422] Emphasis added.

[423] Indeed, the requirement of "immediate" notification under Article 12.1 and the requirement to provide "all pertinent information" under Article 12.2, show that Article 12 seeks to strike a balance between requiring a Member to provide the pertinent information under Article 12.2 to the Members, through the Committee on Safeguards, and doing so in a timely manner. Our understanding of Article 12 preserves this balance because it does not disincentivize a Member from notifying the pertinent information as soon as it is notifiable.

[424] Korea's first written submission, para. 554.

[425] Korea's first written submission, para. 563.

Article 12.1(b), the supplemental injury notification was not immediate as it was notified on 9 December 2017, *five days* after the publication of the report.

7.260. The United States argues that it "immediately" notified its original injury notification as well as its supplemental injury notification. The United States submits that in determining whether the United States' notifications were immediate, we should take the following factors into account:

a. The administrative task of preparing the notification was not *pro forma* but had to be tailored.[426] The supplemental notification did not just enclose the public version of the USITC report, but also pinpointed to findings of potential relevance to Members.[427]

b. The original notification had to be reviewed by the USITC investigating team and required exchanges between two separate US agencies (the USITC and the United States Trade Representative (USTR)).[428]

c. The original and supplemental notifications were made at a time when government officials responsible for the safeguard measures were extremely busy, including with the LRW investigation and the solar products investigation.[429]

7.261. With respect to the original injury notification, taking into account the United States' explanation regarding the process involved in preparation of the notification, we are not persuaded that the United States' notification within seven days of the USITC commissioner's public vote was not "immediate" under Article 12.1(b). With respect to the supplemental injury notification, we note that this notification was based on the USITC report that was transmitted to the US President on 4 December 2017. In determining whether this notification was immediate, we consider the time taken from the date the USITC report was transmitted to the US President.[430] We note that the United States took five days to notify the supplemental notification. Taking into account the United States' explanations regarding the administrative process associated with preparing this notification, we are not persuaded that the notification within five days was not immediate for the purpose of Article 12.1(b).

7.262. Based on the foregoing, we reject Korea's claim that the United States acted inconsistently with Article 12.1(b) of the Agreement on Safeguards with respect to the original injury notification and the supplemental injury notification.

7.8.3 Decision notification

7.263. Korea claims that the United States' decision notification (a) was not immediate under Article 12.1(b) of the Agreement on Safeguards; and (b) did not contain pertinent information within the meaning of Article 12.2 of the Agreement on Safeguards. Therefore, per Korea, the United States acted inconsistently with Articles 12.1(b) and 12.2 of the Agreement on Safeguards. The United States asks us to reject both claims.

7.8.3.1 Providing all pertinent information

7.264. Korea contends that the United States' decision notification was inconsistent with Article 12.1(c) because it did not contain all pertinent information, including the evidence on serious injury caused by increased imports.[431] Korea submits in this regard that while the United States' decision notification referred to the public version of the USITC report, that report redacted information without providing sufficient non-confidential summaries. Specifically, Korea points to redactions in the sections (a) on increased imports where statistics on the development of imports over the POI had been redacted; and (b) on serious injury.[432] Korea asserts

[426] United States' first written submission, para. 393.
[427] United States' first written submission, para. 400.
[428] United States' first written submission, paras. 393 and 400.
[429] United States' first written submission, para. 393.
[430] Indeed, considering the USITC report had not been issued when the USITC commissioners held their public vote on serious injury on 5 October 2017, the United States could not be expected to notify any information based on that report.
[431] Korea's first written submission, para. 564.
[432] Korea's first written submission, para. 565.

in this regard that the obligation to protect confidential information does not mean that Members can redact such information without providing "non-confidential summaries" or the "reasons why a summary cannot be provided" as required by Article 3.2 of the Agreement on Safeguards.[433] Korea states that the United States failed to provide such summaries or reasons as to why not "all pertinent information" was provided in the Article 12.1(c) notification.

7.265. The United States notes that Korea does not explain why the information that the USITC did provide was insufficient under Article 12.2.[434] The United States also asserts that Article 12.2 does not supersede the USITC's obligation under Article 3.2 to not disclose confidential information without permission of the party submitting it.[435]

7.266. We note that while Article 12.2 requires Members to provide all pertinent information in their notifications under Articles 12.1(b) and 12.1(c), we agree with previous DSB reports that such information does not need to cover all details of the recommendations and reasoning set out in the report of the investigating authorities.[436] In addition, we note, as Korea agrees, that Article 12.2 does not require Members to disclose confidential information in their notifications.[437] However, at the same time, considering that notifications under Article 12.1(c) serve as a basis for consultations under Article 12.3, the information must be provided in a manner that would allow exporting Members to have meaningful consultations. Therefore, if a complainant is to assert that a notification does not contain pertinent information, such as the evidence of serious injury or threat thereof caused by increased imports, it must do more than merely assert that the notification redacts confidential information. Instead, the complainant must show why the information that has been conveyed in the notification is not sufficient under Article 12.2, such that the notifying Member could not be said to have "provid[ed]" all pertinent information.

7.267. In our view, Korea has not made such a showing. Korea focuses on the redactions in the increased imports and serious injury sections of the USITC report, and the alleged absence of non-confidential summaries in those reports.[438] In particular, Korea argues that (a) the increased imports section of the USITC report failed to provide all relevant information, as the relevant statistics on the development of imports over the POI was redacted, and no non-confidential summaries were provided in this regard; and (b) the discussion on serious injury in the USITC report was highly redacted, and thus left Members at a loss as to crucial aspects of the findings made.[439] However, we note that the relevant question under Article 12.2 is not whether the public version of the USITC report cited in the notification redacted confidential information, or did not cover all details of the reasoning set out in that report, but whether the United States provided all pertinent information through its Article 12.1(c) notification. Korea has not established through the arguments set out above that the United States failed to do so.

7.268. Based on the foregoing, we reject Korea's claim that the United States acted inconsistently with Article 12.2 of the Agreement on Safeguards.

7.8.3.2 Immediacy of notification

7.269. The parties agree that the United States took the decision to apply a safeguard measure on 23 January 2018, when the US President signed the proclamation detailing the proposed measure.[440] They also agree that the United States notified this decision to the Committee on 26 January 2018, i.e. three days later.[441]

7.270. Korea contends that because the United States took three days to notify the Committee on Safeguards about the decision to apply a safeguard measure, it failed to "immediately" notify the Committee under Article 12.1(c).[442] In this regard, Korea contends that there was no lack of resources that would justify such a delay; the decision to be notified comprised only three pages;

[433] Korea's second written submission, para. 326.
[434] United States' first written submission, para. 406.
[435] United States' first written submission, paras. 405 and 407.
[436] Appellate Body Report, *Korea – Dairy*, para. 109.
[437] Korea's second written submission, para. 326.
[438] Korea's first written submission, para. 565.
[439] Korea's first written submission, para. 565.
[440] Korea's first written submission, para. 548; United States' first written submission, para. 404.
[441] Korea's first written submission, para. 548; United States' first written submission, para. 404.
[442] Korea's first written submission, para. 556.

and the decision did not need to be translated.[443] The United States submits that it complied with Article 12.1(c), and refers to the administrative process relating to the preparation of the decision notification to explain the time taken to notify[444]:

a. Burden on USITC staff:

   i. The US Presidential Proclamation in the underlying LRW safeguard measure was signed on the same day as the proclamation in a parallel case on solar products, putting an extraordinary burden on US officials.

   ii. US officials needed to inform agencies charged with administering the safeguard measure, and respond to questions from the public, including affected governments and foreign producers.

   iii. The United States considered it critical to obtain a formal copy of the US Presidential Proclamation, but the process has several formalities that slowed receipt of the copies.

b. Notification preparation:

   i. To prepare the notification, responsible officials had to extract information from the documents, distil it to ensure maximum comprehensibility, seek comments from relevant officials, and execute necessary changes made by those officials.

c. Time difference between Washington DC and Geneva:

   i. The US Presidential Proclamation was signed after close of business, Geneva time (on 23 January 2018) and the notification was transmitted to Geneva in the evening of 25 January 2018. Once the time zone difference is taken into account, the gap between signature of the US Presidential Proclamation and the notification was actually just two days.

7.271. Taking into account the United States' explanations regarding the administrative process associated with preparing this notification, we are not persuaded that notification within three days was not immediate for the purpose of Article 12.1(c).

7.272. Based on the foregoing, we reject Korea's claim that the United States acted inconsistently with Article 12.1(c) of the Agreement on Safeguards.

7.8.4 Conclusion

7.273. In light of the above we reject Korea's claims under Articles 12.1(a), 12.1(b), and 12.1(c) of the Agreement on Safeguards that the United States allegedly failed to "immediately" notify its initiation notification, serious injury notification and decision notification to the Committee on Safeguards.

7.274. We also reject Korea's claims under Article 12.2 of the Agreement on Safeguards that the United States allegedly failed to provide "all pertinent information" in its serious injury notification and its decision notification.

7.9 Claims under Articles 8.1 and 12.3 of the Agreement on Safeguards

7.275. We note that Article 8.1 of the Agreement on Safeguards provides, *inter alia*, that a Member applying a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with paragraph 3 of Article 12. Article 12.3, in turn, provides as follows:

[443] Korea's first written submission, para. 557.
[444] United States' response to Panel question No. 62, paras. 104-106.

> A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under [Article 12.2], exchanging views on the measure, and reaching an understanding on ways to achieve the objective set out in [Article 8.1].

7.276. Thus, as is evident from the text of Article 8.1, and as also recognized in previous DSB reports, a WTO Member cannot endeavour to maintain an adequate balance of concessions under Article 8.1 unless it provides, as a first step, an adequate opportunity for prior consultations on a proposed measure under Article 12.3.[445]

7.277. Korea argues that the United States failed to provide an adequate opportunity for prior consultations under Article 12.3, and therefore did not endeavour to maintain substantially equivalent level of concessions and other obligations under Article 8.1 of the Agreement on Safeguards. Korea's claim under Article 8.1 is thus directly linked to the question of whether the United States provided adequate opportunity for consultations under Article 12.3. Korea contends in this regard that the United States did not provide it with an adequate opportunity for prior consultations because Korea learnt of the scope and effective date of the safeguard measure on 26 January 2018, which is the date the United States notified the decision to apply a safeguard measure under Article 12.1(c), and the safeguard measure went into effect 12 days later, i.e. 7 February 2018.[446] Korea acknowledges in this regard that the United States and Korea held consultations on 1 February 2018.[447] However, Korea contends that it did not have sufficient time to analyse the measure, consider its likely consequence, conduct appropriate domestic consultations, and prepare for consultations with the United States.[448] Therefore, per Korea, the United States did not provide sufficient opportunity for prior consultations.

7.278. The United States considers that it provided Korea with sufficient opportunity for prior consultations. In particular, the United States disagrees that Korea had only 12 days to prepare for consultations. The United States asserts in this regard that the opportunity for prior consultations arose on 11 December 2017 (not 26 January 2018, as Korea contends), which is when the United States issued a supplemental notification under Article 12.1(b) of the Agreement on Safeguards and announced its readiness for consultations.[449] The United States notes that this notification set out a description of the product, evidence of serious injury caused by increased imports, a proposed measure, the proposed date of introduction, the expected duration, and a timetable for progressive liberalization.[450] The United States submits that Members had received most of the relevant information on 11 December 2017, and the decision notification provided limited additional information, making it relatively simple to evaluate how the effects of the final safeguard measure would differ from expectations based on the proposed measure.[451] The United States also submits that the opportunity for consultations continued beyond 7 February 2018 because the US Presidential Proclamation explicitly provided further time for consultations, and an opportunity to modify the safeguard measure in response to the results of those consultations.[452]

7.279. The question before us is whether the United States provided Korea with adequate opportunity for prior consultations under Article 12.3. In addressing this question, we note from the text of Article 12.3, set out above, that the provision asks Members *proposing to apply a safeguard measure* to provide *adequate opportunity for prior consultations* to Members with substantial interest as exporters of the product concerned with a view to, *inter alia*, (a) reviewing the information provided under Article 12.3, (b) exchanging views on the measures, and (c) reaching an understanding on ways to achieve the objectives set out in Article 8.1. Like previous DSB reports, we consider that Article 12.3 requires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified in Article 12.3.[453] We also agree in this regard with previous DSB reports that the obligation to provide adequate opportunity for "prior"

[445] Appellate Body Report, *US – Wheat Gluten*, para. 146.
[446] Korea's first written submission, para. 530.
[447] Korea's response to Panel question No. 84, para. 111.
[448] Korea's response to Panel question No. 84, para. 112; first written submission, para. 530.
[449] United States' first written submission, para. 411.
[450] United States' first written submission, para. 411.
[451] United States' first written submission, para. 416.
[452] United States' first written submission, para. 417.
[453] Appellate Body Report, *US – Wheat Gluten*, paras. 136-137.

consultations cannot be met if there is insufficient time *prior to the application of the measure* to have a meaningful exchange.[454] Instead, a Member having a substantial interest as exporter of the product concerned must have sufficient time prior to the application of the measure to have consultations with the imposing Member with a view to, *inter alia*, achieving the objectives set out in Article 12.3.

7.280. We note that the parties disagree on whether Korea had sufficient time prior to the application of the safeguard measure for a meaningful exchange. The parties' disagreement in this regard arises from their differing views on whether the opportunity to consult arose on 11 December 2017, when the United States notified its supplemental injury notification and announced its readiness for consultations (as the United States contends), or 26 January 2018, when the United States notified its decision notification (as Korea contends). We note in this regard Korea's argument that it could not have had meaningful consultations on the basis of the United States' supplemental injury notification because, *inter alia*:

a. There was disagreement among the USITC's four commissioners on the necessity for in-quota tariffs for LRW units. Thus, Korea could not have known what remedy the US President would apply unless he made a decision in this regard (he ultimately applied in-quota tariffs).[455]

b. The USITC recommended that the LRW measure not apply to Korea, but the US President decided to apply the measure to Korea.[456]

7.281. Korea notes that as of 11 December 2017, it only knew of the USITC's recommendation reflected in the United States' Article 12.1(b) notification, and did not know what the US President would do in terms of (a) imposition of in-quota tariffs on LRW units, and (b) inclusion of Korea in the scope of the safeguard measure. The United States does not dispute that its supplemental injury notification did not provide this information.

7.282. In our view, to have an adequate opportunity for prior consultations pursuant to Article 12.3, Korea would have required this information. We note in this regard that one of the objectives of Article 12.3 consultations is to review the pertinent information identified in Article 12.2 and provided to Members through Articles 12.1(b) and 12.1(c) notifications. Pertinent information includes a "precise description of the product involved and the proposed measure". We note in this regard that, as Korea argues, the USITC stated in its report that the safeguard measures would not apply to Korea.[457] Considering that Korea did not have the information regarding the application of the safeguard measure to its exports or the nature of the remedy as of 11 December 2017, consultations under Article 12.3 could not have covered this information. Moreover, the purpose of an Article 12.3 consultation is also to exchange views on the measure, and to reach an understanding on ways to achieve the objective set out in Article 8.1 of the Agreement on Safeguards. The objective of Article 8.1 is that a Member proposing to apply a safeguard measure shall endeavour to maintain a "substantially equivalent level of concessions" and other obligations to that existing under GATT between it and "the exporting Members which would be affected by such a measure" in accordance with Article 12.3. We do not consider that Korea could have had an adequate opportunity for prior consultations under Article 12.3, in the sense of exchanging views on the measure and achieving the objective of Article 8.1, in the absence of this information.[458]

7.283. Instead, the opportunity to review this information would have arisen on 26 January 2018, when the United States notified the decision notification, which provided the information set out in

[454] Appellate Body Report, *US – Line Pipe*, para. 112.
[455] Korea's response to Panel question No. 66, para. 264.
[456] Korea's response to Panel question No. 66, para. 265.
[457] Korea's response to Panel question No. 66, para. 265; USITC report, (Exhibit KOR-1), pp. 65-66.
[458] We note in this regard that previous DSB reports, with which we agree, have found when the report of the investigating authorities, notified under Article 12.1(b), did not contain precise recommendations on the nature of the measure to be imposed so as to allow the complainant to accurately assess the likely impact of the measure contemplated, or adequately consult with the imposing Member on the overall equivalent concessions, the exporting Members could not have meaningful consultations based on the Article 12.1(b) notification. (Appellate Body Report, *US – Wheat Gluten*, paras. 141-142).

paragraph 7.280(a)-(b) above.[459] In addition, we note the United States' submission that the opportunity for consultation continued beyond 7 February 2018, when the safeguard measure came into effect, because the US Presidential Proclamation explicitly provided further time for consultations and an opportunity to modify the safeguard measure in response to the results. However, we disagree with this submission because, as we noted above, the obligation to provide adequate opportunity for "prior" consultations cannot be met if there is insufficient time *prior* to the application of the measure to have a meaningful exchange. It remains undisputed that the safeguard measure went into effect on 7 February 2018.[460] Therefore, in examining whether Korea had adequate opportunity for prior consultations, we must consider whether Korea had sufficient time prior to the application of the measure on 7 February 2018 to have a meaningful exchange pursuant to Article 12.3.

7.284. We accordingly consider whether the United States provided Korea with sufficient time to allow for the possibility, through consultations, for a meaningful exchange based on the information set out in paragraph 7.280(a)-(b) above. Taking into account the time available to Korea prior to the application of the safeguard measure on LRWs and the nature of the information set out in paragraph 7.280(a)-(b) above that would inform those consultations, we do not consider that Korea had adequate opportunity for prior consultations under Article 12.3. Therefore, we also find that the United States did not endeavour to maintain a substantially equivalent level of concessions and other obligations under Article 8.1 between it and Korea, in accordance with Article 12.3.

7.285. Based on the foregoing, we find that the United States acted inconsistently with Articles 12.3 and 8.1 of the Agreement on Safeguards.

7.10 Claim under Article 11.1(a) of the Agreement on Safeguards

7.286. In its request for findings, Korea claims that the United States acted inconsistently with Article 11.1(a) of the Agreement on Safeguards because of violations under other provisions of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.[461] Therefore, Korea's claim under Article 11.1(a) is purely consequential and is dependent on a finding of violation with respect to Korea's claims under Article XIX:1(a) and different provisions of the Agreement on Safeguards. We have upheld certain claims made by Korea under Article XIX:1(a) of the GATT 1994 as well as under the Agreement on Safeguards.

7.287. Based on the foregoing, we do not find it necessary to address Korea's claim under Article 11.1(a) of the Agreement on Safeguards.

7.11 Claim under Article II:1 of the GATT 1994

7.288. Korea contends that as long as a Member takes safeguard measures consistently with Article XIX of the GATT 1994 and the Agreement on Safeguards, it may levy tariffs above its bound level.[462] However, per Korea, the United States imposed a safeguard measure on imports of LRWs even though the prerequisites set forth in Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards were not shown to exist.[463] Therefore, according to Korea, by imposing an unlawful safeguard measure the United States imposed duties that were in excess of those set forth in its Schedule of Concessions, thereby violating Article II:1 of the GATT 1994.[464] The United States notes that Korea's claim is purely consequential and it should fail because the United States' safeguard measures are consistent with Article XIX:1(a) of the GATT 1994 and with the Agreement on Safeguards.[465] In addition, the United States submits that even if we were to find violations under

[459] We note Korea's confirmation that it had access to, and was aware of, the contents of the US Presidential Proclamation on 24 January 2018. (Korea's response to Panel question No. 85, para. 115). However, Korea's confirmation does not affect our findings above considering consultations under Article 12.3 are based on the notifications made pursuant to Articles 12.1 and 12.2, and in any case Korea became aware of the contents only two days prior to 26 January 2018, when the United States notified its decision notification.

[460] United States' response to Panel question No. 65(a), para. 110; Korea's second written submission, para. 312.

[461] Korea's first written submission, para. 573.

[462] Korea's first written submission, para. 570.

[463] Korea's first written submission, para. 571.

[464] Korea's first written submission, para. 571.

[465] United States' first written submission, para. 418.

Article XIX:1(a) of the GATT 1994 and under the Agreement on Safeguards, a finding under Article II:1 would be superfluous.[466]

7.289. We note that Korea's claim under Article II:1 is purely consequential and is dependent on a finding of violation with respect to Korea's claims under Article XIX:1(a) and different provisions of the Agreement on Safeguards. We have upheld certain claims made by Korea under Article XIX:1(a) of the GATT 1994 as well as under the Agreement on Safeguards.

7.290. Based on the foregoing, we do not find it necessary to address Korea's claim under Article II:1 of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, we conclude as follows:

a. With respect to Korea's claims under Article XIX:1(a) of the GATT 1994 and Articles 1 and 3.1 of the Agreement on Safeguards challenging the absence of a reasoned and adequate explanation on "unforeseen developments" and the "obligations incurred" by the United States, which would have resulted in the alleged increased imports of LRWs causing serious injury:

   i. We find that the USITC acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards because its report does not contain a reasoned and adequate explanation on "unforeseen developments" and the "obligations incurred" by the United States, within the meaning of Article XIX:1(a) of the GATT 1994. We do not find it necessary to address whether the USITC also acted inconsistently with Article 1 of the Agreement on Safeguards for these same reasons.

b. With respect to Korea's claims under Articles 2.1, 3.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards challenging the USITC's definition of the domestic industry:

   i. We find that the USITC acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because it included LRW parts in the definition of the domestic industry based on (1) its finding of likeness between imported and domestically produced LRW parts; and (2) its application of the product line approach. We do not find it necessary to address whether the USITC also acted inconsistently with Article 2.1 for these same reasons.

   ii. We reject Korea's claim under Articles 3.1 and 4.1(c) of the Agreement on Safeguards, as well as Article 2.1 of the Agreement on Safeguards challenging the USITC's inclusion of belt-driven washers in the definition of the domestic industry.

   iii. We do not find it necessary to address Korea's consequential claims that as a consequence of the improper definition of the domestic industry, the USITC's determination of serious injury and causation was also inconsistent with Articles 2.1, 3.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards.

c. With respect to Korea's claims under Articles 2.1 and 3.1 of the Agreement on Safeguards challenging the USITC's findings on imports in such increased quantities:

   i. We find that the USITC acted inconsistently with Articles 2.1 and 3.1 of the Agreement on Safeguards because it failed to provide a reasoned and adequate explanation in support of its finding on increased imports.

   ii. We reject Korea's claim that the USITC acted inconsistently with Articles 2.1 and 3.1 of the Agreement on Safeguards by (1) cumulating imports of LRWs and LRW parts as part of its increased imports analysis; (2) failing to examine the significance of the increase in imports relative to domestic consumption; and (3) failing to account for

[466] United States' first written submission, para. 419.

the price and non-price based aspects of the conditions of competition in the market in its increased imports analysis.

d. With respect to Korea's claims under Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c) of the Agreement on Safeguards challenging the USITC's findings on serious injury suffered by the domestic industry:

   i. We find that the USITC acted inconsistently with Articles 4.2(a) and 3.1 of the Agreement on Safeguards by excluding the profit and loss data of the producer of belt-driven washers from the profit data used to determine the profitability of the domestic industry. We do not find it necessary to separately address whether the USITC also acted inconsistently with Articles 2.1, 4.1(a), and 4.2(c) for these same reasons.

   ii. We reject, for the reasons set out in paragraph 7.119 above, Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC allegedly failed to objectively examine "profit and loss".

   iii. We reject Korea's claims under Article 4.2(a) of the Agreement on Safeguards that the USITC allegedly failed to objectively examine the share of the domestic market taken by increased imports.

   iv. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC failed to evaluate all injury factors set out in Article 4.2(a).

   v. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 2.1, 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that are consequential to Korea's claims challenging the USITC's definition of the domestic industry.

   vi. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC failed to undertake an objective examination of the significant overall impairment of the domestic industry and based its overall finding of serious injury on one factor alone.

e. With respect to Korea's claims under Articles 2.1, 3.1, 4.2(b), and 4.2(c) of the Agreement on Safeguards challenging the USITC's findings on causation between subject imports and the serious injury to the domestic industry:

   i. We find that the USITC acted inconsistently with Articles 3.1 and 4.2(b) the Agreement on Safeguards because it (1) did not provide a reasoned and adequate explanation in support of its finding that subject imports depressed and suppressed prices of the domestic like product as a whole; and (2) did not make a finding on coincidence in trends in a manner consistent with Article 4.2(b). We do not find it necessary to separately address whether the USITC also acted inconsistently with Articles 2.1 and 4.2(c) for these same reasons.

   ii. We reject Korea's claims under Articles 3.1 and 4.2(b), as well as Articles 2.1, and 4.2(c) of the Agreement on Safeguards challenging the USITC's finding that (1) joint pricing of dryers and LRWs and (2) deterioration of US brands, were not factors causing injury to the domestic industry.

   iii. We reject Korea's claims under Articles 3.1 and 4.2(b), as well as Articles 2.1 and 4.2(c) of the Agreement on Safeguards challenging the USITC's application of the substantial cause test in the underlying investigation.

   iv. We do not find it necessary to address Korea's claims under Articles 3.1 and 4.2(b), as well as Articles 2.1 and 4.2(c) of the Agreement on Safeguards regarding the USITC's analysis of non-price related aspects of competition.

v. We do not find it necessary to address Korea's claims under Article 4.2(b), as well as Articles 2.1, 3.1, and 4.2(c) of the Agreement on Safeguards that are consequential to Korea's claims challenging the USITC's definition of the domestic industry and its determination on increased imports.

f. With respect to Korea's claims under Articles 5.1 and 7.1 of the Agreement on Safeguards:

i. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards that is premised on Korea's view, which we have rejected, that the USITC found factors other than increased imports were causing injury to the domestic industry.

ii. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards challenging the form and level of the United States' safeguard measure. To the extent Korea's claim is premised on its view that the duty on out-of-quota LRW parts was not necessary under Article 5.1, for the reasons set out in paragraph 7.226 above, we do not find it necessary to address this aspect of Korea's claim.

iii. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards that the United States acted inconsistently with this provision in failing to take into account existing import restrictions from anti-dumping and countervailing measures.

iv. We reject Korea's claim under Articles 5.1 and 7.1 of the Agreement on Safeguards that the United States failed to limit the safeguard measure to what was necessary to remedy injury and facilitate adjustment.

v. We do not find it necessary to address Korea's claim under Article 5.1 of the Agreement on Safeguards that is consequential to Korea's claim challenging the USITC's determination on causation.

g. With respect to Korea's claims under Articles 12.1 and 12.2 of the Agreement on Safeguards:

i. We reject Korea's claims under Articles 12.1(a), 12.1(b), and 12.1(c) of the Agreement on Safeguards that the United States allegedly failed to "immediately" notify its initiation notification, serious injury notification, and decision notification to the Committee on Safeguards.

ii. We reject Korea's claims under Article 12.2 of the Agreement on Safeguards that the United States allegedly failed to provide "all pertinent information" in its serious injury notification and its decision notification.

h. With respect to Korea's claims under Articles 8.1 and 12.3 of the Agreement on Safeguards, we find that the United States acted inconsistently with Article 12.3 because it failed to provide Korea with adequate opportunity for prior consultations under Article 12.3 of the Agreement on Safeguards. We find that as a consequence of this violation under Article 12.3, the United States also acted inconsistently with Article 8.1 of the Agreement on Safeguards.

i. With respect to Korea's claim under Article 11.1(a) of the Agreement on Safeguards, we do not find it necessary to address this claim.

j. With respect to Korea's claim under Article II.1 of the GATT 1994, we do not find it necessary to address this claim.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measure at issue is inconsistent with Article XIX:1(a) of the GATT 1994 and several provisions of the Agreement on Safeguards, it has nullified or impaired benefits accruing to Korea under these agreements.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measure into conformity with its obligations under Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards.

WORLD TRADE ORGANIZATION

WT/DS546/R/Add.1

8 February 2022

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UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF LARGE RESIDENTIAL WASHERS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS546/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 9 October 2019

General

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

(2) The Panel reserves the right to modify these procedures as necessary, as well as any additional working procedures that may be adopted by the Panel, after consultation with the parties.

Confidentiality

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

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

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than fifteen days after the written submission in question is presented to the Panel, unless a different due date is established by the Panel upon written request of a party showing good cause.

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

Submissions

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

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

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

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

Preliminary rulings

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first

written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Korea shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

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

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

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

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

Evidence

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

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

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

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

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

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

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

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

Editorial Guide

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

Questions

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

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

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

Substantive meetings

10. The Panel shall meet in closed session.

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

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

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

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

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

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

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

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

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

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

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

f. Following the meeting:

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

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

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

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

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

Third party session

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

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

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

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

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

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

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

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

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

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

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

f. Following the third-party session:

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

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

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

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

Descriptive part and executive summaries

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

23. Each party shall submit an integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions and its oral statements at the first and the second substantive meetings of the Panel with the parties. This integrated executive summary may also include a summary of the party's responses to questions following the first and the second substantive meetings of the Panel with the parties. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. Each party's integrated executive summary shall be limited to no more than 20 pages.

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

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

Interim review

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

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

Interim and final report

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

Service of documents

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

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (DSRegistry@wto.org) on the due dates established by the Panel, preferably in both Microsoft Word and PDF format, either on a CD-ROM, a DVD or as an e-mail attachment.

b. The electronic version of documents shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Should there be any discrepancy between the Microsoft Word format and PDF format of the documents, the PDF format shall constitute the final version of the party's submission.

c. Each party and third party shall provide the DS Registry (Office No. 2047) with a paper copy of any document submitted to the Panel within 24 hours following the deadline for submitting such document.

d. All emails from the parties and third parties to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If a CD-ROM/DVD is provided, it shall be filed with the DS Registry.

e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party in electronic format only, either as an email attachment or a CD-ROM or a DVD. Each party and third party shall confirm in an e-mail that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

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

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

Correction of clerical errors in submissions

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

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 9 October 2019

Revised on 18 October 2019

Revised on 31 October 2019

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

2 For the purposes of these Panel proceedings, BCI is any information that was previously treated by the U.S. International Trade Commission as confidential in the course of the specific safeguard proceeding at issue in this dispute, including any subsequent reviews. These procedures do not apply, however, to any information that is available in the public domain, nor any BCI that the entity providing such information agrees in writing to make publicly available.

3 No person may have access to BCI except a Panelist, a member of the Secretariat assisting the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. However, an outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises.

4 A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Each party and third party is responsible for ensuring that its employees and outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

5 A party submitting BCI shall mark the cover and/or first page of the document containing BCI to indicate the presence of such information. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx". The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit KOR-1 (BCI), or Exhibit USA-1 (BCI)).

6 Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

7 Where a party submits a document containing BCI to the Panel, the other party or third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked and treated as described in paragraph 5. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are present or observing the session at that time. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 5.

8 Third parties' access to BCI shall be subject to the terms of these Additional Working Procedures. Where third parties receive written submissions pursuant to the Working Procedures, the third parties shall receive the redacted version of such written submissions containing BCI and

redacted versions of exhibits thereto. The redacted versions of the parties' written submissions received by third parties pursuant to the Working Procedures and redacted versions of exhibits thereto shall be sufficient to convey a reasonable understanding of the nature of the information at issue.

9 A third party may request access to the non-redacted version of a party's written submission received by a third party pursuant to the Working Procedures or an exhibit thereto containing BCI. The Panel, after consulting the parties, shall decide whether to grant access to such BCI, taking into consideration the sensitivity of the information and the need for the third party to see the information for the purpose of participating effectively in the Panel proceedings. Any such request shall include a list of the third party's representatives and outside advisors who would like to review the BCI. If granted, the third party's access to the non-redacted version of a party's written submission or an exhibit thereto containing BCI will take place on the premises of the WTO Secretariat, unless good cause is shown for an alternative arrangement.

10 If a party considers that information submitted by the other party or third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, to third parties, together with the reasons for the objection. Similarly, if a party considers that the other party or third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings based on the criteria set out in paragraph 2.

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

12 Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded by the WTO Secretariat to the Appellate Body in the event of an appeal of the Report of the Panel, provided that the Appellate Body confirms that it will not disclose BCI in its report, or in any other way, to persons not authorized under these procedures to have access to BCI, other than members of the Appellate Body or a member of the Secretariat assisting the Appellate Body.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING HOLDING A SUBSTANTIVE MEETING CONDUCTED VIA CISCO WEBEX

Adopted on 29 January 2021

Amended on 21 April 2021

General

1. These Additional Working Procedures set out terms for holding the substantive meeting of the Panel via Cisco Webex Events.

Definitions

2. For the purposes of these Additional Working Procedures:

"DORA" means the Disputes Online Registry Application.

"Host" means the designated person within the WTO Secretariat responsible for the management of the platform for remote participants to participate in the meeting with the Panel.

"Participant" means any authorized person attending the meeting, either remotely or from the designated room at the WTO premises, including the Members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the meeting, members of the parties' and third parties' delegations, and interpreters.

"Platform" means the Cisco Webex Events platform.

Equipment and technical requirements

3. Each party and third party shall be responsible for ensuring that the members of its delegation participating in the meeting with the Panel by remote means join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.

Technical support

4. (1) In light of the Secretariat's limited ability to offer remote assistance during, and in advance of the meeting, each party and third party is responsible for providing its own technical support to the members of its delegation.

(2) The host will assist participants in accessing and using the platform in preparation for, and during the course of, the meeting with the Panel.

Pre-meeting

Registration

5. Each party and third party shall provide to the Panel the list of the members of its delegation no later than 5 p.m. (Geneva time) 7 working days before the first day of the meeting with the Panel. Such list shall include all members of each party's and third party's delegation, and shall indicate whether they will be participating in the meeting remotely or from the designated room at the WTO premises. Each party and third party shall limit the number of members of its delegation participating at the WTO premises to that set by the Panel in advance of the meeting.

Advance testing

6. Each group of remote participants (members of each party's and third party's delegation) will hold two testing sessions for each substantive meeting, with the Secretariat before the meeting with the Panel: a separate one for each group, and a joint session with all remote participants in the meeting. Such test sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. Remote participants should make themselves available for the test sessions.

Confidentiality and security

7. The meeting shall be confidential.

8. Each party and third party shall follow any security and confidentiality protocols and guidelines set by the Panel in advance of the meeting.

9. The remote participants shall connect to the meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

Conduct of the meeting

Recording

10. The meeting will be recorded in its entirety via the platform. The recording of the meeting will form part of the panel record.

11. The parties and third parties are strictly prohibited from:

(1) recording, via any means, including audio or video recording, or screenshot, the meeting or any part thereof; and

(2) permitting any non-participant to record, via any means, including audio or video recording, or screenshot, the meeting or any part thereof.

Access to the virtual meeting room

12. The participants shall access the virtual meeting room either remotely in accordance with these Additional Working Procedures or from the designated room at the WTO premises.

13. (1) The host will invite remote participants via email to join the virtual meeting room.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password with unauthorized persons.

(3) Each party and third party shall ensure that only participants from its delegation join the virtual meeting room.

Advance log-on

14. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of the meeting.

(2) In order to ensure that the meeting will start as scheduled, participants accessing the meeting remotely must login to the platform at least 30 minutes in advance of the scheduled start time of the meeting.

(3) Participants accessing the meeting remotely will be placed in a virtual lobby where they will remain until the Panel is ready to start the meeting, at which time the host will admit them to the meeting.

Document sharing

15. (1) Before each party or third party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement through DORA.

(2) Any participant wishing to share a document with the other participants during the meeting will do so through DORA.

Communication breakdown

16. Each party and third party will designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The parties and third parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the meeting. To do so, the party or third party that experiences the technical or connectivity issue shall:

(1) if possible, immediately intervene at the meeting and briefly state the nature of the issue experienced; or

(2) if doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform, by sending an email to olga.falguerasalamo@wto.org, or by calling at +41 22 739 6746.

17. The Panel may postpone the proceedings until the technical issue is resolved or continue the proceedings with those that continue to be connected or are physically present in the meeting room at the WTO.

Participation

18. (1) If a participant attending the meeting remotely wishes to take the floor, the participant should use the "raise a hand" function in the platform, so that the Panel can give the floor to the participant and allow the participant to unmute their microphone and turn their camera on.

(2) If a participant attending the meeting from the WTO premises wishes to take the floor, the participant should raise their placard/flag in the designated room at the WTO premises, so that the host can register the request on the virtual meeting platform and the Panel can give the floor to the participant. When the participant takes the floor, the camera will automatically move to the participant, once their microphone is turned on.

Structure of the substantive meetings

First substantive meeting with Parties

19. The first substantive meeting of the Panel with the parties will be conducted as follows:

(1) On the first day of the meeting with the parties, the Panel will invite Korea to make an opening statement to present its case first. Subsequently, the Panel will invite the United States to present its point of view. Before each party takes the floor, the party shall provide the Panel and other participants at the meeting with a provisional written version of its statement by uploading it to DORA. In its opening statement, each party should avoid lengthy repetition of the arguments in its submissions. Each party shall limit the duration of its opening statement to 75 minutes.

(2) On the second day of the meeting with the parties, the Panel will pose questions to the parties, which will be sent to the parties in advance of the meeting. Once the questioning has concluded, the Panel will afford each party an opportunity to present a closing statement, with Korea presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants with a provisional written version of its closing statement, if one is available, by uploading it to DORA. Each party shall limit the duration of its closing statement to 30 minutes.

(3) Following the meeting:

a. Each party shall submit the final written version of its opening statement no later than 5 p.m. (Geneva time) on the first working day following the meeting. By the same deadline, each party shall also submit the final written version of any prepared closing statement that it delivered at the meeting.

b. Each party may send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the other party to which it wishes to receive a response in writing.

c. The Panel will endeavour to send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the parties to which it wishes to receive a response in writing.

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

Third-party session

20. The third-party session will be conducted as follows:

(1) All parties and third parties may be present during the entirety of this session.

(2) The Panel will hear the oral statements of the third parties, who shall speak in reverse alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement by uploading it on DORA at the start of the third-party session. Each third party shall limit the duration of its statement to 15 minutes and avoid repetition of the arguments already in its submission.

(3) Following the third-party session:

a. Each third party shall submit the final written version of its oral statement no later than 5 p.m. (Geneva time) on the first working day following the third-party session.

b. Each party may send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

c. The Panel may send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

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

Second substantive meeting with the parties

21. The second substantive meeting of the Panel with the parties will be conducted as follows:

(1) On the first day of the meeting with the parties, the Panel will invite the United States to make an opening statement first, followed by Korea. If the United States chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5 p.m. (Geneva time) three working days day prior to the meeting. In that case, the Panel shall invite Korea to present its opening statement first.

Before each party takes the floor, the party shall provide the Panel and other participants at the meeting with a provisional written version of its statement by uploading it to DORA. In its

opening statement, each party should avoid lengthy repetition of the arguments in its submissions. Each party shall limit the duration of its opening statement to 75 minutes.

(2) After the conclusion of the opening statements, the Panel will pose questions to the parties, which will have been sent to the parties in advance of the meeting. The Panel will continue and conclude the questioning on the second day of the meeting with the parties.

(3) On the third day of the meeting with the parties, the Panel shall afford each party an opportunity to present its closing statement. The party that presented its opening statement first shall present its closing statement first.

Before each party takes the floor, it shall provide the Panel and other participants with a provisional written version of its closing statement, if one is available, by uploading it to DORA. Each party shall limit the duration of its closing statement to 30 minutes.

(4) Following the meeting:

a. Each party shall submit the final written version of its opening statement no later than 5 p.m. (Geneva time) on the first working day following the meeting. By the same deadline, each party shall also submit the final written version of any prepared closing statement that it delivered at the meeting.

b. Each party shall send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the other party to which it wishes to receive a response in writing.

c. The Panel will endeavour to send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the parties to which it wishes to receive a response in writing.

d. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, no later than 5 p.m. (Geneva time), within a timeframe established by the Panel before the end of the meeting.

22. The above format and structure are without prejudice to how the Panel decides to conduct subsequent meeting(s) with the parties.

Relationship with the Working Procedures of the Panel adopted on 9 October 2019

23. These Additional Working Procedures complement the Working Procedures of the Panel adopted on 9 October 2019. To the extent that these Additional Working Procedures conflict with the Working Procedures of the Panel, these Additional Working Procedures shall prevail.

ANNEX A-4

INTERIM REVIEW

1 INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this annex sets out our discussion of the arguments made at the interim review stage. We have revised certain aspects of the Interim Report in light of Korea's request (the United States did not make a request, but provided comments on Korea's request). In addition, we have made certain editorial changes to improve the clarity and accuracy of the Final Report, or to correct typographical and non-substantive errors, including those suggested by the parties. The footnote numbers in the Final Report have changed due to these revisions. The footnote numbers indicated in this annex pertain to those in the Final Report, but we have also indicated the footnote numbers in the Interim Report where they differ from those in the Final Report. The paragraph numbers in the Final Report remain unchanged.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY KOREA

2.1 The USITC's definition of the domestic industry

2.1.1 Paragraphs 7.39(a), 7.47 and 7.50

2.1. Korea asks us to modify our description of its claim that the USITC acted inconsistently with the Agreement on Safeguards by including producers of belt-driven washers in the domestic industry. In particular, Korea asks us to note that it is also challenging the USITC's failure to provide a reasoned and adequate explanation in support of its definition of the domestic industry.[1] Korea requests us to modify paragraphs 7.39(a), 7.47, and 7.50 to reflect this change.[2] The United States does not comment on Korea's request.

2.2. We have made the changes suggested by Korea in paragraphs 7.39(a) and 7.47. However, we do not find it necessary to make the change suggested by Korea in paragraph 7.50, which contains our analysis, because the issue raised by Korea is adequately covered in paragraph 7.52 of our Report.

2.1.2 Footnote 72 (to paragraph 7.39)

2.3. Korea notes that in footnote 72 of the Interim Report we stated that Korea initially challenged the inclusion of domestic LRW parts because they were not like or directly competitive with imported LRWs, and given the difference between LRWs and LRW parts, the USITC erred by not treating them as separate like products.[3] We also noted in footnote 72 that Korea subsequently clarified that it was challenging the USITC's inclusion of parts within the domestic industry because they were not like or directly competitive with the PUC. Korea contends that while this discussion suggests that Korea changed the contours of its claims, it does not believe there was such an evolution of its claim.[4] Korea accordingly requests us to modify footnote 72 by removing the reference to Korea's initial description of its claim.[5] The United States opposes Korea's request, finding our description regarding the evolution of Korea's claim to be accurate.[6]

2.4. We do not share Korea's views regarding our description of its claim in footnote 72 of our Report. However, modifying footnote 72 in the manner proposed by Korea, i.e. removing the reference to Korea's initial description of its claim, does not affect our analysis in any manner. We have, accordingly, made the change requested by Korea.

[1] Korea's request for interim review, paras. 3-4.
[2] Korea's request for interim review, para. 5.
[3] Korea's request for interim review, para. 9.
[4] Korea's request for interim review, paras. 6-7.
[5] Korea's request for interim review, para. 9.
[6] United States' comments on Korea's request for interim review, para. 2.

2.2 The USITC's increased imports determination

2.2.1 Paragraph 7.96

2.5. Korea requests us to make certain additions in paragraph 7.96 of the Interim Report in order to clarify the basis for our conclusion on Korea's claim on increased imports.[7] The United States opposes Korea's request, noting in this regard that, as drafted, the paragraph clearly lists the unavailability of business confidential data and the failure to address the degree of decrease at the end of the period of investigation as reasons for concluding that the United States failed to rebut Korea's *prima facie* case on this issue.[8]

2.6. We decline to make the changes suggested by Korea in interim review because our Report adequately sets out the legal as well as factual basis for our conclusion on this issue.

2.3 The USITC's serious injury determination

2.3.1 Paragraph 7.118

2.7. Korea requests us to revise our findings concerning the USITC's evaluation of the domestic industry's profit data.[9] In particular, Korea submits that we did not address its arguments regarding possible profit shifting and regarding the evidence that the domestic producer Whirlpool was a healthy company.[10] Korea contends that the "key point" it was making was that the USITC accepted the domestic producer's story without engaging in any critical analysis.[11] The United States opposes Korea's request.[12]

2.8. We note that in support of its request, Korea refers back to arguments made in these proceedings, and which we examined in reaching our findings in the Interim Report. For instance, Korea (a) recalls its argument that a significant difference in profit between Whirlpool's sales of washers compared to sales of other products "could" be evidence of profit shifting; (b) refers to Whirlpool's tax filings in 2016 as evidence that was presented to the USITC and which showed that Whirlpool made profits in its overall North American operations; and (c) contends the USITC was required to examine the overall profitability of the laundry segment to verify the injury finding based on profitability in the LRW segment.[13] In making our findings, we noted that the focus of the USITC's injury analysis was on the domestic industry producing the like product, which was made up of LRWs (and covered parts), and not other products such as dryers. Thus, as we stated in that paragraph, it was reasonable that the USITC found uninformative Whirlpool's financial results for its North American operations, given that the like product at issue constituted only 13.1% to 13.5% of total revenue.

2.9. Korea has not explained through these arguments, as we noted in the Interim Report, why the USITC's explanations were not adequate in this regard. Indeed, we do not see from Korea's arguments why the profitability of Whirlpool's North American operations, where LRWs (the like product) formed only 13.1% to 13.5% of total revenue, undermines the USITC's profitability or injury analysis pertaining to the US domestic industry, which was defined on the basis of the producers of LRWs (and LRW parts). In addition, in contending that the USITC's examination of the profitability data was not objective, Korea argues again that "the USITC was required to examine the overall profitability of the laundry segment to verify if it confirmed the injury finding based on profitability in the LRW segment". However, we rejected this argument for the reasons set out in paragraph 7.115 of the Interim Report.[14]

2.10. Moreover, while Korea recalls its argument that the USITC report did not meaningfully explain how Whirlpool's geographically segmented financial data, including its SG&A expenses, were appropriately allocated to the production of LRWs, we note that the USITC explained in its report

[7] Korea's request for interim review, para. 10.
[8] United States' comments on Korea's request for interim review, para. 3.
[9] Korea's request for interim review, para. 11.
[10] Korea's request for interim review, para. 18.
[11] Korea's request for interim review, para. 18.
[12] United States' comments on Korea's request for interim review, para. 5.
[13] Korea's request for interim review, paras. 13-16.
[14] Korea's request for interim review, paras. 15-16.

that it had verified Whirlpool's financial results, including its SG&A expenses using appropriate methodologies from a previous investigation.[15] The USITC noted in this regard that when the SG&A ratios for Whirlpool's North American segment are calculated using the same methodology, the resulting SG&A ratios are in the same range as those Whirlpool reported for LRWs.[16] Korea did not explain, as we noted in the Interim Report, why the USITC's verification of Whirlpool's financial results were inadequate. Thus, we see no reason to revisit our findings or analysis in this regard.[17]

2.11. We, accordingly, decline Korea's request.

2.3.2 Paragraph 7.126

2.12. Noting that we found it unnecessary to address Korea's claims challenging the USITC's serious injury determination on the ground that the USITC improperly defined the domestic industry, Korea asks us to make findings on these claims.[18] The United States opposes Korea's request.[19]

2.13. Having found that the USITC acted inconsistently with Article 4.1(c) by including producers of LRW parts in the domestic industry, we explained in our Interim Report that it was unnecessary to make an additional (purely consequential) finding that because of the USITC's improper definition of the domestic industry, its serious injury finding was also inconsistent with the Agreement on Safeguards. We are not persuaded that we need to revisit these findings in the interim review.

2.3.3 Paragraphs 7.134-7.135

2.14. Korea notes that having found that in making its overall serious injury finding the USITC relied on an intermediate finding of profitability, which we found to be inconsistent with Article 4.2(a), we found it unnecessary to address Korea's claims that the USITC allegedly based its serious injury determination on declining profitability alone.[20] Korea asks us to make additional findings with respect to Korea's claims in this regard, asserting that it has established that even assuming *arguendo* that the USITC's profitability analysis was reasonable, it still failed to make a proper determination regarding the significant overall impairment of the domestic industry.[21] The United States opposes Korea's request.[22]

2.15. Having considered Korea's request, we are not persuaded that it would be appropriate to make additional findings on an "*arguendo*" basis with respect to Korea's claims. We, accordingly, decline Korea's request.

[15] USITC report, (Exhibit KOR-1), fn 210.
[16] USITC report, (Exhibit KOR-1), fn 210.
[17] Considering these findings, we also saw no basis to agree with Korea's argument that a significant difference in profit between Whirlpool's sales of washers compared to sales of other products "could" be evidence of profit shifting. Korea does not point to any specific evidence before the USITC that shows profit shifting from washers to other products, instead arguing that the differences in profits between washers and other products "could" be evidence of profit shifting. We also note, as we set out in footnote 206 of our Report, that Korea did not argue that profits made on washers were allocated to dryers. Indeed, noting that the USITC stated that the record did not support the respondents' assertion that Whirlpool and GE purposely priced their LRWs to sell at a loss, with the expectation that profitable sales of matching dryers would compensate that loss, Korea contended that "that was not really the argument made by the respondents". Instead, Korea contended that the "main point" not addressed by the USITC was that one cannot view LRW profits in isolation, and reach a conclusion on profitability, given that the industry views LRWs and dryers sales as part of the laundry segment as a whole. (Korea's first written submission, para. 290).
[18] Korea's request for interim review, para. 24.
[19] United States' comments on Korea's request for interim review, para. 6.
[20] Korea's request for interim review, para. 25.
[21] Korea's request for interim review, para. 26.
[22] United States' comments on Korea's request for interim review, para. 7.

2.4 The USITC's causation determination

2.4.1 Paragraph 7.152

2.16. Korea requests that in resolving its claim concerning the USITC's finding that imports depressed and suppressed domestic prices, we reflect and address the full extent of its arguments.[23] The United States does not comment on Korea's request.

2.17. We consider, as previous DSB reports have also recognized, that we have the discretion to address only those arguments that are necessary to resolve a particular claim.[24] We also agree with previous DSB reports that provided a panel makes an objective assessment of the matter under Article 11 of the DSU, it is not obligated to address each and every argument put forth by a party.[25] Considering how we have resolved Korea's claim in our Report, and also taking into account how Korea presented its arguments in these proceedings, we find it unnecessary to reflect and address the particular arguments alluded by Korea.

2.18. In particular, Korea asks us to reflect and address in our Report, its arguments that the "USITC's price-effect findings involved a simple observation that prices declined", "that the USITC failed to examine sufficiently the relationship between imports and effects on domestic prices" and that "the USITC failed to explain how any price depression was explained by the increased imports".[26] We note that Korea introduced these arguments in paragraph 382 of its first written submission.[27] However, Korea did not substantiate its view. For instance, Korea asserted that "price depression is not simply a matter of prices going down" and "[y]et that is how it was approached by the USITC", before adding that the USITC "failed to explain how any price depression was explained by the increased imports". Korea did not substantiate its assertions by explaining why Korea took this view, considering the USITC's finding is, in fact, based on the relation between the effect of subject imports on domestic prices, with the USITC finding that a "significant and growing quantity of low-priced imports depressed and suppressed prices of the domestic like product".[28]

2.19. Korea may, of course, (and has in these proceedings) challenge the USITC's price effects finding in this regard. Indeed, we have upheld Korea's claim challenging the USITC's price effects finding based on certain arguments that were substantiated.[29] However, we see no basis for reflecting all of its arguments in our Report, especially those we find to be unsubstantiated.[30] We, accordingly, decline Korea's request.

2.4.2 Paragraph 7.156

2.20. Korea requests us to make certain revisions in this paragraph. In particular, Korea disagrees with our statement that it did not engage with the USITC's reasoning for rejecting arguments made by the Korean respondents challenging the use of the six product categories to make price comparisons.[31] Korea also disagrees with our statement that it did not show why the USITC's reasoning was flawed in this regard.[32] Korea thus disagrees that it failed to establish a basis

[23] Korea's request for interim review, paras. 27-28.
[24] Appellate Body Report, *EC – Poultry*, para. 135. See also Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 125.
[25] Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 125; *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 134.
[26] Korea's request for interim review, paras. 27-28.
[27] Korea refers to paragraph 385 of its first written submission, but we note that the arguments are introduced in paragraph 382 of Korea's first written submission. Paragraph 385 deals with the issue of price comparability. We also note that having introduced the arguments in paragraph 382, Korea moves on, in paragraphs 383-384 of its first written submission, to quoting and referring to previous DSB reports to develop the appropriate standard to examine a price effects analysis, but does not explain how what it considers to be the appropriate standard applies to the facts of this case.
[28] USITC report, (Exhibit KOR-1), p. 42.
[29] Panel Report, section 8.1(e)(i).
[30] We also note that Korea refers to paragraphs 223 and 240 of its second written submission as parts of its submissions where the arguments that we allegedly did not address were made. However, review of these paragraphs makes it clear that Korea links its arguments to issues that we have addressed in our Report, specifically the non-inclusion of agitator-based TL LRWs in the USITC's price effects analysis. (Korea's second written submission, paras. 223 and 240).
[31] Korea's request for interim review, para. 30.
[32] Korea's request for interim review, para. 30.

for its claim because of the reasons we set out in the Interim Report. Instead, Korea contends that it devoted substantial portions of its submissions to debunking, and engaging with, the USITC's reasoning.[33] The United States opposes Korea's request, noting in this regard that Korea simply repeats arguments made by the respondents before the USITC without providing any specific points to establish a *prima facie* case that the six product categories used by the USITC distorted its price comparisons.[34]

2.21. We note that in paragraph 7.156 of our Report we addressed the issue raised by Korea that the six product categories that the USITC used to make price comparisons included multiple models with different price ranges. In paragraph 7.155 of our Report we noted the USITC's explanation for rejecting the Korean respondents' arguments that the product categories included multiple models with different price ranges (and were thus allegedly overbroad). In paragraph 7.156 we stated that Korea did not engage with specific reasons the USITC set out in that explanation for rejecting the arguments.

2.22. Consistent with our standard of review, we have examined whether the USITC's explanations were reasoned and adequate in light of the record evidence and the arguments made by the respondents. We have not conducted a *de novo* review based on the arguments made by the respondents before the USITC (and recalled by Korea in these panel proceedings). We note, as explained in paragraph 7.156, that it is Korea's burden as the complainant to show the USITC's reasoning and explanations were flawed. Having carefully considered the points made by Korea in its request, we are not persuaded that we need to revise paragraph 7.156 in the manner proposed by Korea.[35] Nonetheless, we have made some modifications to better reflect our reasoning in this regard.

2.4.3 Paragraph 7.160

2.23. In paragraph 7.160, we responded to the issue raised by Korea that "there is no information on the manner in which the USITC price comparisons were made, including whether adjustments were made for any differences between products in the same product group".[36] Korea disagrees with our presentation of its arguments, and specifically our statement that Korea did not raise any specific argument to support its claims.[37] Contending that it raised very specific points in this regard, Korea refers to arguments that it made in paragraph 258 of its second written submission and paragraph 68 of its response to Panel question No. 76(a).[38] The United States opposes Korea's request.[39]

2.24. We note that in paragraph 7.160 we were responding to the issue raised by Korea in paragraphs 402-403 of its first written submission. We have added a citation in paragraph 7.160 to these paragraphs of Korea's first written submission to clarify this. However, we are not persuaded that Korea raised specific arguments in support of this issue. In particular, while Korea refers to its response to Panel question No 76(a), that question – and Korea's response – concerned a different

[33] Korea's request for interim review, para. 31.
[34] United States' comments on Korea's request for interim review, para. 8.
[35] For instance, Korea asserts that it devoted "substantial portions to engage and debunk the USITC's reasoning" and cites paragraphs 252-259 of its second written submission. (Korea's request for interim review, para. 31). Korea does not explain what exactly in paragraphs 252-259 contradicts what we said in paragraph 7.156 of our Report. We note that some of the issues raised in these paragraphs, such as Korea's argument regarding the inclusion of washers with large capacity options, are addressed in our Report. (Panel Report, paras. 7.157-7.159). In paragraph 32 of its request, Korea provides some examples of arguments where it challenged the USITC's reasoning. In particular, Korea highlights its argument that the product categories selected by the USITC accounted for a small portion of total imports, and also asserts, referring to its submissions, that it raised elaborate arguments to demonstrate that product categories were too broadly defined to provide meaningful price-to-price comparisons. (Korea's first written submission, para. 399; second written submission, paras. 223, 250, and 258). However, we note that in its explanation, which we quoted in paragraph 7.155 of our Report, the USITC responded to these arguments, which were made by the respondents in the underlying investigation. (See also United States' response to Panel question No. 35(d), para. 64). To the extent Korea's argument is that the USITC should have selected a different method to make price comparisons, i.e. used a model-specific price comparison, we also refer to our explanations in footnote 279 of the Report.
[36] Korea's first written submission, para. 402.
[37] Korea's request for interim review, para. 34.
[38] Korea's request for interim review, para. 35.
[39] United States' comments on Korea's request for interim review, para. 8.

matter. Indeed, the subject of that discussion, as the United States also notes, was price data that the United States confirmed – and we noted – was not used for price comparisons.[40] Similarly, Korea does not show the interlinkage between the issue addressed in paragraph 7.160 and the arguments made in paragraph 258 of Korea's second written submission. We note in this regard that we addressed the issues raised by Korea with respect to this issue in our Report.[41]

2.25. That being said, we are of the view that removing the reference to the statement that Korea did not raise any specific points to its argument does not affect our analysis. We accordingly have modified paragraph 7.160 to remove that statement, and added, as noted above, a citation to the parts of Korea's first written submission where this issue was raised.

2.4.4 Footnote 345 (to paragraph 7.194) (footnote 344 of the Interim Report)

2.26. Korea requests us to modify footnote 344 of the Report, disagreeing in particular with our description of its arguments, which it does not consider to be accurate.[42] The United States opposes Korea's request.[43]

2.27. We note that in footnote 344 we referred to Korea's argument in paragraph 430 of its first written submission that the USITC "ignored most of the compelling evidence" presented by the respondents. Korea did not provide any citation to support this argument, and instead, in the sentence that followed, moved on to contend that the USITC relied on a statement made by the representative of one of the domestic producers. Thus, Korea did not specify what "compelling evidence" it was referring to. Hence, we stated in footnote 344 that Korea did not explain what specific evidence the USITC ignored or cite to the evidence on the USITC's record that in its view was ignored. To the extent the evidence referred in paragraph 430 of Korea's first written submission was the specific evidence that, as Korea notes, was addressed in our analysis, we consider that removing our statement in footnote 344 does not affect our analysis.[44] We, accordingly, have made the modification requested by Korea by removing this statement in footnote 344.

2.4.5 Paragraphs 7.179 and 7.217

2.28. Noting that we found it unnecessary to address the aspect of Korea's causation claims that challenged the USITC's alleged failure to demonstrate that increased imports of LRW parts caused serious injury, Korea requests us to address it and find a violation.[45] Korea requests that we make a finding as to how the USITC's faulty domestic industry definition vitiated the basis for its causation finding.[46] The United States opposes Korea's request.[47]

2.29. We are not persuaded that we need to revisit the findings we made in paragraphs 7.179 and 7.217 of the interim report.

2.30. We note that in paragraph 7.179 we were examining whether, as Korea claimed, the USITC acted inconsistently with Article 4.2(b) because it failed to demonstrate the conditions of competition were such that increased imports of parts caused serious injury. Article 4.2(b) does not provide a specific methodology to make a causation determination, and does not prescribe how the conditions of competition must be analysed.[48] Thus, in assessing whether the USITC acted inconsistently with Article 4.2(b) we must review the determination made by the USITC.

2.31. In addressing Korea's claim in our Interim Report, we noted the United States' argument that it would not have made any sense for the USITC to consider the impact of imports of LRW parts on domestic producers of LRW parts in light of the USITC's recognition that imports of covered parts

[40] United States' comments on Korea's request for interim review, para. 8; Panel Report, fn 301.
[41] Korea's first written submission, paras. 402-403; Panel Report, para. 7.160.
[42] Korea's request for interim review, para. 40.
[43] United States' comments on Korea's request for interim review, para. 10.
[44] Korea's request for interim review, para. 42.
[45] Korea's request for interim review, paras. 37-39.
[46] Korea's request for interim review, para. 38.
[47] United States' comments on Korea's request for interim review, para. 9.
[48] The United States as well as the European Union as a third party alluded to the different ways in which competition could manifest in the market. Considering the nature of the finding made by the USITC in the underlying investigation, we did not find it necessary to address those arguments. (Panel Report, para. 7.62 and fn 110)

did not compete with domestically produced covered parts. We also noted the United States' submission that in establishing a causal link between subject imports and the domestic industry's serious injury, the USITC focused its analysis on the locus of competition between subject imports and the domestic industry, which was the US market for LRWs. However, as we noted in paragraph 7.179, the USITC found domestically produced LRW parts to be like imported parts, as opposed to finding a single like product covering LRWs and LRW parts. Taking into account how the USITC had defined the domestic industry, which affected its causation determination, and considering we had already found that the USITC acted inconsistently with Article 4.1(c) in finding that domestic LRW parts were like imported parts, we found it unnecessary to make a separate finding on whether the USITC acted inconsistently with Article 4.2(b). Considering the fact-specific nature of our determination, we are not persuaded that a finding under Article 4.2(b) would assist in the resolution of this dispute or is otherwise necessary. We, accordingly, decline Korea's request.

2.32. With respect to paragraph 7.217, we note that here we addressed Korea's claim under Article 4.2(b) that because the USITC's definition of the domestic industry and its determination on increased imports were flawed, the USITC's causation determination, which depended on these findings, was also inconsistent with Article 4.2(b). Having upheld Korea's claims challenging certain aspects of the USITC's definition of the domestic industry and its determination on increased imports were inconsistent with the Agreement on Safeguards, we declined to make findings with respect to this purely consequential claim. We are not persuaded that we should revisit our decision in this regard. We, accordingly, decline Korea's request.

2.5 Claims under Articles 5.1 and 7.1 of the Agreement on Safeguards

2.5.1 Paragraphs 7.221-7.241

2.33. Korea contends that to the extent we find it unnecessary to rule on a claim under Article 5.1, we should exercise judicial economy on all claims under Articles 5.1 and 7.1, and not engage in the type of substantive analysis contained in paragraphs 7.221-7.241.[49] In the alternative, Korea contends that we should make findings under each of the claims presented by Korea.[50] Otherwise, per Korea there is an unexplained lack of balance in our evaluation of Korea's claims under Articles 5.1 and 7.1.[51] The United States opposes Korea's request, noting in this regard that whereas some aspects of its claims under Articles 5.1 and 7.1 are consequential to other claims made by Korea, others are not, and thus we acted appropriately in addressing them.[52]

2.34. We note that in making its claims under Articles 5.1 and 7.1 of the Agreement on Safeguards, Korea raised separate grounds of violation under these provisions. We addressed these separate grounds on their own merits. For instance, in paragraph 481 of its first written submission Korea contended that "in the absence of a demonstration of the causal link, the resulting safeguard measure was not appropriate, and therefore, not 'necessary' in the sense of Article 5.1 of the Agreement on Safeguards". Considering we had already made findings on causation, where we upheld certain aspects of Korea's claims, we found it unnecessary to make separate findings on Article 5.1, which would have been purely consequential to our findings on causation. However, to the extent Korea's claims under Articles 5.1 and 7.1 were not consequential to any such findings, we addressed them in our Report.

2.35. In paragraphs 482-489 of its first written submission, Korea based its claim on the ground that "the USITC acknowledged that at least some of the serious injury to the domestic industry was caused by other factors", i.e. factors other than increased imports, and it should have separated and distinguished the role played by these other factors for purposes of applying the measure.[53] In failing to do so, the United States per Korea acted inconsistently with Article 5.1 of the Agreement on Safeguards.[54] Korea's claim here rested on the factual premise that the USITC acknowledged factors other than increased imports were causing injury to the domestic industry. In paragraphs 7.188-7.189 and 7.200-7.201 of our Report we found this factual premise to be

[49] Korea's request for interim review, para. 48.
[50] Korea's request for interim review, para. 51.
[51] Korea's request for interim review, para. 51.
[52] United States' comments on Korea's request for interim review, paras. 11-15.
[53] Korea's first written submission, paras. 484-486.
[54] Korea's first written submission, paras. 486-489.

incorrect. Having rejected the factual premise on which Korea's claim rested, we rejected Korea's claim under Article 5.1. Unlike our finding with respect to the ground set out in paragraph 481 of Korea's first written submission, Korea's claim here was not consequential to our findings with respect to any other claim. Thus, we saw no basis for concluding here that it was unnecessary to address Korea's claim. In addressing other aspects of Korea's claims under Articles 5.1 and 7.1, we followed the same approach.

2.36. We, accordingly, decline Korea's request to (a) either not address any of the claims under Articles 5.1 and 7.1 of the Agreement on Safeguards, or (b) make findings with respect to each of them.

2.5.2 Paragraph 7.226

2.37. Korea, as we noted in paragraph 2.33 above, contends that if we find it unnecessary to rule on a claim under Article 5.1, we should not engage in the type of substantive analysis contained in paragraphs 7.221-7.241, including paragraph 7.226. In the alternative, Korea contends that we should make findings under each of the claims presented by Korea. Specifically, with respect to findings contained in paragraph 7.226 of our Report, Korea states that we should find a violation under Article 5.1 (and not exercise judicial economy).[55] Korea contends that there is no reason to deny it the benefit of another finding of violation that relates to the flawed application of the measure.[56] The United States opposes Korea's request.[57]

2.38. Having carefully considered Korea's request, we are not persuaded that we need to revisit our finding in paragraph 7.226. In particular, we do not consider that any finding of violation would assist in the positive resolution of this dispute. We, accordingly, decline Korea's request.

2.5.3 Paragraph 7.229

2.39. Korea contends that we rejected its Article 5.1 claim based on a misunderstanding of the argument it actually made.[58] Clarifying its arguments in this regard, Korea requests us to revise our Report to address the argument it actually made.[59] The United States opposes Korea's request, and asserts, by pointing to relevant parts of Korea's submissions in these proceedings, that we did not misunderstand Korea's argument.[60]

2.40. We note that in paragraph 7.227(a) of our Report we set out Korea's argument, which we addressed in paragraph 7.229. In setting out the argument in paragraph 7.227(a), we noted that Korea challenged the United States' duty rates on the ground that such rates were introduced even though the facts showed weak, non-existent serious injury and average price underselling of only 14.2%. We also noted Korea's argument that since the USITC found lower domestic prices to be directly responsible for the losses to the domestic industry, limiting the safeguard remedy to the price difference between subject imports and domestic like products would have addressed the domestic industry's serious injury. Korea has not challenged our description of its arguments in paragraph 7.227(a).

2.41. We also note that in its interim review request, Korea refers to its second written submission, and specifically to paragraphs 297-298 of that submission to clarify the argument it actually made.[61] However, we note that having set out the USITC's findings in paragraph 297 of its second written submission, Korea argued in paragraph 298 of its second written submission as follows:

> Given these findings, the extent to which imports were alleged to undersell domestic prices was highly relevant in designing the LRW safeguard measure to be *commensurate* to the serious injury attributed to the increased imports. Thus, counteracting the price

[55] Korea's request for interim review, para. 52.
[56] Korea's request for interim review, para. 52.
[57] United States' comments on Korea's request for interim review, para. 14.
[58] Korea's request for interim review, para. 53.
[59] Korea's request for interim review, para. 57.
[60] United States' comments on Korea's request for interim review, para. 16.
[61] Korea's request for interim review, paras. 54-57.

> differential would have addressed the domestic industry's serious injury, since it was the lower domestic prices that (allegedly) were "direct[ly]" responsible for the losses.[62]

2.42. In paragraph 299, Korea added as follows:

> However, by applying (i) in-quota tariffs of 20% up to 1.2 million LRW units and a 50% tariff for any subsequent imports; and (ii) a tariff of 50% on any imports parts exceeding 50,000 units, the U.S. safeguard measure went beyond what was necessary to remedy injury. It was not necessary in light of the USITC's findings that, in particular, the average price underselling was only 14%.

2.43. Given these arguments, we consider it was appropriate to examine, as we did in paragraph 7.229, whether Article 5.1 requires investigating authorities to calibrate their safeguard measures to reflect the degree of price underselling. We, accordingly, decline Korea's request.

2.6 Claims under Articles 12.1 and 12.2 of the Agreement on Safeguards

2.6.1 Paragraphs 7.226-7.267

2.44. With regard to our rejection of its Article 12.2 claim, Korea disagrees with our finding that Korea failed to show why the information conveyed in the notification was not sufficient.[63] Korea thus requests us to reconsider this finding. The United States opposes Korea's request, noting that while in its interim review request Korea summarizes and cross refers to arguments made in previous submissions, those summaries provide no basis for us to revisit our finding.[64]

2.45. We note that in its interim review request Korea refers to arguments that it made in its submissions, and which we examined in reaching the findings that are set out in our Interim Report. We are not persuaded that we need to revisit these findings. We, accordingly, decline Korea's request.

2.7 Section 8 (Conclusions and recommendations)

2.7.1 Paragraph 8.1

2.46. Korea requests us to modify section 8 of our Report, which contains our conclusions and recommendation.[65] The United States considers Korea's request to be outside the scope of interim review, and in any case notes that the DSU provides a panel with discretion to present its conclusions in a format it deems appropriate.[66]

2.47. We are not persuaded that we need to modify section 8 of the Report in the manner proposed by Korea. In these proceedings, Korea raised independent grounds of violation of the same provision. For example, in section 8.1(f)(v) of the Report, we conclude that it was not necessary to address Korea's claim under Article 5.1 that was consequential to its claim challenging the USITC's causation determination. However, Korea did not just claim violation of Article 5.1 on such a consequential basis. Thus, for example, in section 8.1(f)(iii) we rejected Korea's claims under Article 5.1 that the United States acted inconsistently with this provision because the United States failed to take into account existing import restrictions from anti-dumping and countervailing measures. Korea's proposal to modify section 8 would remove these distinctions that we drew in our Report, and which we consider add to the clarity of our conclusions in this case. We, accordingly, decline Korea's request.[67]

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[62] Emphasis original.
[63] Korea's request for interim review, para. 58.
[64] United States' comments on Korea's request for interim review, para. 17.
[65] Korea's request for interim review, para. 68.
[66] United States' comments on Korea's request for interim review, paras. 19-20.
[67] We also note that similar approaches have been followed in other cases. (See e.g. Panel Reports, *US – OCTG (Korea)*, sections 8.2(j) and 8.3(d); and *US – Anti-Dumping Methodologies (China)*, paras. 8.1(a)(i) and 8.1(a)(vi)).

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE REPUBLIC OF KOREA

I. INTRODUCTION

1. This dispute concerns the safeguard measure imposed by the United States on imports of large residential washers ("LRWs") and certain parts in 2018. Korea considers that the safeguard measure is inconsistent with the obligations of the U.S. under relevant provisions of the General Agreement on Tariffs and Trade ("GATT") 1994 and the Safeguards Agreement.

II. STANDARD OF REVIEW

2. The general standard of review in Article 11 of the Dispute Settlement Understanding ("DSU") applies to this dispute. Accordingly, the Panel is required to (i) assess whether the U.S. International Trade Commission ("USITC") examined all the pertinent facts; (ii) examine whether the USITC provided adequate and reasoned explanations of how the facts supported its findings; and (iii) consider whether the USITC's explanation addressed fully the nature and complexities of the information on the record and responded to other plausible interpretations of the data. The Panel must find that an explanation by the USITC is not reasoned or adequate if some alternative explanation of the facts is plausible and the USITC's explanation does not seem adequate in light of that alternative explanation.

3. Articles 3.1 and 4.2(c) of the Safeguards Agreement require the publication of a report with "detailed analysis", "demonstration of the relevance of the factors examined", and findings supported by "reasoned conclusions reached on all pertinent issues of fact and law". If there is no reasoned and adequate explanation to support a USITC finding, the Panel must find a violation.

4. The Panel's mandate does not include reviewing new, after-the-fact explanations by the U.S. in the context of this dispute. Such *ex post* rationalizations are irrelevant for purposes of reviewing the reasoned and adequate nature of the explanations provided by the USITC in support of its conclusions.

5. Finally, the Panel must not "find support for [a certain conclusion] by cobbling together disjointed references scattered throughout a competent authority's report".

III. GENERAL OBSERVATION ON THE U.S.' UNWILLINGNESS TO COOPERATE

6. The Panel gave the U.S. ample opportunities to provide certain unredacted sections of the USITC Report by making numerous specific requests. However, the U.S. has consistently refused to comply. The U.S.' unwillingness to cooperate with the Panel and to provide essential information concerning the factual basis for the USITC's assessments and findings in the underlying investigation prevents the Panel from critically scrutinizing the measure, as it is required to do under Article 11 of the DSU. This refusal also undermines the ability of Korea to seek the "prompt" and "satisfactory" resolution of the dispute under the DSU.

7. It goes without saying that the Panel is entitled to seek any information that it deems "appropriate" pursuant to Article 13 of the DSU. Article 27 of the Vienna Convention on the Law of Treaties ("VCLT") makes it clear that the U.S. cannot invoke its domestic laws as a justification for its failures to comply with its international obligations under the DSU.

8. Nevertheless, the U.S. cites to alleged confidentiality concerns in the underlying USITC investigation as the justification for depriving the Panel and Korea of the relevant information. However, a WTO dispute does not have the same confidentiality concerns as a U.S. domestic investigation, since the entire WTO dispute settlement proceeding is confidential and does not involve any of the commercial actors that participated in the underlying investigation. In addition, at the request of the parties to this dispute – including *the U.S.* – the Panel adopted "Additional Working Procedures of the Panel concerning Business Confidential Information" to

protect the confidentiality of any sensitive information. Hence, there were adequate procedures in place to protect the exchange of business confidential information while ensuring that the Panel can make an objective assessment of the facts and the matter in this dispute. The situation in this dispute is no different from what is frequently the case in WTO disputes involving trade remedies. It is also worth noting that the USITC routinely submits the same confidential information in litigation before U.S. domestic courts.

9. The U.S.' repeated failure to provide the relevant information in this dispute should be duly taken into account by the Panel in its examination of the matter, as it clearly raises what the Appellate Body has called a "serious systemic issue". Korea submits that the Panel is entitled – even required – to draw adequate inferences, including *adverse inferences*, from the U.S.' unwillingness to provide the requested information. Otherwise, the Panel's acceptance of the U.S.' arguments would erroneously amount to a "total deference" to the USITC's findings, which would constitute an error of law under Article 11 of the DSU.

IV. CLAIM 1: THE U.S. FAILED TO DETERMINE THAT IMPORTS INCREASED AS A RESULT OF "UNFORESEEN DEVELOPMENTS" AND AS THE EFFECT OF "OBLIGATIONS INCURRED"

10. The U.S. failed to address the essential prerequisites for the imposition of a safeguard measure, namely that the alleged increase in LRW imports was the result of "unforeseen developments" and the effect of "obligations incurred" under the GATT 1994.

11. It is well established that competent authorities must affirmatively find that the increased imports were "the result" of these factual circumstances. The burden was on the U.S. to demonstrate, before the imposition of the measure, which "unforeseen" circumstances and which "obligations" under the GATT 1994 that resulted in the increased imports of LRWs and parts, which in turn caused serious injury to the domestic industry. Yet, there was no such analysis and no such findings in the USITC Report or the U.S. President's Proclamation.

12. The failure to respect these foundational conditions means that there was no legal basis to apply the LRW safeguard measure.

13. First, with respect to "unforeseen developments", the term is not even mentioned in any of the USITC's published reports. Korea understands there is no legal requirement under U.S. law to find that increased imports were the result of "unforeseen developments", but that in the past the United States Trade Representative – to ensure compliance with WTO law – has regularly requested the USITC to prepare a supplementary report to examine the issue in safeguard investigations. For reasons unknown to Korea, no such request was made in the LRW investigation and, accordingly, no examination or finding was ever made by the USITC about the existence of unforeseen developments.

14. Second, with respect to the "obligations incurred", the USITC similarly failed to undertake any examination of the issue, let alone any determination of which "obligations" had the "effect" of increasing LRW imports. The USITC Report only contained a short description of the tariff classification and of the applied duty rates for LRWs and parts. Other than simply listing this information, there was no reasoned and adequate explanation that linked the duty rates to "obligations" of the U.S. under the GATT 1994, nor linking the "obligations" to the alleged increased imports.

15. In sum, Korea and the Panel are left guessing what the "unforeseen developments" and the "obligations" under the GATT 1994 could be and how they would be linked to the alleged increase in imports. As a result, the USITC has acted inconsistently with Article XIX:1 of the GATT 1994 and Articles 1, 3.1, and 11.1(a) of the Safeguards Agreement.

16. In its submissions to the Panel, the U.S. remarkably asserts that the increase in imports of LRWs and parts were the result of unforeseen developments and tariff concessions, while at the same time confirming that "[t]he USITC Report does not contain a finding on unforeseen developments within the meaning of Article XIX:1(a) of the GATT 1994". This admission that no relevant finding was made by the USITC is the end of the matter, and the Panel can base its finding on this admission alone.

17. Indeed, the U.S. can point to no part of the USITC Report where such an affirmative finding and reasoned conclusion are set forth. Its limited assertion is based on a footnote reference in the USITC Report that certain *U.S. producers* did not foresee the expansion of international production lines, but it does not refer to a reasoned finding by the USITC itself.

18. The other argument by the U.S. is that Korea is wrong to rely on well-established guidance from the Appellate Body in support of its position. It argues that there is no need to address the question of "unforeseen developments" in the published reports, and that a Member has "discretion as to how, when, and where it demonstrates the existence of unforeseen developments". However, the relevant text of the GATT 1994 and the Safeguards Agreement is unequivocal in this regard and the relevant guidance by the Appellate Body has – without exception – been confirmed and followed by all WTO panels and the Appellate Body. The U.S. cannot point to any example or textual basis to support its preferred reading of the relevant provisions.

19. Certainly, the requirements to examine, affirmatively find, and support with a reasoned conclusion (all set forth in a published report before the imposition of a measure) that the increased imports were the result of unforeseen developments derive from the text of the GATT 1994, General Interpretative Note to Annex 1A (Multilateral Agreements on Trade in Goods), and the Safeguards Agreement. These prerequisites are clearly part of the "pertinent issues of fact and law" that must be addressed in the competent authority's published report as required by Article 3.1 of the Safeguards Agreement. Thus, it is not sufficient for the competent authority to satisfy itself merely that the "unforeseen developments" exist as a factual matter. Rather, the existence of "unforeseen developments" must be addressed *before* imposing a safeguard measure, not three years later in the context of a WTO dispute. The Panel does not need to examine the U.S.' arguments developed in the context of this dispute that seek to fill gaps in the USITC Report, as they amount to *ex post* justifications.

20. The U.S. also wrongly argues that the USITC Report contains a demonstration that the U.S. incurred obligations under the GATT 1994 that resulted in the increased imports. This unsubstantiated assertion is refuted by its own admission that the USITC Report merely "contains a *description* of the tariff lines at issue, including the bound (MFN) rates", but no identification of any GATT obligations and no examination, finding and supporting explanation of how such tariff findings *resulted in* the increased imports.

21. Indeed, the USITC Report contained only a short description of the "tariff treatment" of LRWs and parts under the U.S. Harmonized Tariff Schedule ("HTS"). The USITC did not link this tariff treatment to any "obligations" under GATT 1994, nor any explanation of how the increased imports were the "effect" of such "obligations". The U.S. is incorrect to suggest that "a simple recitation of a relevant tariff concession" is sufficient. The text of Article XIX:1 of the GATT 1994 makes it clear that there are two aspects to be examined: what are the relevant "obligations incurred", and how did these obligations have the effect of increasing imports in such a way as to cause serious injury. The USITC never identified the relevant obligations incurred and certainly did not examine (let alone determine) how the increased imports were the "effect of" these obligations.

22. For the foregoing reasons, Korea submits that the U.S. has failed to rebut its *prima facie* case of violation under Article XIX:1(a) of the GATT 1994 and Articles 1 and 3.1 of the Safeguards Agreement.

V. CLAIM 2: U.S. FAILED TO MAKE A PROPER DETERMINATION OF "INCREASED IMPORTS"

23. The U.S. failed to make a proper determination that LRWs and parts were imported in "such increased quantities, absolute or relative to domestic production, and under such conditions" as to cause serious injury to the domestic industry.

24. The USITC's finding of increased imports was flawed in many different ways: (i) there was no examination or finding about the degree of recentness, suddenness, sharpness and significance of the increase in imports; (ii) the USITC failed to examine properly the trends in import volumes over the POI, including the rate and significance of the increase; (iii) the

USITC failed to support its finding with a reasoned and adequate explanation given that imports actually decreased in the most recent period of the POI; (iv) the USITC's increased import analysis was based on a flawed dataset and the USITC failed to undertake any proper verification thereof; and (v) the USITC erroneously cumulated imports of LRWs and parts while it was undisputed that imported parts were not in competition with any like domestic product.

25. For the reasons set forth below, Korea submits that the U.S. has failed to rebut its *prima facie* case of violation under Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 3.1 of the Safeguards Agreement.

V.1. USITC failed to (i) undertake an objective examination based on positive evidence to establish a sufficiently recent, sudden, sharp and significant increase of imports, (ii) examine properly the trends in import volumes over the POI, and (iii) support its finding with a reasoned and adequate explanation

26. The record facts show that the import volume of LRWs decreased in the most recent period of the period of investigation ("POI") (i.e. 2017) and that there was a significant deceleration in the rate of increase since 2015. In response, the U.S. argues that a number of prior WTO disputes allegedly confirm that there is no need for a sharp increase in the most recent POI, and that neither a deceleration nor even a decline in imports prevents an authority from making a finding of increased imports.

27. However, the WTO jurisprudence, based squarely on the text of the Safeguards Agreement, is consistent in requiring that not just any increase suffices, but that the increase in imports must be "recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively". This legal standard requires both a *quantitative* and a *qualitative* analysis.

28. Yet, it is clear that the USITC did not undertake any qualitative analysis about the alleged significance of the increase in imports and did not address either the deceleration or the decrease in the latter part of the POI. There was nothing recent, sudden or sharp about the admittedly "steady" increase in imports, which was followed by a sharp decline in the most recent period of the POI. Indeed, the publicly available data from the USITC show a decrease of 5% in quantity and more than 12% in value for 2017 1Q. This is not the relevant "sudden, sharp and significant increase" in the most recent period that could justify the imposition of an emergency measure.

29. The U.S. attempts to defend the USITC's finding by repeating its finding that imports "nearly doubled" during the POI. The U.S. asserts that it was reasonable for the USITC to rely exclusively on the increase that took place between 2012-2016, suggesting that the drop in the latter part of the POI was not material. However, this finding is based solely on a start-point to end-point analysis, which previous panels and the Appellate Body have consistently rejected as the proper basis for examining whether imports increased in such quantities and under such conditions as to cause serious injury. Indeed, the imports increased only by 26.2% between 2013 and 2016, and by an even smaller percentage between 2013 and 2017 (1Q). This huge discrepancy caused by a slight adjustment of the relevant period further demonstrates the inherently deficient and skewed nature of a start-point to end-point analysis.

30. The USITC neglected to consider the deceleration of LRW import rates in the latter half of the POI, and failed to properly consider the decline in 2017 1Q. Nowhere in the USITC Report can it be found that the USITC had actually considered the deceleration that transpired throughout the latter half of the POI in the proper context. Moreover, the record reveals that the USITC's superficial, result-oriented explanation on the decline in imports in 2017 1Q only paraphrases uncorroborated allegations by the petitioners that does not actually explain the decline. The U.S. cannot argue otherwise.

31. Korea notes that all three LRW import dataset before the Panel (i.e. (i) paragraph 147 of Korea's first written submission, (ii) Exhibit 2D of the Petition, and (iii) Exhibit 2A of the Petition, which the U.S. expressly confirmed to be "consistent" with the USITC's own import

trend analysis), uniformly demonstrate a deceleration in the latter half of the POI, followed by a sharp decline in 2017 1Q. Thus, the Panel has all the data it needs to review Korea's argument and to find that the USITC acted inconsistently with its WTO obligation.

32. In response to the Panel's pointed questions, the U.S. suggests that a qualitative analysis was undertaken by referring to *price*-related considerations of the USITC in the context of the causation examination. However, to comply with Article 2.1, the USITC was required to explain how the *increase* in imports was of "such" significance in terms of volume and value, both quantitatively and qualitatively, to cause serious injury. This is different from examining the coincidence between increased imports and related *price* developments.

33. In addition, the U.S. suggests that imports' market share "significantly increase[d]". This assertion must be contrasted with the USITC's finding that the *domestic industry's* market share "fluctuated within a narrow band during the period of investigation" and that it "was roughly the same" in the POI. Since the total market share is the combination of the domestic industry market share and market share of imports, the fact that there is no real change in the market share of the domestic industry means that there is no real change in market share of imports. Therefore, whatever the percentage increase in the market share of imports (which has been redacted from the public version of the USITC Report), the changes must have been insignificant or merely a result of the deliberate exclusion of belt-driven LRWs from the product under consideration ("PUC").

34. Indeed, there is an internal contradiction in the USITC's findings that imports' market share increased significantly, on the one hand, and that the domestic industry's market share "was roughly the same in 2016 as in 2012", on the other. Since the market share of imports and that of the domestic industry constitutes total U.S. consumption, a finding that imports increased their market share, but the domestic industry's market share remained flat, cannot coexist at the same time. The U.S. explains this contradiction by pointing to the excluded belt-driven LRW imports and that "the significant increase in subject import market share … corresponded to a decline in the market share of out-of-scope imports of belt-driven washers". Again, this assertion is uncorroborated.

35. The U.S. admits that this is an *ex post* rationalization and not an explanation made by the USITC. Thus, the USITC apparently failed to provide any reasoned and adequate explanation on these important qualitative issues. However, assuming *arguendo* that the U.S.' *ex post* rationalization is correct, it only confirms that the *entirety* of the alleged increase in market share of imports was the result of the USITC's arbitrary exclusion of belt-driven LRWs from the PUC. If belt-driven LRWs had been properly covered (as they were for the domestic industry definition), imports' market share would have remained stable throughout the POI, just like the domestic industry's market share. The resulting inconsistency between the market shares of imports and of the domestic industry is a representative example of how this deliberate exclusion/inclusion mismatch by the USITC materially distorted the examination of the conditions for imposing the safeguard measures in the underlying investigation. This does not constitute an objective examination, but an artificial construction of the facts to reach certain conclusions: one supposedly that imports' market share increased when only certain imported models increased at the expense of other declining imported models.

36. Finally, Korea respectfully reminds the Panel that the U.S. continues to refuse to reveal the actual data underlying the USITC's finding. To the extent that there is any doubts as to the veracity or reasonableness of the USITC's increased import analysis, Korea considers that the Panel is entitled to draw adequate and adverse inferences from the U.S.' unwillingness to provide the requested information. The inference that the Panel can draw from this refusal, in light of the substantiated *prima facie* case that Korea has presented, is only that the U.S. has failed to rebut Korea's claim that the USITC failed to make a proper determination that LRWs and parts were imported in "such increased quantities, absolute or relative to domestic production, and under such conditions" as to cause serious injury to the domestic industry.

V.2. USITC'S INCREASED IMPORT ANALYSIS WAS BASED ON A FLAWED DATASET AND THE USITC FAILED TO UNDERTAKE ANY PROPER VERIFICATION THEREOF

37. In this dispute, the only dataset that matches the USITC's increased import finding that the imports "nearly doubled" during the POI is the dataset contained in Exhibit 2A of the Petition, which was artificially created by the petitioner, Whirlpool, by excluding its own out-of-scope belt-driven LRW imports to the U.S. from the official import data contained in Exhibit 2D of the Petition. Naturally, Korea has constantly and repeatedly raised issues against the veracity and reliability of the dataset contained in Exhibit 2A of the Petition.

38. In response, the U.S. argues that the USITC did not rely on Exhibit 2A, but instead conducted its own increased import analysis based on the data that it gathered from the importers. Korea responded by demonstrating that no data provided by importers could have allowed the USITC to *ex officio* exclude the out-of-scope belt-driven LRWs from the overall LRW import statistics, as imports of belt-driven LRWs cannot be identified based on HTS. Importers of Samsung and LG could not have provided such information either, as Samsung and LG did not export belt-driven LRWs to the U.S. during the POI. The only party that is in possession of the information that could have possibly allowed such an adjustment was the U.S. domestic industry (and their foreign subsidiaries). Yet, the USITC neither requested any underlying data from the domestic industry (or from their foreign subsidiaries) nor conducted any verification of the dataset contained in Exhibit 2A of the Petition.

39. In this dispute, Korea repeatedly highlighted that the dataset used by the petitioner as well as the dataset used by the USITC seem highly questionable. For example, official U.S. import statistics show that the increase in 2012 to 2016 was merely 33.7%, with yearly increases of about 6%, 5%, 8%, 13%, and 5%. In contrast, Exhibit 2A shows over 100% of increase between 2012 and 2016, although it also shows similarly steady annual increase in LRW imports from 2013 to 2016. Even in Exhibit 2A, therefore, the only year that made significant difference so as to create the "over 100%" surge in LRW imports in 2012 to 2016 was the year 2012. As it happens, 2012 was the *only year* in which an artificial adjustment was made by the petitioner by excluding *its own* belt-driven LRW imports from the overall LRW imports.

40. It must be noted that belt-driven LRWs were excluded from the overall LRW imports for every year during the POI, including for 2013, 2014, 2015, 2016, and 2017. For these five years, however, the exclusion was made *automatically* as Whirlpool had allegedly relocated its belt-driven LRW production back to the U.S. (thus no belt-driven LRWs were allegedly imported by Whirlpool during this period). It was only for the year 2012 (which, allegedly, were prior to the relocation) that the exclusion was made *artificially* by Whirlpool after subtracting the number of *its own* belt-driven LRW imports from *its own* foreign subsidiaries.

41. It is noteworthy that Whirlpool's unilateral and fully discretionary adjustment in 2012 was the sole cause of "over 100%" increase in LRW imports between 2012 and 2016. However, the USITC did not even attempt to verify this crucial adjustment. Instead, the USITC seemingly accepted Exhibit 2A, which catered to its result-driven approach, as a given, disregarding all official import statistics that showed opposite of the drastic 100% increase in import volume.

42. The U.S. suggests that the official import statistics were "problem[atic]" because they included data on, among others, "imports of out-of-scope belt-driven washers". However, this circular argument is another good example of the way in which the USITC constructed a results-driven reality. The arbitrary decision by the USITC to gerrymander the scope of its investigation where belt-driven LRWs were *excluded* from the PUC, but *included* in the domestic industry definition (while the financial performance data for the domestic belt-driven LRW producers were again *excluded*) does not represent an objective examination. It is an artificial construction of the facts to reach certain conclusions. Had it not been for the arbitrary decision to exclude belt-driven LRWs from the PUC, there could not have been a finding that imports "nearly doubled" during the POI. The aforementioned debate about market shares reveals that imports of belt-driven LRWs significantly declined during the POI, allowing imports to grow their market share. Thus, by not including the significantly declining levels of belt-driven LRWs, the USITC increased its chances of finding an increase in imports. Furthermore, the exclusion of the declining imports of belt-driven LRWs from the PUC effectively functioned as an upward adjustment to the overall LRW import volume trend.

43. Instead of providing any rebuttal or counter-evidence, the U.S. merely confirms that Exhibit 2A of the Petition is "consistent" with the USITC's increased import analysis. Given the U.S.' refusal to provide any information in this regard despite numerous requests by the Panel, the adequate inference to be drawn by the Panel is that the USITC had accepted the information in Exhibit 2A of the Petition for granted, without undertaking any verification thereof. This, in turn, should lead to a finding that the USITC acted inconsistently with its WTO-obligations.

V.3. USITC ERRONEOUSLY CUMULATED IMPORTS OF LRWS AND PARTS

44. The U.S. asserts that the USITC was entitled to aggregate import data for LRWs and parts when making the finding of increased imports. This is so even though LRW parts served exclusively a captive market and thus posed no competitive threat whatsoever to domestic LRWs or parts. Thus, it was not consistent with the requirement to undertake an objective examination to cumulate these imports, since any increase in LRW parts could never be "in such quantities … and under such conditions, as to cause" serious injury. However, by including LRW parts in the determination of increased imports, the USITC undoubtedly distorted its increased import analysis. The fact that the Safeguards Agreement does not impose disciplines on the definition of the PUC does not mean that an authority can group any products without examining whether, given the conditions of competition, any increase of these products can be such as to cause serious injury to like domestic products.

VI. CLAIM 3: U.S. FAILED TO PROPERLY DEFINE THE "DOMESTIC INDUSTRY"

45. The USITC's definition of the domestic industry was inconsistent with Article 4.1(c) of the Safeguards Agreement. This incorrectly defined domestic industry also tainted the injury and causation determinations, rendering them fundamentally flawed.

46. Specifically, first, the USITC included in the domestic industry producers of products that were expressly excluded from the PUC (i.e. belt-driven LRWs). This created a mismatch between the scope of subject imports and the domestic industry, which meant that injury and causation were not assessed based on the same product scope. Second, the domestic industry included producers of LRW parts even though these products were not "like or directly competitive" with imported parts, let alone with imported LRWs. On this, the USITC *expressly* adhered to its longstanding "product line" approach. It is well-established, however, that the USITC's "product line" approach is WTO-inconsistent. Third, the U.S. erred by including parts in the scope of investigation, since it was undisputed that domestic and imported parts were not in competition, and thus did not constitute "like or directly competitive products".

47. For the reasons set forth below, the U.S. has failed to rebut Korea's *prima facie* case demonstrating a violation of Articles 2.1, 3.1, 4.1(c), 4.2(a), and 4.2(b) of the Safeguards Agreement concerning the way in which the domestic industry was defined by the USITC.

VI.1. USITC'S DEFINITION OF THE DOMESTIC INDUSTRY CREATED A MISMATCH BETWEEN THE DEFINITION OF THE DOMESTIC INDUSTRY AND THE PUC

48. The U.S. has no response to the deliberate mismatch created by the USITC between the PUC and the definition of the domestic industry (i.e. belt-driven LRWs were excluded from the PUC, but included in the domestic industry definition), as it merely repeats what the USITC did. However, a competent authority "bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry". The manner in which the USITC constructed the domestic industry definition to best suit the domestic industry's needs is remarkable. Not only did the domestic industry include producers of non-competing products, such as LRW parts, it also included producers of product models that were expressly and arbitrarily excluded from the PUC. Indeed, as noted, the USITC *included* domestic producers of belt-driven LRWs in the scope of the domestic industry while *excluding* belt-driven LRWs from the scope of the subject imports without any explanation.

49. Imports of this product type showed an overall decline and, thus, excluding them increased the chances of finding an increase in imports. At the same time, there still were foreign

subsidiaries of the U.S. companies (i.e. Electrolux and Haier/GE) that exported the belt-driven LRWs to the U.S. Excluding these products would thus save those foreign subsidiaries from a potential safeguard remedy, while all their global competitors would be subject to the measure. The USITC never explained why belt-driven LRWs were excluded from the PUC, even though the respondents made several submissions on the issue. It only noted that "[t]he Commission need not amend the scope of the investigation to consider out-of-scope washer imports as an alternative cause of injury…". That is not a reasoned and adequate explanation supporting the arbitrarily defined PUC and domestic industry.

50. It is well established that the domestic industry definition cannot exclude part of the domestic producers, such as producers of a certain product type, as this would create a risk of material distortion. Korea submits that it is equally distortive *to add* producers of products that go beyond the product scope defined by the authorities. The wrongly defined domestic industry distorted the relevant injury and causation examination undertaken by the USITC as a whole.

VI.2. USITC ERRONEOUSLY INCLUDED IN THE DEFINITION OF THE DOMESTIC INDUSTRY LRW PARTS THAT WERE NOT IN COMPETITION WITH IMPORTED PRODUCTS

51. The U.S. argues that competent authorities are at liberty to include "different product *types*" in a domestic industry definition as long as each "type" is "like or directly competitive with" the imported product. Korea agrees with this statement in principle, but that was not the factual situation of the underlying investigation where (i) the domestic industry included both LRW parts and finished LRWs, which are not different product "types", but different products all together, which have different characteristics and are not in competition, and (ii) domestic parts that were not even in competition with the imported parts were included.

52. The U.S. also argues that parts were included in the PUC to avoid circumvention of duties on finished LRWs. However, this does not justify including in the definition of the domestic industry products that are not "like or directly competitive". The Safeguards Agreement does not refer to circumvention as a basis for derogating from the relevant disciplines. No safeguard measure can be imposed to protect domestic producers of "unlike" products, such as those with "only a remote or tenuous competitive relationship with the imported products". That is, however, exactly what the USITC did by including LRW parts, which were acknowledged not to compete with domestic LRW units or parts.

53. Furthermore, the U.S. relies on an erroneous formalistic argument that parts could be included in the domestic industry definition because they were "like" imported parts, even if they were not in competition with imported parts. However, the U.S. fundamentally misunderstands the nature and purpose of the likeness test, as used across several WTO agreements, by suggesting it is not concerned with identifying products that are in competition. The likeness test is a marketplace-based concept to identify those products that are in a close to perfect competitive relationship as interchangeable products. It is not concerned with products that share merely certain physical characteristics, uses, and marketing-channels. Absent competition in the marketplace, there could never be a likeness finding.

54. Whereas "likeness" implies close to perfect substitutability ("a degree of competition that is higher than merely significant"), "directly competitive or substitutable" products would be those that compete to a lesser degree. Thus, in order for two products to be "like" – by definition – they will be in very close competition in the marketplace. If products are not in competition, they cannot genuinely be "like products".

55. The U.S. largely relies on the Appellate Body's traditional criteria for determining "likeness", such as "the physical properties of the products", the "extent to which the products are capable of serving the same or similar end-uses", and "the international classification of the products for tariff purposes". It attempts to turn the "likeness" test into a "physical likeness" test. However, these criteria are not exhaustive and are not treaty text and, most importantly, they are "tools available to panels for organizing and assessing the evidence relating to the *competitive relationship* between and among the products". By unduly focusing on certain physical characteristics of the products, while completely disregarding the question of competition, the U.S. has put the cart before the horse. Notably, the USITC failed to duly consider "end-uses" and "consumer tastes and habits" among the traditional likeness criteria.

If the USITC had correctly considered "consumers' taste and habits" or "end-use" it could not possibly have reached the erroneous conclusion that domestic and imported LRW parts were "like" given their complete lack of substitutability. A proper application of the likeness criteria should thus have revealed the inherent relationship between the concept of likeness and that of products with close to perfect competitive substitutability.

56. Undoubtedly, it was insufficient of the USITC to base its "likeness" finding between imported and domestic parts on the alleged fact that they were "substantially identical in inherent or intrinsic characteristics", especially when there was conclusive evidence that there was no marketplace competition between the products. The imported and the domestic LRW parts did not satisfy the same demand. This error is further aggravated because the USITC had initially found that the imported and domestic parts were not in a competitive relationship.

VII. CLAIM 4: U.S. FAILED TO MAKE A PROPER DETERMINATION THAT THE DOMESTIC INDUSTRY SUFFERED "SERIOUS INJURY"

57. The U.S. failed to provide a reasoned and adequate explanation in support of the finding that the domestic industry suffered "serious injury". The USITC found "serious injury" based essentially on a single negative trend – profitability – while disregarding all other factors that trended positively. There was certainly no serious injury amounting to a "significant overall impairment" in the position of the domestic industry.

58. Specifically, the U.S. (i) failed to examine all relevant injury factors; (ii) failed to undertake the requisite substantive evaluation of the "significant overall impairment" of the domestic industry; (iii) failed to undertake an objective examination of the one injury factor allegedly trending negatively; and (iv) failed to explain how the limited circumstances of alleged injury were so "serious" to justify the safeguard remedy. In addition, (v) the USITC failed to properly evaluate the factor "share of the domestic market taken by increased imports"; and (vi) the USITC's injury analysis was distorted by using data for products that were excluded from the scope of the investigation and by arbitrarily relying on different datasets.

59. For the reasons set forth below, Korea submits that the U.S. acted inconsistently with Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c) of the Safeguards Agreement. Consequently, the U.S. also violated Article 11.1(a) of the Safeguards Agreement.

VII.1. USITC FAILED TO EXAMINE ALL INJURY FACTORS LISTED IN ARTICLE 4.2(A)

60. The U.S. disputes that the USITC failed to evaluate all relevant injury factors. It argues that "the rate and amount of the increase in imports of the product concerned in absolute and relative terms" and "the share of the domestic market taken by increased imports" were examined by the USITC. In support, the U.S. refers to sections of the USITC Report other than the section evaluating injury. However, in these sections of the report, the USITC merely states that the increase in imports was "steady" and that imports increased their "penetration of the U.S. market". These short, descriptive references which cannot be reviewed by the Panel given the lack of available unredacted data, and do not amount to the requisite "evaluation" of these mandatory factors for purposes of determining serious injury.

61. Furthermore, there was simply no reflection, let alone a proper evaluation, of these two factors in the USITC's injury examination. Korea's argument is not a formalistic complaint about the structure of the USITC Report in which these factors were examined. The fact of the matter is that *no section* of the USITC Report "evaluates" these factors as part of an assessment of whether there was a significant overall impairment in the position of the industry.

VII.2. USITC FAILED TO UNDERTAKE AN OBJECTIVE EXAMINATION OF THE "SIGNIFICANT OVERALL IMPAIRMENT" OF THE DOMESTIC INDUSTRY

62. The U.S. argues that the USITC's examination and explanation properly established the "overall" injurious state of the industry even if there were 13 factors trending positively. It also argues that the injury determination was premised on "six factors" (as opposed to one factor) and that the USITC adequately explained why the positively trending factors did not "detract from its determination". However, the U.S.' suggestion that the serious injury

determination was based on six factors is squarely belied by the USITC Report. That much is clear.

63. While Korea is reluctant to completely rule out even the theoretical possibility that there could be a particular situation of serious injury where essentially only one injury factor trends negatively, at any rate, this would be an extremely rare situation that requires a clear and particularly compelling explanation. This is because the injury factors that must be evaluated under Article 4.2(a) should generally inform the "overall impairment" of the domestic industry. In principle, therefore, a finding of serious injury should be based on the establishment of a significant impairment in the overall position of the domestic industry, which should be evident across the injury factors. In addition, given the close interrelation between profit/loss and several other injury factors under Article 4.2(a), it would be expected that serious injury is also revealed through other factors than profit/loss, although not necessarily to similar degrees.

64. That was never the case in the underlying investigation. The USITC Report shows that the domestic industry, among others, *increased* production, capacity, and utilization; *increased* sales in the most important product segment; *increased* revenue; did *not* lose market share to import competition; *increased* employment, wages, and productivity; *increased* expenditure on R&D; and suffered *no* idling of production facilities. Indeed, the addition of new capacity during the POI confirms that the industry was willing and able to make capital investments, an important indicator of the overall health of the industry. The USITC also found that the domestic industry had not suffered a significant idling of productive facilities and that there had not been any significant unemployment or underemployment. That is a long list of positive factors that simply does not support a conclusion that there was a "significant overall impairment in the position of the domestic industry".

65. Given these facts, for the USITC to find the existence of "serious injury" essentially based on a single negatively trending injury factor, there must be a *very compelling explanation* of how the one factor justifies a finding of "significant *overall* impairment in the position of a domestic industry" in light of all the other factors. However, there was none.

66. Finally, the U.S. entirely fails to address Korea's argument that the USITC never even began to examine whether the alleged injury was of such a nature to represent a "significant" overall impairment of the position of the domestic industry. Nothing in the USITC Report or in the U.S. submissions supports a conclusion that this standard was met in this case.

VII.3. USITC failed to undertake an objective examination of the factor "profits and losses"

67. The U.S. argues that the examination was proper and the finding was supported by reasoned conclusions. However, it effectively acknowledges that the USITC did not take into consideration the record evidence of joint-pricing practices of washers and dryers, and related overall profit data for the combined laundry segment. It thus admits that the USITC rejected these important and well-substantiated arguments. The reason for the USITC's rejection of this information was that it did not relate to a "like or directly competitive" product, as dryers were not covered products. It also considered that the CEO of Whirlpool denied such a joint-pricing reality. There was no other analysis or "reasoned" conclusion, as these two arguments – one formalistic about the scope of the industry and one anecdotal based on the petitioner's own statement – were the sole reasons for rejecting the substantiated argument of the respondents.

68. However, Korea considers that these reasons did not justify refusing to consider relevant information with important implications for the key factor that was driving the injury analysis. The USITC was required to examine objectively "all relevant factors" having a "bearing" on the state of the domestic industry. The joint-pricing practice and the overall profitability of domestic producers in the laundry segment were clearly such "relevant" factors that had to be addressed and evaluated. Further, these facts were substantiated by empirical evidences and extensive economic analysis.

69. Therefore, the USITC should not have refused to engage with this evidence when making its determination on serious injury, but rather should have objectively examined it and provided a reasoned and adequate explanation in support of its finding in light of this evidence. Simply concluding that the "record is mixed" is not a reasoned and adequate explanation when there were plausible alternative explanations of the record facts. Accordingly, the USITC did not engage with the record evidence showing that the *overall* financial condition of the industry was solid, and that any alleged loss in the narrow segment of LRW sales did not amount to serious injury.

VII.4. USITC's injury determination was vitiated by its flawed domestic industry definition

70. The U.S. argues that the domestic industry definition did not affect its serious injury determination, even though the USITC created a deliberate mismatch between the PUC used for determining increased imports, on the one hand, and the domestic industry used for the serious injury determination, on the other. It merely repeats the erroneous position that the definition of the domestic industry was appropriate. However, a flawed definition of the domestic industry will necessarily lead to erroneous injury and causation determinations.

71. A further distortion was created by selectively disregarding financial data of the domestic belt-driven LRW producers, while apparently taking other injury factors of the domestic belt-driven LRW producers into account. The U.S. acknowledges that the USITC relied on some of the belt-driven producer's data for part of its injury analysis, but excluded the information when analyzing the domestic industry's financial data. The U.S. argues this was "because of flaws in the reported [financial] data", but does not explain what those flaws were, nor provided the unredacted part of the USITC Report so that the Panel can objectively examine this issue. In any case, the USITC had the responsibility to undertake an objective assessment based on positive information and "objective data" on the state of the industry, yet it created a situation where certain producers' data was used for some metrics while other metrics, including in particular financial performance, was determined based on a smaller subset, without any reasoned or adequate explanation justifying this arbitrary approach.

VIII. CLAIM 5: U.S. FAILED TO ESTABLISH THE EXISTENCE OF A "CAUSAL LINK" BETWEEN THE ALLEGED INCREASED IMPORTS AND THE ALLEGED SERIOUS INJURY

72. The U.S. imposed the LRW safeguard measure without properly demonstrating the existence of a causal link between the alleged increase in imports and the alleged serious injury to the domestic industry. In particular, the USITC failed to provide a reasoned and adequate explanation supporting the existence of a causal link in light of the general lack of coincidence between trends in injury factors, which generally developed positively, and alleged increase of the LRW imports. A reasoned and adequate explanation also required a plausible explanation for why the increase in imports did not coincidentally lead to a negative trend in so many of the injury factors. Given the absence of coincidence, a very compelling analysis was required. However, none was provided in the USITC Report.

73. In addition, the USITC failed to examine properly the conditions of competition and price-related effects. For example, the USITC's price *depression* analysis was in fact a pure price *decrease* observation. In addition, the USITC's price comparisons categorically carved-out particularly low-priced, agitator-based LRWs, which represented 50% of all domestic sales in the POI. The price comparisons were thus not at all representative of the domestic industry. Moreover, six pricing products exclusively used in the comparisons were defined in an unduly broad manner, each pricing product including multiple models with a range of features and consequent wide variations in price in any specific quarter. The USITC's pricing data was therefore unduly broad and uninformative. To obtain probative information on the actual price competition between models, the USITC should have required price data for each corresponding models within each pricing product category. That data would have allowed the USITC to make price comparisons of closely matching models. Additional flaws vitiated the USITC's price analysis such as its undue reliance in this *global* safeguard investigation on price comparisons undertaken in the *anti-dumping* investigation on *LRWs from China.*

74. Finally, the USITC failed to evaluate properly the known "other factors" causing injury to the industry, including by failing to properly separate and distinguish their effects. As part of its WTO-inconsistent "substantial cause" test, the USITC acknowledged that there were other factors negatively affecting the state of the industry. However, based on a very superficial analysis, it found that these "other factors" were not more important than increased imports. It did not otherwise attempt to separate and distinguish these other factors. In addition, the USITC's assessment of these other factors was not objective.

75. For the reasons set forth below, Korea submits that the U.S. acted inconsistently with its obligations under Articles 2.1, 3.1, 4.2(b), and 4.2(c) of the Safeguards Agreement. Consequently, the U.S. also violated Article 11.1(a) of the Safeguards Agreement.

VIII.1. USITC FAILED TO EXAMINE PROPERLY THE COINCIDENCE BETWEEN TRENDS IN IMPORTS AND INJURY FACTORS

76. The U.S. argues that the USITC demonstrated a coincidence of trends of how increased imports caused financial losses to the industry. However, the entirety of this "finding" relates to price developments, not to any other of the relevant factors for assessing serious injury. Evaluation of price is only one factor, among many others, when assessing the impact on competition and, relevantly, "price" is not even among the listed factors in Article 4.2 of the Safeguards Agreement. The USITC conducted an isolated (and flawed) price analysis as opposed to the required analysis of the coincidence between the trends in the injury factors with the trends in imports.

77. For example, the USITC did not address the fact that, despite allegedly increasing imports, there was effectively no change in the domestic industry's market share. There was equally no causation-related evaluation of the lack of coincidence between increased imports and the at least 13 positively trending injury factors reflected in the serious injury analysis. This falls short of undertaking the required examination of the coincidence in the increase in imports and the trends in the injury factors.

78. In response to Korea's argument that the USITC failed to examine trends in production, capacity, utilization, revenue, employment, wages, and R&D spending, the U.S. argues that Korea failed to show "how the relevant trends were inconsistent with the finding that the increase in low-priced imports suppressed and depressed prices, causing profits to drop". The U.S.' reply reveals the extent to which its approach is misguided. For the U.S., it is all about price when this factor is not even mentioned in Article 4.2(a). The point Korea is making is that a causation analysis that seeks to establish a coincidence in trends is to examine and explain why in respect of so many injury factors, there is no such coincidence. In fact, when there is no coincidence, a particularly compelling explanation is required. None was offered by the USITC and the U.S.' circular argument only confirms that.

VIII.2. USITC FAILED TO EXAMINE PROPERLY THE CONDITIONS OF COMPETITION IN THE DOMESTIC INDUSTRY, RELYING INSTEAD ON A FLAWED PRICE ANALYSIS

79. The U.S. has no response to the fact that the USITC did not evaluate non-price factors in its causation analysis, even though it acknowledged that non-price factors were important factors in purchasing decisions for LRWs. The section on conditions of competition in the USITC Report does not provide an analysis of the competitive interaction between imports and domestic products, but rather describes the various pieces of information and concludes that domestically produced LRWs and imported LRWs are "comparable" in terms of non-price factors. This is not the kind of analysis of the conditions of competition with respect to certain trends in the market over the POI that is required as part of a causation analysis. It is not because products may be comparable that non-price factors become irrelevant. Yet, that is effectively how the USITC treated these non-price factors.

80. The USITC's evaluation of causation was primarily driven by its price-related analysis, which was also flawed and distorted. Among others, the USITC deliberately excluded from its pricing analysis the low-priced, agitator-based LRWs that made up about half of the overall shipments by the domestic industry in the POI, while including the same agitator-based LRWs in its injury

analysis in general. To conduct a representative price analysis, the USITC should have appropriately reflected the actual and prevailing product mix in the market.

81. The USITC's exclusion of agitator-based LRWs is particularly problematic given that the USITC's price-effect analysis was principally based on its finding of price undercutting, which could (in fact, most likely would) have turned out differently if agitator-based LRWs had been duly incorporated into the pricing products used in the underlying investigation. This error alone renders the USITC's deeply flawed price-effect analysis beyond redemption.

82. On this point, the U.S. mistakenly contends that including agitator-based LRWs in the pricing products would have "yielded few if any price comparison, given the few import shipments of such LRWs". This misguided argument only reveals the U.S.' and USITC's result-driven approach in the underlying investigation. In fact, agitator-based LRWs could have been easily covered by at least half of the six pricing products, simply by adding "with agitator or without agitator" to the definitions for products 3, 4, and 6, which all are top-load LRWs. This is not to mention that many better and more reasonable ways of reflecting prices of agitator-based LRWs were available if the entire pricing products were to be re-defined. To the extent that the USITC explicitly found that agitator-based LRWs were in competition with imported LRWs, it should have – but failed to – define its pricing products to properly cover and reflect agitator-based LRWs.

83. In fact, the whole notion of price decreases that the USITC found to exist is solely based on the information related to the six specific pricing products that the USITC defined for its price comparisons. It is important to recall that the USITC acknowledged that the total quantity *and value* of U.S. shipments by the domestic industry *increased* annually. Thus, while the value of U.S. LRW sales went up consistently throughout the POI, the price decreases that the USITC gave importance to were merely a construction based on six product categories that did not include half of all LRW product types sold in the U.S.

84. In addition, the U.S. has no response to the fact that the USITC's price depression finding was based on its observation of a mere price decrease. However, Korea pointed out that both import and domestic prices decreased in the POI, in similar ranges. On top of ignoring about half of U.S. domestic sales of low-priced agitator-LRWs in the price analysis, the USITC failed to examine if the imports were truly the reason for the price decline or if prices rather declined because of some other exogenous factor. There is no basis to assume that the imports should be the cause for the drop in domestic prices and not some exogenous factor. In *China – GOES*, the Appellate Body explained that the concept of price depression "refers to a situation in which prices are pushed down, or reduced, *by something*" and that "[a]n examination of price depression, by definition, calls for more than a simple observation of a price decline". The USITC clearly failed to live up to the requisite standard.

85. Finally, Korea has pointed to several other fundamental flaws in the methodology and in the data used by the USITC for the price analysis. For example, the six product categories were unrepresentative of the U.S. LRWs market, and the USITC findings regarding agitator-based models were based almost exclusively on an evaluation that was undertaken in a prior *anti-dumping* investigation on imports from *China*. This China-specific price comparison based on one product category at a particular period of time different from the underlying safeguard POI is obviously not an objective and reliable basis for making findings in this global safeguard investigation. Rather, it serves as yet another strong example of the result-driven nature of the underlying safeguard investigation.

VIII.3. USITC failed to establish causation with respect to LRW parts

86. The U.S. acknowledges that the entire causation determination was based on an examination of LRW units and not a consideration of the impact of imports of LRW *parts*. The obvious reason is that domestic parts were not in competition with imported parts and thus imported parts could not cause injury to domestic parts. However, this begs the question of why parts were included in the determination of increased imports?

87. Korea is of the view that no measures can be imposed on a product unless a finding of increased imports causing serious injury has been made. In this case, no such findings were

made with respect to LRW parts. It does not suffice to include parts and components in a safeguard measure based solely on a theoretical concern about circumvention. If so, parts would always be included in a measure and it would never be necessary to establish that the conditions for the imposition of a measure are met for parts. That cannot be correct. In this case, the facts affirmatively demonstrate that the conditions have not been met for the imposition of a safeguard measure on LRW parts.

VIII.4. USITC FAILED TO PROPERLY SEPARATE AND DISTINGUISH THE EFFECTS OF "OTHER FACTORS" CAUSING INJURY

88. The U.S. argues that the USITC ensured compliance with Article 4.2(b) because, while applying the WTO-inconsistent "substantial cause" test as required by the U.S. statute, the USITC somehow *additionally* determined that "increased imports were 'the only explanation' for the domestic industry's serious injury". However, in the absence of any meaningful explanation of the nature and extent of the injurious effects of these other factors, the Panel cannot simply uphold the U.S.' contention. Indeed, the USITC made only a *relative* finding of injury between different known injury factors. It suggests that the "other causes" contributed to the alleged serious injury, but that these were not "more important" than the increased imports. Thus, applying the "substantial cause" test in this way *ipso facto* fails to separate and distinguish the injurious effect of known other factors as is well-established in prior cases.

89. Korea respectfully reminds the Panel that the onus has shifted to the U.S. to rebut Korea's prima *facie* claim of violation. Merely providing alternative interpretations of the USITC's statements, as the U.S. does, is insufficient to rebut Korea's case. Notably, the U.S. has no answer to this point.

90. In direct contradiction with the actual findings by the USITC, the U.S. argues that the USITC found that two specific "other" factors (i.e. "joint pricing" and "deterioration of brand") did not cause any of the injury. But, the USITC's actual finding tells a different story. With respect to "joint pricing", for example, the USITC initially juxtaposed various statements submitted by the petitioner and respondents, and considered that the "record is mixed" as to "whether Whirlpool and GE sell matching pairs of LRWs and dryers for the same net wholesale price". In the causation section of the USITC Report, the USITC expressly found, "[r]egardless of the extent to which the domestic industry sold matching LRWs and dryers for the same net wholesale price, we find that the domestic industry's 'joint pricing' of matching LRWs and dryers was not an important cause of injury to the domestic industry, much less a more important cause than imports". It is not credible for the U.S. to seriously argue that what the USITC actually found was that "joint pricing" had no effect at all for the serious injury allegedly suffered by the domestic industry.

91. The same is true of the USITC's examination of the "deterioration of the U.S. brand". Although the USITC did not leave a "smoking gun" with respect to "deterioration of the U.S. brand" as it did with the "joint pricing", the logical progression of the USITC's causation analysis leaves no doubt that what the USITC did was simply to undermine, rather than to altogether deny, the relevance of the domestic industry's brand deterioration. This is evidenced by the USITC's failure to even attempt to assess the nature of the non-replacement demand, even after being forced to confirm that at least one-third of the overall demand in the U.S. LRW market was served by non-replacement demand, as contended by the respondents.

92. Korea further submits that, in addition to applying the WTO-inconsistent "substantial cause test", USITC failed to properly assess the effect of other factors causing injury. The USITC failed to undertake objective and unbiased examination of the matter by unduly disregarding so many of the empirical evidence and analyses submitted by the respondents, while accepting unsubstantiated statements by the petitioners at face value.

93. As for the "joint pricing" practice, the USITC did not even attempt to request relevant laundry-related information from the petitioners (which would have revealed pricing dynamics between washers and dryers) despite the fact that "joint pricing" was undoubtedly a well-established practice in the market, as expressly noted by the USITC's own Chairman, and despite the clear-cut economic evidence that washers and dryers are complementary goods and thus "joint pricing" is what would likely be adopted by reasonably acting firms in the LRW

market. The USITC simply disregarded all relevant information and analysis, treating them as an issue of "my word against yours" vis-à-vis the petitioners' unsubstantiated statements.

94. As for the "brand deterioration", the respondents argued that domestic consumers usually opt to purchase imported LRWs because of their innovation and brand image, even when the functional life of their existing LRWs had not ended. In response to the respondents' argument that imports served largely a self-created demand that could not be served by the domestic industry, the USITC confirmed that at least one-third of overall U.S. demand consisted of such non-replacement demand. However, this is where the USITC made a full stop. The USITC did not event attempt to examine the nature of this sizeable demand and the supplier of this demand in light of the respondents' arguments and evidence. Although the respondents went as far as to assert that "exclusion of FlexWash and Sidekick reveals that the domestic industry's share of the overall U.S. market for LRWs has slightly increased", the USTIC did not even bother to delve any further into these issues.

95. The USITC's approach to these two highly contested "other factors" certainly fell short of the objective and reasonable investigation as required by the Safeguards Agreement.

VIII.5. USITC'S CAUSATION ANALYSIS WAS SKEWED BY ITS FLAWED DETERMINATION OF "INCREASED IMPORTS" AND DOMESTIC INDUSTRY DEFINITION

96. The U.S. has no response to this allegation other than to suggest it is purely "derivative" of the domestic industry definition claim. Korea disagrees. Even if one were to assume that, based on a formalistic approach, the definition of the domestic industry may allow for the inclusion of producers of like or directly competitive products, it would still be required to examine whether the injury and causation analysis was objective. That will not be the case if producers of products are included that are excluded from the product scope.

IX. CLAIM 6: U.S. FAILED TO APPLY THE SAFEGUARD MEASURE ONLY TO THE EXTENT "NECESSARY" TO REMEDY THE ALLEGED SERIOUS INJURY AND TO FACILITATE ADJUSTMENT

97. The U.S. acted inconsistently with Articles 5.1 and 7.1 of the Safeguards Agreement because it failed to apply the safeguard measure "only to the extent necessary to prevent or remedy serious injury" and "only to the extent necessary to facilitate adjustment". In particular, the safeguard measure is inconsistent with these obligations because the U.S. (i) failed to limit the application of the safeguard measure to the alleged serious injury caused by the increased imports alone; (ii) failed to take into account existing import restrictions from AD/CVD measures; (iii) imposed the measure on LRW parts even though these were not in competition with the "like" domestic products and thus caused no injury; (iv) did not limit the level of the measure to what was necessary to remedy the alleged injury; and (v) failed to ensure that the measure was not applied beyond what was necessary to facilitate adjustment.

98. For the reasons set forth below, Korea submits that the U.S. acted inconsistently with its obligations under Articles 5.1 and 7.1 of the Safeguards Agreement. Consequently, the U.S. also violated Article 11.1(a) of the Safeguards Agreement.

IX.1. U.S. failed to limit the safeguard measure to injury caused by increased imports

99. The only response from the U.S. is that Korea's argument is "derivative" of the claim against the serious injury finding. It incorrectly states that the USITC found that "the serious injury found by the USITC is attributable exclusively to the increased imports". However, as noted, that is not what the USITC found. The USITC acknowledged that some of the serious injury to the domestic industry was caused by other factors, although these factors were found not to be "important causes of serious injury".

100. Therefore, it should be undisputed that there was injury caused by other factors, for which additional analysis was required to separate and distinguish that injury to ensure that the measure was applied only to injury caused by the increased imports. However, the USITC performed no such analysis, and the measure thus exceeded what is necessary to remedy the injury caused by increased imports alone.

IX.2. U.S. failed to take existing trade remedy measures into account

101. The U.S. argues that there is no legal obligation that requires the USITC to take into account existing restrictions on imports of LRWs when applying the safeguard measure. Korea recalls that three of the main sources of supply were subject to high additional duties based on in total no less than four AD/CVD measures. Article 5.1 expressly limits the application of measures by requiring that the measure is limited "only to the extent necessary" to remedy serious injury. It places the safeguard measure in its specific trade context that includes existing trade remedy measures. Even the U.S. indicates that the trade remedy measures had the effect of significantly decreasing imports from the covered countries, including Korea. Yet, the U.S. made no attempt at calibrating the measures in any way to take account of the existing trade remedies. The U.S. should have taken these facts into account when tailoring the relief "necessary" under the safeguard measure. It did not even try to do so.

102. The U.S. suggests that the USITC took into account the existing trade remedy orders, including in the "partial equilibrium model" used to estimate changes in prices and quantities of imports and domestic LRWs. However, there is no evidence in the USITC Report that trade remedy orders were taken into account in the modelling. The model assumed that "U.S. imports from countries that are FTA partners of the U.S. are not covered by the [safeguard] remedy", which was an incorrect premise since the U.S. decided to *include* 16 FTA partners, including Korea, and only excluding Canada and a number of developing countries. Therefore, whether or not the model reflected existing trade remedy orders is irrelevant since the model was based on assumptions which were not true. In essence, the model was useless, as it reflected a different situation than the reality, and cannot support the U.S.' argument that the USITC took account of existing trade remedy orders when determining the application of the safeguard remedy.

IX.3. U.S. imposed the measure on LRW parts without having made a proper finding of imports causing injury

103. As noted, the U.S. did not make a finding of injury caused by increased imports of LRW parts and confirms that there was no competition between imported LRW parts and the like domestic products, and that the sole reason for applying the measure to imported parts was to avoid alleged "circumvention". However, a measure can only be "necessary" if it remedies serious injury and facilitates adjustment. If there is no competition between imported and domestic products, then additional import duties will not have any remedial impact. The USITC did not make a threat of serious injury finding with regard to imports of parts and, thus, it is completely baseless of the U.S. to argue that the imposition of the measure on parts was necessary to "prevent" serious injury, as this possibility is limited to findings of threat of serious injury.

104. The U.S. was not justified extending the application of the measure to non-competing imports because of a *potential, theoretical, future risk* of circumvention whereby imported parts *could* circumvent existing duties on LRW units and be converted into LRWs in the U.S. that *could* compete with domestic LRWs and *potentially* cause serious injury. Applying an emergency safeguard measure to potential future and hypothetical threats is an abuse of the instrument, which should not be permitted.

IX.4. U.S. failed to assess the level and form of the safeguard measure in light of the actual serious injury found to exist

105. The USITC failed to assess the level and form of the safeguard measure in light of the actual serious injury found to exist, which was essentially based on price effects causing financial losses. Financial performance in the form of losses was essentially the only factor found to be negative while over 13 other factors trended positively. These financial losses were said to be "a direct consequence of the declining prices on sales of domestically produced LRWs" and that "the only explanation for the domestic industry's declining prices … is the significant increase in low-priced imports of LRWs during the period of investigation". The USITC found also that the alleged low-priced imports undersold domestic prices on average by 14%.

106. Given these findings, the extent to which imports were alleged to undersell domestic prices was highly relevant in designing the LRW safeguard measure to be *commensurate* to the

serious injury attributed to the increased imports. Thus, counteracting the price differential would have addressed the domestic industry's serious injury, since it was the lower domestic prices that allegedly were "direct[ly]" responsible for the losses.

107. However, by applying (i) in-quota tariffs of 20% up to 1.2 million LRW units and a 50% tariff for any subsequent imports; and (ii) a tariff of 50% on any imports parts exceeding 50,000 units, the U.S. safeguard measure went beyond what was necessary to remedy injury. It was not necessary in light of the USITC's findings that, in particular, the average price underselling was only 14%.

108. The only rebuttal by the U.S. is that Korea's reference to the underselling margin is "invalid", as that considers domestic selling prices, not import prices. Korea fails to see the relevance of this distinction. If the serious injury is linked to the depression and suppression of domestic prices (which resulted in worsening financial losses), the alleged lower price of imports is relevant to use as a basis for determining what is necessary to prevent and remedy the serious injury. In addition, the U.S. seeks to dismiss the fact that at least two USITC Commissioners agreed with Korea that the measure went beyond what was necessary by suggesting that "reasonable minds may differ". Of course, the U.S. wants to downplay this remarkable disagreement among the Commissioners that showed the level of the measure exceeded what was necessary, but is incapable of explaining why, despite these views of two Commissioners, the measure would be in compliance with Article 5.1.

IX.5. U.S. failed to ensure that the measure is necessary to facilitate adjustment

109. The U.S. argues that the conclusory statement in Proclamation 9694 that the measure would prevent injury and "facilitate a positive adjustment to import competition" was sufficient to comply with the second sentence of Article 5.1. Korea disagrees. The need to ensure that the measure will facilitate adjustment is a substantive obligation, which requires proper analysis of the relevant facts. While adjustment plans do not have to be provided in each case *per se*, submission and consideration of such plans may be desirable as a means of substantiating that a Member complies with Article 5.1. In the underlying investigation, there is zero evidence that any such analysis took place. Even the submitted plans by the domestic industry were weak, largely making commitments to increase investments only. At no point in time did the USITC examine these general commitments in light of its findings operating losses and declining prices.

110. Moreover, any adjustment must clearly relate to the developments that were "unforeseen" and which led to the increased imports causing serious injury. That is why adjustment is necessary, i.e. because something unforeseen happened that the industry previously had not adjusted to. Since the USITC never examined nor identified any unforeseen developments, it could not determine that the measure was necessary to facilitate adjustment either. The sole blanket statement by the U.S. President to which the U.S. refers did not demonstrate that the relevant obligations of the Agreement were respected.

X. CLAIM 7: U.S. FAILED TO "ENDEAVOR TO MAINTAIN" A SUBSTANTIALLY EQUIVALENT LEVEL OF CONCESSIONS IN VIOLATION OF ARTICLES 8.1 AND 12.3 OF THE SAFEGUARDS AGREEMENT

111. The U.S. acted inconsistently with Articles 8.1 and 12.3 of the Safeguards Agreement because it failed to endeavor to maintain a substantially equivalent level of concessions and other obligations under the GATT 1994 with Korea. In particular, the U.S. failed to provide an adequate opportunity for prior consultation concerning trade compensation, as Korea only learned of the scope and the effective date of the proposed LRW safeguard measure 12 days before it took effect.

112. Indeed, on 23 January 2018, the U.S. took the decision on the proposed nature, level and date of application of the LRW safeguard measure and notified this decision to the WTO on 26 January 2018. The measure was applied on 7 February 2018. It was not feasible for Korea to analyze the final measure and prepare for consultations with the U.S. within a mere 12 days. In *US – Line Pipe*, the Appellate Body faulted the U.S. for failing to meet its obligation under Article 8.1 when information on the scope and date of application of the measure was

provided to interested parties 18 days before it took effect. In the LRW proceeding, there was even less time.

113. The U.S. argues that it complied with Articles 8.1 and 12.3 and refers to a WTO notification of 11 December 2017 as the starting date for consultations. At that time, however, there were not yet the required details of the proposed final safeguard measure in terms of its form, nature and date of application; there was only the USITC Report with its *recommendations* to the U.S. President to take certain actions. There were many significant differences between the USITC's recommendations and the final safeguard measure. Only on 23 January 2018 was the proposed final measure announced by the U.S. President.

114. Finally, the U.S. argues that there was "ample" time to consult since Proclamation 9694 provided "further time" for consultations following the imposition of the measure. The U.S. does not further develop this argument. It knows that the obligation in Article 12.3 is to provide adequate opportunity for "prior" consultations, not opportunities to consult once the measure has entered into force. This argument falls based on the express wording of the Safeguards Agreement.

115. For the foregoing reasons, Korea submits that the U.S. acted inconsistently with its obligations under Articles 8.1 and 12.3 of the Safeguards Agreement. Consequently, the U.S. also violated Article 11.1(a) of the Safeguards Agreement.

XI. CLAIM 8: U.S.' NOTIFICATIONS OF THE DIFFERENT DECISIONS FAILED TO COMPLY WITH ARTICLES 12.1 AND 12.2 OF THE SAFEGUARDS AGREEMENT

116. The U.S. acted inconsistently with Articles 12.1 and 12.2 of the Safeguards Agreement because it failed to provide immediate notifications of the different decisions to the WTO given the time between the decision and the related notification. In addition, the notifications did not contain all pertinent information, as a result of undue redaction of allegedly confidential information and failure to provide adequate non-confidential summaries.

117. The U.S. agrees that Members must notify the initiation of investigations "at once, without delay, or instantly". The LRW investigation was initiated on 5 June 2017, but the U.S. failed to notify immediately other Members since it took another 7 days to notify to the WTO, i.e. on 12 June 2017. The 7-day delay to notify the LRW investigation to the WTO was inconsistent with Article 12.1(a) of the Safeguards Agreement.

118. In relation to the claim that the U.S. failed to notify immediately other WTO Members of the USITC's finding of serious injury, the U.S. seeks to justify the 7-days delay by suggesting that "the degree of urgency and need for immediacy were not high". However, it is not for the U.S. to decide for itself whether the circumstances were such that immediacy was not "high". The U.S. already acknowledged that the term "immediacy" means that notifications must be made "at once, without delay, or instantly". It failed to do so when it waited 7 days to notify the serious injury finding.

119. The U.S. suggests also that the delay was justified because the notification had to be "tailored" to the WTO and responsible officials were "extremely busy". This may explain why the notification was late, but it does not justify it. Indeed, Korea submits there is no justification why the U.S. could not have acted with the required level of urgency seeing that the notification was merely three pages long, did not require translation, and the U.S. does not ostensibly have any lack of resources to justify a delay.

120. In relation to the claim that the U.S. failed to provide all pertinent information in its notification under Article 12.1(b), the U.S. argues that it was not required to provide evidence on the USITC's finding of "serious injury" because the Commissioners had not finalized their "individual reasoning" and "drafting" their views. The scenario that the U.S. tries to present is a *non-sequitur* because under which scenario can a Member reach a conclusion of serious injury without first having determined that pertinent information supports this conclusion? There would be no basis for such a serious injury finding.

121. In addition, no domestic procedure or other national rule can justify a breach of a WTO obligation. Article 27 of the VCLT provides that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Thus, whether or not the Commissioners were in the process of finalizing the serious injury finding in accordance with internal administrative procedures, Article 12.1(b) clearly requires "all pertinent information" to be provided in the notification and provides that this includes "*evidence* of serious injury or threat thereof caused by increased imports" and not just a *statement* that such a finding was made. The U.S. failed to do so.

122. In fact, the supplemental Article 12.1(b) notification on 9 December 2017 clearly shows that the U.S. sought to correct its obvious violation by providing more information on the serious injury finding. However, given the requirement for an "immediate" notification, Korea submits that this supplemental notification is not compliant since it came more than two months after the finding of serious injury on 5 October 2017.

123. Finally, in relation to the claim that the U.S. failed to provide all pertinent information in its notification under Article 12.1(c), the U.S. argues that the failure to provide non-confidential summaries of redacted information in the notification cannot "establish an inconsistency with Article 12.2". While Korea agrees in principle that confidential information does not have to be revealed in notifications to the WTO, this does not mean that Members can simply redact such information and deny the due process rights of interested parties. That much is clear from Article 3.2 of the Safeguards Agreement that requires "non-confidential summaries" of such information or the "reasons why a summary cannot be provided". The U.S. failed to provide such summaries or reasons for why not "all pertinent information" was provided in the Article 12.1(c) notification.

124. For the foregoing reasons, Korea submits that the U.S. acted inconsistently with its obligation under Articles 12.1 and 12.2 of the Safeguards Agreement. Consequently, the U.S. also violated Article 11.1(a) of the Safeguards Agreement.

XII. CLAIM 9: THE SAFEGUARD MEASURE AMOUNTED TO A WITHDRAWAL OR MODIFICATION OF THE U.S.' CONCESSIONS WITHOUT JUSTIFICATION

125. The U.S. acted inconsistently with Article II:1 of the GATT 1994 because the safeguard measure amounts to a withdrawal or modification of concessions without justification. The U.S. argues that this consequential claim should not be considered by the Panel. However, Korea respectfully invites the Panel to rule on this claim, as it would assist in positively resolving the dispute between parties.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

1. The financial situation of the U.S. washers industry commenced a sustained decrease beginning in the 2013-2014 period, as confirmed by information gathered by the USITC (U.S. International Trade Commission or "Commission") in the global safeguard investigation Korea has challenged. The pervasive underselling by imported "LRWs" led to a doubling of imports that peaked in 2016. These increasing imports at low prices undersold, suppressed and depressed prices for domestically produced washers, leading to significant and worsening operating losses for the domestic industry producing like or directly competitive products. This precipitous decline occurred despite market conditions that were otherwise favorable to the domestic producers, including increasing domestic demand and the availability of domestic products that customers perceived as being as good as or better than competing imports.

2. The domestic industry first sought to resolve the difficulties posed by increasing imports by seeking antidumping and countervailing duty measures. Instead, each antidumping measure (on washers from Korea, Mexico, and China) and countervailing duty measure (on washers from Korea) prompted a shift in production to a country where washers for export to the United States were not subject to such remedies.

3. In 2017, the domestic industry filed a petition with the USITC requesting imposition of a safeguard measure on imports of LRWs and covered parts from all sources. ("Covered parts" is a limited category that includes only the three largest components of a washer, and not the myriad of parts incorporated in the finished product.) The Commission conducted an investigation and found that increased imports were causing serious injury to the domestic washers industry, and recommending the imposition of TRQs on LRWs and covered parts. The President imposed a safeguard measure, similar in most respects to the USITC's recommendation, that he determined "will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs".

4. Korea claims that the washers safeguard measure and underlying investigation by the USITC were inconsistent with the GATT 1994 and the SGA. However, the arguments it advances in support of its claims are wrong. Korea relies on multiple misunderstandings of the relevant obligations, fails to take account of the totality of the evidence, and distorts the findings of the competent authorities.

5. Korea does not address the factual question of whether the increased imports were "as a result of unforeseen developments". It mistakenly assumes that all it needs do to establish an inconsistency with Article XIX:1(a) of GATT 1994 is to show that the competent authorities did not make an explicit finding on this point. Korea misunderstands the text and context for Article XIX:1(a) and SGA Articles 1 and 3.1, and by relying on erroneous Appellate Body statements, seeks to read into the text of Article XIX and the SGA an obligation that is not there. In fact, the evidence establishes that foreign producers developed an unforeseen ability to rapidly increase their production of LRWs for the U.S. market and then shift production rapidly among countries to avoid the effects of trade measures, and that the increase in imports was a result of this unforeseen development. Korea also errs in its arguments regarding the "obligations incurred". The USITC Report explicitly described the tariff concessions the United States took on with respect to the LRWs at issue in this investigation, which is sufficient to establish that the increased imports were "a result of ... the obligations incurred by a contracting party under this Agreement, including tariff concessions".

6. The USITC's serious injury determination is WTO-consistent. The USITC properly defined the domestic like product and the domestic industry, and explained its conclusions. The USITC further examined conditions of competition, the injury factors, and alternate causes of injury put forward by the parties before it, and explained its conclusions at great length. The USITC found that the domestic industry was seriously injured. As the Commission explained, the domestic industry invested heavily in the development and production of competitive new LRWs during the period of

investigation, and should have been well positioned to capitalize on the concurrent increase in apparent U.S. consumption. The Commission found that instead "the domestic industry's financial performance declined precipitously during the period of investigation, necessitating cuts to capital investment and R&D spending that imperil{ed} the industry's competitiveness". The Commission found that these factors represented a "significant overall impairment in the position of" the domestic industry. In light of "strong demand growth, rising costs, and the competitiveness of the domestic industry's LRWs", the Commission found that "the only explanation for the domestic industry's declining prices and increasing COGS to net sales ratio is the significant increase in low-priced imports of LRWs during the period of investigation".

7. The U.S. imposition of the washers safeguard measure is consistent with SGA Articles 5.1 and 7.1. The measure remedied the injury caused by imports – and only the injury caused by imports – with two elements. It addressed the increase in imports by imposing a TRQ set at the average level of imports for the 2014-2016 period during which the serious injury occurred, with an out-of-quota tariff that would likely be preclusive. The measure addressed the low prices with an in-quota tariff set at a level to reduce or eliminate price suppression or depression. On covered parts, the United States imposed a TRQ at a level reflecting import volumes during the period of investigation, which parties agreed were used almost exclusively to repair previously sold models, with a substantial additional amount to facilitate foreign producers' efforts to ramp up production at new U.S. facilities. The measure imposed no in-quota duty, and an out-of-quota rate set so as to lessen any incentive for Samsung and LG to displace their expected U.S. production of machines or covered parts with imported covered parts for simple assembly. Korea's assertion that this combination of elements went beyond "the extent necessary to prevent or remedy serious injury and to facilitate adjustment" for purposes of SGA Article 5.1 is baseless. By tailoring the safeguard measure to address aspects of imports that the Commission identified as injurious, the United States stayed within the limits laid out in Article 5.1. Korea offers no support for its claim under Article 7.1 that the United States applied the safeguard for a longer period of time than is necessary.

8. There is no basis for Korea's claims under SGA Articles 8 and 12 regarding notification and consultation requirements. The United States notified the Committee on Safeguards at each relevant step of the process toward adoption of the washers safeguard measure, from institution of the investigation on June 12, 2017, through the announcement of the definitive safeguard measure on January 23, 2018. At each stage, the United States made its notification within one week of the triggering event – well within the periods that past panel and appellate reports have accepted as sufficient for purposes of SGA Article 12.1. Each of the notifications contained all of the relevant information available at the time, except as necessary to protect information submitted to the USITC on a confidential basis, in accordance with the obligation under SGA Article 3.2. The United States provided an opportunity for prior consultations beginning on December 11, 2017, and provided for consultations to continue through February 22, 2018. Through this process, the United States provided an opportunity for prior consultations with Members having a substantial interest as exporters of the product, as required under Article 12.3, and endeavored to maintain a substantially equivalent level of concessions and other obligations with those Members, as required under Article 8.1. Members representing the most voluminous exporters of covered washers during the investigation period consulted with the United States from December 11, 2017 – February 22, 2018. Despite Korea's assertions to the contrary, the United States' actions were consistent with SGA Articles 8.1, 12.1, 12.2, and 12.3.

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT PANEL'S FIRST VIDEOCONFERENCE WITH THE PARTIES

9. The GATT 1994 and the Safeguards Agreement establish a Member's right to suspend its obligations under the WTO Agreement if a product is being imported into its territory in such increased quantities and under such conditions as to cause serious injury or threat of serious injury to the Member's domestic industry. The availability of this escape valve is one of the factors that gives Members the comfort to make tariff concessions that could in the future otherwise impede their ability to forestall serious injury to their economies and their stakeholders. Protecting this right is accordingly critical to the continued acceptance of the WTO system in any Member in which government is accountable to its citizens.

10. To be clear, that is exactly what the Safeguards Agreement envisages. Its preamble calls for "multilateral control over safeguards" – not their elimination. Article 1 echoes this point, providing that the Agreement "establishes rules for the application of safeguard measures", and the remainder

of the agreement elaborates on those rules. The assumption throughout is that Members will use safeguard measures in the specified circumstances. Korea's arguments invert this logic, advocating instead a reading of the Agreement's disciplines such that no competent authorities and no Member could meet them in practice. Under this approach, rather than setting guidelines for Members, the Safeguards Agreement lays down a procedural minefield with no viable exit. The United States urges you to reject this view and its supposed grounding in past reports of panels and the Appellate Body, which Korea misreads in large part.

11. First, contrary to Korea's assertions and its misreading of reports interpreting the Safeguards Agreement and Article XIX of the GATT 1994, the United States has acted consistently with the Safeguards Agreement in demonstrating that increased imports were the result of unforeseen developments and obligations incurred, consistent with Article XIX of the GATT 1994. Second, contrary to Korea's arguments, the USITC acted consistently with the Safeguards Agreement in defining the domestic like product and the domestic industry. Third, the Commission's detailed analysis on serious injury thoroughly explained how imports increased significantly "under such conditions" as to cause serious injury to the domestic industry.

EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT PANEL'S FIRST VIDEOCONFERENCE WITH THE PARTIES

12. Korea's opening statement underscores its failure to establish any *prima facie* case of inconsistency with the Safeguards Agreement in the USITC's finding that increased imports caused serious injury to the domestic industry. In its statement, Korea asserted, incorrectly, that the United States failed to respond to Korea's first written submission arguments. Korea also continues to urge the Panel to consider the serious injury section of the Commission's report in isolation, as if other sections were irrelevant to the Commission's evaluation of relevant factors. In actuality, the Commission's report must be read as a whole. Finally, Korea impugns the reliability of the Commission's data on import volume and prices even though the two Korean producers LG and Samsung themselves reported these data, and recommended five of the six LRW products for which pricing data were collected.

13. We will next address Korea's incorrect assertion that the Panel should consider the serious injury section of the Commission's report in isolation from all other relevant sections of the Commission's evaluation. There is no basis for Korea's assertion that the Commission somehow failed to evaluate certain relevant factors, including the rate of the increase in import volume, import market share, and other factors showing trends adverse to the domestic industry, simply because the USITC chose to present and organize its analysis differently from the way Korea argues it would have liked.

14. Finally, we will address Korea's incorrect assertion that the Commission's data on import volume and prices were unreliable even though two Korean producers themselves reported these data and agreed with five of the six pricing products recommended for data collection. Contrary to Korea's arguments, the Commission based its analysis on precise and reliable data, including with respect to increased imports and their impact on domestic prices, and pricing comparisons.

15. We will now address some of the remarks offered on unforeseen developments, particularly those by Mexico during the third party session with respect to the meaning of "unforeseen". An obligation based on developments that are "unforeseeable" is different from, and would impose a higher standard on Members, than one based on developments that are "unforeseen". The proper inquiry is not on what negotiators "could have imagined", but what they foresaw. And the fact that they might expect imports to increase in response to tariff concessions does not mean, as Mexico suggests, that "significant increases in a short time", must be accepted as "foreseen". Mexico errs as a matter of fact in that the unforeseen development is not, as Mexico asserts, simply that imports increased, or that certain producers increased capacity by a specific degree. The speed with which LG and Samsung increased both capacity and output, and shifted from country to country in rapid succession, is what was unforeseen. Korea has provided no basis to think otherwise.

16. We will close with a final systemic point. In this case, Korea's unforeseen developments arguments have relied on portions of the Appellate Body's reasoning in *US – Lamb* and *US – Steel* that are not persuasive for the reasons the United States has set out at length in its first written submission. Consequently, the Panel need not, and should not, agree with the faulty reasoning of these reports. The appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is

to apply the "customary rules of interpretation of public international law". Those customary rules of interpretation, as reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties, do not assign any interpretive role to dispute settlement reports. Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". As part of engaging in that interpretive exercise, a WTO panel may consider it appropriate to consider a prior report for the assistance it may give in properly understanding a WTO provision interpreted according to customary rules of interpretation – that is, a prior report may be examined for its persuasive value. Thus, relying on prior reports as "case law" or treating so-called DSB "adopted" interpretations as a "sufficient guide" would constitute serious legal error.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

Question 4

17. The Commission defined the domestic like product to include domestically produced belt-driven washers because it found them to be like imported LRWs, based upon a thorough examination of the similarities and differences between domestically produced belt-driven washers and imported LRWs in terms of physical properties, customs treatment, manufacturing process, uses, and marketing channels. Having found domestically produced articles, including belt-driven washers, that were like the imported products under investigation, the Commission had no need to evaluate whether any of those products were also "directly competitive" with imports.

Question 9(a)

18. The Commission did not rely on a product line approach to define the domestic industry. Consistent with SGA Article 4.1(c), as well as SGA Article 2.1, the Commission defined the domestic industry as "producers ... of the like or directly competitive products". Having defined the like or directly competitive domestic products as "all domestically produced LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts", the Commission defined the domestic industry as "all domestic producers of LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts, including Whirlpool, GE, Alliance, and Staber". On this basis alone, the Commission's definition of the domestic industry fully complied with SGA Article 2.1 and 4.1(c).

Question 11

19. While recognizing that imports of covered parts did not compete with domestic covered parts or LRWs, the Commission found that the significant increase in subject imports as a whole, consisting almost entirely of low-priced LRWs, seriously injured domestic producers of LRWs and covered parts, whose shipments consisted almost entirely of LRWs in direct competition with imported LRWs.

Question 12

20. Neither the Antidumping Agreement nor the SCM Agreement specifically requires investigating authorities to assess the competitive relation between the imported and domestically produced good as part of their likeness assessment. Article 2.6 of the Antidumping Agreement defines "like product" for purposes of that agreement as "a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". Footnote 46 of the Agreement on Subsidies and Countervailing Measures contains identical language. Neither provision prescribes any particular methodology for defining a domestic like product or imposes a requirement for investigating authorities to assess the competitive relationship between domestic and subject imported articles. This leaves to investigating authorities the ability to employ appropriate methodologies in defining the domestic like product for purposes of antidumping and countervailing duty investigations.

Question 14(a)

21. The Commission recognized that the domestic industry's market share in 2016 was similar to that in 2012 even after imports of LRWs had increased their penetration of the U.S. market to a significant degree. Nevertheless, the Commission found that subject import competition negatively affected the domestic industry's market share during the period of investigation. As the Commission

explained, fluctuations in the domestic industry's market share coincided with LG's and Samsung's movement of LRW production from country to country during the period as imports of LRWs from Korea and Mexico, and then China, became subject to antidumping and countervailing duty disciplines. Specifically, the Commission noted that the imposition of such disciplines on LRWs from Korea and Mexico coincided with an increase in the domestic industry's market share, while LG's and Samsung's subsequent movement of LRW production to China coincided with declines in the domestic industry's market share. The subsequent imposition of an antidumping duty order on LRWs from China coincided with another increase in the domestic industry's market share. Based on these data, the Commission concluded that "import levels appear to have been restrained by serial antidumping and countervailing duty orders during the period of investigation". In other words, the significant increase in subject import volume and market share during the period of investigation occurred despite the imposition of WTO-consistent trade remedies that LG and Samsung had completely evaded by the end of the period by shifting production to Thailand and Vietnam, which were subject to no measures.

Question 30

22. The analysis of the conditions of competition is a fact-specific inquiry that by necessity differs from investigation to investigation, so it is not possible to provide a generalized answer to this question. In the Washers report, the Commission recognized that imports of covered parts did not directly compete with domestically produced covered parts. It addressed the role that covered parts played in domestic and foreign producers' sales as part of both the product under consideration and the domestic like product. Virtually all domestic industry shipments and imports consisted of washers, while imports of covered parts were limited to the small volumes necessary to repair specific imported washers models. Respondents made no argument before the Commission that the increase in subject imports during the period of investigation consisted of covered parts rather than washers or that covered parts otherwise severed the causal link between increased imports and serious injury, confirming that covered parts were not an important condition of competition in the U.S. market. The Commission's analysis of covered parts based on increased imports and the domestic like or directly competitive product as a whole was fully consistent with this evidence. For these reasons, the Commission reasonably focused its analysis of conditions of competition and causation on washers, as the locus of competition in the U.S. market.

Question 34(a)

23. The Commission's finding that "pricing product data show that imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based TL LRWs", was based upon a comparison of the average unit value of domestic industry shipments for different types of LRWs to importer sales prices for the six pricing products during each quarter of the POI. Specifically, for the price levels of different types of domestically produced LRWs, the Commission relied on the data in Table III-7 of its report, titled "LRWs: U.S. producers' U.S. commercial shipments, by product type, 2012-16, January-March 2016, and January-March 2017", which contained the average unit value of domestic industry shipments of top load LRWs, front load LRWs, top load LRWs with an agitator but without Energy Star certification, and top load LRWs with an agitator and Energy Star certification, among other types of LRWs. For the price levels of subject imports, the Commission relied on the data in Tables V-13-18, containing quarterly sales price data reported by importers on six pricing products representing a representative range of TL and FL LRWs. Based on a comparison of these two sets of data, the Commission found that "imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based TL LRWs", meaning that importers reported sales of pricing products at the same "price points" as domestic producer shipments of agitator-based TL LRWs.

24. In addition to the data particularly collected during the safeguard investigation, the Commission relied on pricing product data from *LRWs from China*, and the Commission's analysis of the data in its determination for *LRWs from China*, which had been placed on the record of the safeguard investigation. Specifically, the Commission noted that "{i}n *LRWs from China*, the Commission found that subject imports of pricing product 9, an impeller-based TL LRW, undersold domestically produced agitator-based top load LRWs with a capacity of 3.6 cubic feet ... even though the subject imported model was more fully featured" and should have therefore commanded a higher price. Based on these data, the Commission made the following finding in *LRWs from China*, which the Commission adopted by reference in its report for the safeguard investigation: "That Samsung sold significant volumes of a more fully featured top load LRW with an impeller and 4.0 cubic feet of

capacity at a lower price that Whirlpool's smaller capacity, agitator-based top load LRWs, provides further evidence that agitator- and impeller-based top load LRW models compete with each other".

Question 35(c)

25. Competent authorities should base their price comparisons on product types that are representative of competition in the marketplace, and thus cover an appreciable share of subject imports and domestic producer shipments. For this reason, competent authorities may reasonably forego collecting pricing data on product types that are produced domestically but not imported or imported only in minimal quantities. The collection of such data would impose a reporting burden on responding domestic producers without yielding useful price comparisons. In such a circumstance, the competent authority may examine the extent to which imports of other product types compete with the domestically produced product type. Although pricing data should be collected on product definitions that are narrow enough to permit apples-to-apples price comparisons on directly competitive products, competition between domestically produced articles and subject imported articles need not be limited to such strictly defined product types. In this case, the Commission found that imported LRWs competed with domestically produced LRWs in all segments of the U.S. market, including agitator-based TL LRWs, because the record showed competition across all product types.

Question 38

26. The Commission made its injury and causation findings with respect to the products under investigation in the aggregate, including both LRWs and covered parts. And nothing in the Safeguards Agreement obligated the Commission to make separate injury and causation determinations with respect to LRWs on the one hand and covered parts on the other.

Question 41

27. The Commission thoroughly explored respondents' joint pricing theory and explicitly found that this theory did not explain any of the injury to the domestic industry. Irrespective of how this analysis is categorized, it is clear that the Commission looked at the proposed alternative cause from every angle before concluding that there was simply no causal relationship between the alleged practice of jointly selling LRWs and matching dryers and the injury suffered by the domestic industry.

Question 46

28. As the United States has pointed out elsewhere, the "obligations incurred ... including tariff concessions" language in Article XIX:1(a) sets out a factual circumstance in which a safeguard measure is available. A simple recitation of a relevant tariff concession establishes the existence of that circumstance; no more is needed. The rationale is obvious. Where a concession under GATT 1994 Article II prevents the Member experiencing an injurious increase in imports from taking tariff action to address the problem, the increase is indisputably "the effect of" the concession.

Question 47

29. The United States submits that the reasoning in the quoted passages in *Dominican Republic – Safeguards* and *India – Iron and Steel* is unpersuasive insofar as those panels extended to the "obligations incurred" language the flawed logic regarding "unforeseen developments" in the *US – Lamb* and *US – Steel Safeguards* appellate reports. In *Dominican Republic – Safeguard Measures*, the report quotes the Appellate Body's statement in *Argentina – Footwear* that, "we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions". But with no explanation or support, the report next states that: "It then falls to the importing Member to identify those obligations incurred under the GATT 1994 that are linked with the increase in imports causing serious injury to its domestic industry. These findings and conclusions must be reflected in the report of the competent authority". The problem with this statement is that it simply assumes that "identifying" (itself not Agreement text) obligations requires "findings and conclusions", and that these must appear in the report of the competent authorities. The absence from the Safeguards Agreement of an obligation to address "obligations incurred" means that, as with most other WTO obligations, a Member need not demonstrate compliance in a report of its competent authorities.

Question 50

30. This question raises two different issues – whether the report of the competent authorities complies with the obligations placed upon the competent authorities and the separate question whether the Member has complied with obligations placed directly on the Member. This second category includes obligations like those in Article 5 of the Safeguards Agreement that do not pertain to the competent authorities' findings and its report. As the United States stated in its first written submission, "[i]n reviewing agency action, the Panel must not conduct a *de novo* evidentiary review". As the United States has explained, unforeseen developments is a factual circumstance of Article XIX, not a condition relevant to Safeguards Agreement Articles 2, 3, or 4, and therefore it is not in the purview of agency findings. Because neither Article XIX nor the Safeguards Agreement charges the competent authorities with making findings as to unforeseen developments, the concept of *de novo* review of agency action does not apply. A panel may properly base its evaluation of such claims on argumentation and evidence presented exclusively in a WTO dispute resolution proceeding. That is, in fact, the way panels address compliance with most WTO obligations.

Question 51

31. The USITC report does not contain a finding on unforeseen developments within the meaning of Article XIX:1(a) of the GATT 1994. However, that report does provide explanations of circumstances that qualify as unforeseen developments. As the United States explained in its first written submission, the USITC noted that, "Whirlpool and GE state that they did not foresee that LG and Samsung would move their production of LRWs for the U.S. market first from Korea and Mexico to China, and then from China to Thailand and Vietnam, and escape the disciplining effect of the resulting antidumping and countervailing duty orders, moves that … would have cost hundreds of millions of dollars".

Question 52

32. Nothing in Article XIX:1(a) or the Safeguards Agreement requires that the identification of the relevant tariff concession appear in the report of the competent authorities. Article XIX:1(a) itself does not mention the competent authorities, and the provisions of the Safeguards Agreement that set out the duties of the competent authorities do not reference the identification of "obligations incurred ... including tariff concessions". Thus, had the USITC report been silent as to the tariff treatment applicable to washers, the United States would have been free to identify the bound tariff rate and relevant concession for the first time in this dispute. This point, however, is moot, as the USITC Report explicitly describes the U.S. tariff treatment of washers, which is bound in the U.S. Schedule to GATT 1994.

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

33. Korea's statements during the Panel's videoconference with the parties and written answers to the Panel's questions essentially recapitulate its arguments from earlier submissions. The U.S. first written submission already explained that the text of GATT 1994 Article XIX:1(a) distinguishes between what prior reports have correctly described as the "circumstances" listed in the first clause and the conditions in the second clause. The United States demonstrated that within this framework, the "pertinent issues of fact or law" for purposes of Safeguards Agreement Article 3.1 are those that Articles 2.1 and 3.1 charge the competent authorities to investigate – whether goods are imported in such quantities as to cause serious injury. Those "issues" do not encompass all considerations related to the taking of a safeguard measure, such as whether the measure is taken only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment or whether the circumstances set out in the first clause of Article XIX:1(a) exist. Thus, Article 3.1 cannot permissibly be read to require the competent authorities to make findings as to unforeseen developments and obligations incurred.

34. The United States also demonstrated in its first written submission that the increase in imports observed by the USITC was indeed the result of unforeseen developments in that the negotiators of those tariff concessions did not foresee that a producer would be able to expand from producing zero or low volumes of large residential washers in a country to producing large volumes in a very short time, enabling foreign producers both to penetrate the U.S. market at unexpected speeds, and to shift production among facilities in multiple countries at unexpected speeds. The increase was also the effect of the U.S. concessions, in that tariff bindings undertaken by the United States,

referenced in the USITC Report, prevented it from increasing applied tariffs so as to modulate the increase in imports and provide the domestic industry with an opportunity to adjust to import competition. As a result, imports almost doubled over the five years of the investigation period.

35. Korea argues that the clause "if as a *result* of unforeseen developments and the *effect* of the obligations incurred", mandates a "causation" test, under which a competent authority must demonstrate a *genuine and substantial relationship of cause and effect* between the unforeseen development and the obligation, on the one hand, and the increased imports, on the other. It provides no valid support for this assertion. Likewise, contrary to Korea's assertion that "Korea and the Panel are left guessing what these 'obligations' could be and how they would be linked to the alleged increase in imports", it is beyond dispute that the tariff lines cited by the United States reflect WTO bound rates (concessions), and that those concessions limit the U.S. ability to reduce imports by raising tariffs. More fundamentally, no additional context is needed in the identification of such tariff concessions because the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994.

36. In addition, Korea is wrong in asserting that *ex post* justifications are never admissible in WTO proceedings. Many claims that can be brought at the WTO under the various covered agreements would involve explanations by a Member offered in the course of, or for the purpose of, defending its actions in a WTO dispute. The admonition that a panel must not conduct *de novo* review of *agency action* applies only to the obligations applicable to the agency, and not to other obligations applicable only to the Member. In the safeguards context, obligations on the competent authorities – such as what their report is to contain – are provided under Articles 2, 3, and 4 of the Safeguards Agreement. Other obligations, like those in Article 5 of the Safeguards Agreement, do not pertain to the competent authorities' findings and report. The existence of unforeseen developments, likewise, is a factual circumstance provided under Article XIX that is applicable only to Members, not a requirement that competent authorities must address in their reports pursuant to Safeguards Agreement Articles 2, 3, or 4. As such, Korea's statement that the Panel need not examine the U.S. arguments with respect to Korea's Article XIX claim is without merit. The DSU calls on panels to examine or consider the parties' arguments unless they are outside the panel's terms of reference. As the complaining party, Korea determined which claims to bring and how to frame their argumentation. Nothing the United States has offered in response for the Panel's consideration is outside of the Panel's terms of reference.

37. Regarding the USITC's injury determination, the Commission predicated its affirmative serious injury determination in this case on facts that epitomize the circumstances in which safeguard relief is warranted. Starting in 2011, domestic producers of LRWs sought relief from dumped and subsidized imports of LRWs through antidumping and countervailing duty actions, and the Commission found the industry materially injured by significant and increasing volumes of low-priced imports in April 2013 and January 2017. Based on the expected trade relief from the resulting antidumping and countervailing duty orders and projections of strong demand growth, the domestic industry made substantial investments in the development and production of competitive new LRWs, which independent consumer publications ranked among the very best available. These investments, however, were undermined as LG and Samsung shifted their production of LRWs to facilities in countries not subject to the various AD and CVD orders. With these production shifts, imports of LRWs continued to increase while selling at prices substantially below those of comparable domestic LRWs, in turn leading to mounting financial losses for the U.S. industry.

38. In the ensuing safeguard investigation, the Commission found that imports of LRWs nearly doubled over the period of investigation, significantly increasing their penetration of the U.S. market. It found that pervasive underselling by increasing volumes of imported LRWs, which were substitutable with and comparable to domestically produced LRWs, forced the domestic industry to defend its market share by reducing prices, given the importance of price to purchasers. By significantly depressing and suppressing domestic prices, the Commission explained, the increasing volumes of low-priced imports caused the industry's "dramatically worsening" financial losses and forced draconian cuts to capital and research and development spending that imperiled the industry's competitiveness. LG's and Samsung's only alternative explanations for these trends were the illogical notions that domestic producers purposefully sustained increasing financial losses on sales of LRWs by selling them at the same prices as matching dryers, and that consumers somehow rejected domestically produced LRWs that were viewed as comparable to imported LRWs by retail purchasers and independent reviewers. Rejecting these arguments as unsupported by the record,

the Commission found that increased imports were "the only explanation" for the industry's serious injury.

39. Korea has failed to show that the Commission's determination was in any way inconsistent with the Safeguards Agreement. First, Korea's challenges to the Commission's like product and domestic industry definitions fail. The Commission could not simply ignore covered parts that were included within the scope of the investigation, as Korea argues, when the Commission was required to include domestically produced parts that were "like" the imported parts in the domestic industry definition. Second, the Commission analyzed the rate of increase and market share taken by imports, as noted by the Panel in its questions to Korea, and reasonably found that the near doubling of import volume satisfied the increased imports requirement and coincided with the industry's serious injury. Third, in analyzing serious injury, the Commission reasonably found the domestic industry to be seriously injured, as evinced by the data collected in the investigation that showed declines based on no fewer than six negative factors, including massive financial losses that threated the industry's viability. The Commission also reasonably explained that seemingly positive trends driven by loss-making investments were not consistent with a healthy industry.

40. In analyzing causation, the Commission objectively relied on pricing data collected on the basis of products that were advocated by LG and Samsung and that covered an appreciable share of domestic and import shipments in the U.S. market, including the very products in which the industry invested substantial sums to develop. The Commission also reasonably found that "neither of respondents' alleged alternative causes of injury is supported by the record evidence", notwithstanding references to the statutory "important cause" standard that Korea mistakes for factual findings. The Panel should reject Korea's challenges to these and other aspects of the Commission's affirmative serious injury determination and uphold the determination as fully consistent with the Safeguards Agreement.

41. Korea also continues to insert extraneous concepts into the text of Article 5.1. In its responses to the Panel, Korea repeatedly references Article 3.1, "reasoned and adequate explanation", "the record", and "findings", none of which apply to an Article 5.1 claim. Korea also advocates a *sui generis* but undefined "compelling alternative explanation" standard in light of certain assertions Korea makes on the basis of findings selectively chosen from the USITC record. There also is no support, textual or otherwise, for this so-called standard.

42. Finally, regarding Korea's Articles 8 and 12 claims, the United States notes that Article 12 obligations are ones of transparency. Like all transparency commitments, their function is to ensure that Members provide both adequate notice of any measure taken that affects the interests of other Members and opportunity to express or exchange views on those impacts, so that Members are not unfairly harmed or prejudiced by actions that lack rational basis, process, or predictability. They are not, as mentioned in the U.S. opening statement to the Panel during its videoconference with the parties, part of "a procedural minefield" intended to sabotage a Member's decision to take emergency action when necessary. The U.S. first written submission and subsequent responses to the Panel's questions demonstrated many flaws in Korea's claim that the U.S. efforts were insufficient to satisfy Articles 8 and 12 of the Safeguards Agreement. Korea failed to rehabilitate its claims during the panel's videoconference and in its responses to the Panel's questions. In its responses, Korea mischaracterizes the relevant facts, and otherwise fails to establish that the United States did not immediately notify the Committee on Safeguards or provide an adequate opportunity for prior consultations.

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT PANEL'S SECOND VIDEOCONFERENCE WITH THE PARTIES

43. The United States notes that Korea complains that the United States did not seek a "supplemental report" on unforeseen developments. Just as there is no obligation for the competent authorities to include unforeseen developments in their report, there is no obligation to seek a "supplemental" report containing findings on those issues.

44. Korea's new argument that respondents advocated a completely different pricing methodology, and only endorsed the Commission's pricing product definitions "in the alternative", is unpersuasive. The Safeguards Agreement does not require competent authorities to analyze subject import price effects, much less prescribe a particular price comparison methodology. Competent authorities therefore have the discretion to adopt reasonable methodologies to analyze

the impact of subject imports on a domestic industry's prices. As the United States has pointed out, the Commission's price comparison methodology, based upon pricing data collected on the basis of strictly-defined pricing products, was considered by the panel in *US – Tyres* as "a proper basis for comparing prices". Moreover, the Commission has used the same price comparison methodology in antidumping, countervailing duty, and safeguard investigations for decades. Having participated as respondents in two antidumping/countervailing duty investigations involving LRWs before the Commission, LG and Samsung were aware that the Commission would be utilizing its normal price comparison methodology, as it had in previous investigations of LRWs, when they endorsed four of the six pricing products in their comments on the draft questionnaires. Respondents and petitioners recommended a fifth product in *LRWs from China* that the Commission adopted for the safeguard investigation. The Commission reasonably considered respondents' recommendation of five of the six pricing products, as well as the appreciable coverage afforded by pricing product data, as evidence that the products were representative of competition in the U.S. market.

EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT PANEL'S SECOND VIDEOCONFERENCE WITH THE PARTIES

45. Finally, the United States observes that the Commission's thorough analysis of the record evidence in its report for LRWs, with the Views alone spanning 63 pages and 366 footnotes, belies Korea's contention that the Commission somehow neglected to adequately address various issues. Rather than basing its increased imports finding on an end-point to end-point comparison, as Korea mistakenly argues, the Commission thoroughly evaluated subject import volume in each year and interim period, both in absolute terms and relative to consumption, as well as the rate of increase in subject import volume in each year and interim period. Far from overlooking respondents' innovation argument, the Commission fully considered the evidence concerning substitutability and non-price factors and reasonably found a moderate to high degree of substitutability between subject imports and the domestic like product.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

Question 67(b)

46. No, investigating authorities are not required to consider the competitive relationship between domestic and imported parts as part of their likeness assessment pursuant to Article 4.1(c) of the Safeguards Agreement. As the United States has explained, Articles 2.1 and 4.1(c) permit competent authorities to define the domestic industry to include producers of "like or directly competitive" articles, using the disjunctive "or" to indicate that domestically produced articles that are like the products under investigation need not be directly competitive with them. If "like" meant "directly competitive" to a perfect degree, as Korea argues, competent authorities could always define the domestic industry as producers of directly competitive articles. The term "like" would be rendered superfluous, contrary to the interpretative principle "that interpretation must give meaning and effect to all the terms of a treaty".

Question 76(b)

47. The United States would like to clarify that the Commission's finding that "LRWs competed at all price points in the U.S. market" was not based solely upon a comparison of the average unit value of domestic industry shipments for different types of LRWs to importer sales prices for the six pricing products. Nonetheless, those data supported the finding by showing that importers reported sales of pricing products at the same "price points" as domestic producer shipments of different types of LRWs, including agitator-based top load LRWs. As explained by the United States in response to question 34, however, the Commission also cited a range of other evidence in support of the finding.

Question 81

48. As the United States explained in its second written submission in detail, "the date the Commission publicly announced institution is the proper date for evaluating whether the United States satisfied the obligation to 'immediately notify ... initiating an investigatory process relating to serious injury or threat thereof and the reasons for it'" under Article 12.1(a) of the Safeguards Agreement. That date was June 8, 2017. The Secretary of the Commission signed the notice of institution on June 7, 2017, and on the next day, June 8, sent it to USTR and entered it on

the Commission's Electronic Document Information System, on June 8, 2017. Therefore, the U.S. Government considers June 8, 2017, to be the date on which the Commission publicly announced the initiation of the investigation.

EXECUTIVE SUMMARY OF U.S. COMMENTS ON KOREA'S RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

Question 67(b)

49. In responding to this question, Korea agrees with the United States that investigating authorities need not "always assess the nature and extent of the competitive relationship before defining a 'like product'", and that there is no "separate requirement to assess the nature and extent of competitive relationship" under the Safeguards Agreement. Korea also acknowledges that the "the four traditional criteria for determining 'likeness', as endorsed by the Appellate Body in *Philippines – Distilled Spirits*" do not include a factor concerning the competitive relationship between domestic and imported articles. As the United States has explained, the Commission based its determination that domestically produced covered parts were "like" imported parts on an assessment of similar factors, and reasonably found that domestic and imported covered parts were similar in terms of physical properties, customs treatment, manufacturing process, uses, and marketing channels. Korea's only challenge to this finding – "that the Commission did not properly consider the lack of substitutability" between domestic and imported parts – is directly contradicted by its recognition that the Safeguards Agreement does not require such an assessment. Because the Safeguards Agreement does not prescribe a methodology for assessing likeness, and the Commission's likeness methodology was reasonable, the Commission's finding that domestic covered parts were like imported covered parts complied with Article 4.1(c) of the Safeguards Agreement.

Question 73

50. Korea once again seeks to magnify the importance of a small decline in subject imports in January-March 2017 relative to January-March 2016. The Commission found that subject import volume "increased steadily" in every year of the 2012-16 period and "nearly doubled" between 2012 and 2016. In other words, imports of LRWs had peaked in 2016, within three months of the end of the period of investigation, at a level nearly twice that of 2012, after increasing in every year of the investigation period. Korea points to nothing suggesting that the small decline in January-March 2017 outweighs this increase. In fact, as the United States has noted, the increase in imports that the Commission found in this case was greater in percentage terms and more recent than the increase in imports of welded pipe at issue in *US – Steel Safeguard* or the increase in imports of bags and tubular fabric at issue in *Dominican Republic – Safeguard Measures*. In both of those cases, the panels found the increases sufficient to satisfy the increased imports standard under Article 2.1 of the Safeguards Agreement.

Question 74

51. Korea agrees with the United States that competent authorities need not rely on data covering all domestic producers comprising a domestic industry so long as the data replied upon is "sufficiently representative to give a true picture of the 'domestic industry'". In this case, the Commission based its analysis of the domestic industry's financial performance on the usable financial data reported by "three firms that are estimated to have accounted for all known U.S. production of LRWs in 2016", namely GE Appliances, Staber, and Whirlpool. As the United States has explained, the exclusion of Alliance's unusable financial data did not undermine the representativeness of these data, because Alliance's production of residential belt-driven washers was "very, very small". Financial data reported by domestic producers accounting for all LRW production, and nearly all production of the domestic like product, are necessarily representative of the financial performance of the domestic industry.

Question 76(a)

52. Korea prefaces its response to this question by arguing that no analysis of causation was possible without the collection of pricing data on agitator-based top loading LRWs. As the United States has explained, however, the Commission reasonably limited its collection of quarterly pricing data to six pricing products that were representative of competition in the U.S. market and

likely to yield probative price comparisons. The Commission reasonably found these pricing data representative of competition in the U.S. market because five of the six pricing products were proposed or endorsed by respondents and the data covered an appreciable percentage of domestic producer and importer U.S. shipments. Moreover, the types of LRWs covered by the pricing products, impeller-based top loading LRWs and front loading LRWs, accounted for nearly all imports of LRWs and half of the domestic industry's U.S. shipments of LRWs. These types of LRWs accounted for all direct competition between subject imports and domestically produced LRWs, and were the very types of LRWs in which the domestic industry had invested so heavily during the period of investigation. In light of these considerations, the Commission's pricing data reasonably supported its finding that the large and increasing volume of low-priced imports significantly depressed and suppressed prices for the domestic like product during the period of investigation.

Question 77

53. Korea mistakenly claims that the inclusion of a pricing product corresponding to an agitator-based top load LRW would have made a price undercutting finding "far less likely" because such LRWs are, in its view, "particularly low-priced". That is not the case. The Commission only compares domestic producer and importer sales prices on sales of the same pricing product in the same quarters. Had the Commission collected pricing data for a pricing product corresponding to an agitator-based top load LRW, most if not all of the pricing data would have been reported by domestic producers, as there were few import shipments of agitator-based top load LRWs. In the absence of any sales of domestic and imported agitator-based top load LRWs in the same quarters, there would have been no additional quarterly price comparisons, and the pricing product data would still have shown subject import underselling in 76.1 percent of quarterly comparisons. As the United States has explained, the inclusion of such a pricing product would have imposed an additional reporting burden on domestic producers without yielding additional price comparisons.

Question 82

54. The United States explained why the "notice of institution in the Federal Register" for purposes of calculating the deadline for filing notices of appearance in the Commission's safeguard investigation was June 13, 2017. The Commission accepted as timely all notices filed within 21 days of June 13, 2017, which in practices meant accepting notices filed as late as July 5, 2017, as July 4th was a U.S. federal holiday. Korea does not challenge or even address these facts.

55. Korea argues that it is irrelevant that interested parties had 23 days after the date of the notification to request to participate in the ITC investigation. The United States made this observation in response to Korea's argument that participants were prejudiced by having the time to request participation curtailed. Korea now appears to have dropped this argument. Instead, Korea again insists that the investigation was "initiated" on June 5, 2017. For the reasons described in the U.S. response to Question 81, the date of initiation was June 8, 2017.

Question 83

56. As of early December 2017, Korea had an adequate opportunity for prior consultations under Article 12.3 of the Safeguards Agreement. As the United States has explained in detail, an evaluation of whether a Member provided an adequate opportunity for prior consultations does not depend exclusively on the content and timing of the final notification. It depends on the notifications (plural) as a whole, and whether Members received the information over time in such a way as to permit consultations. Here, Members received most of the relevant information on December 11, 2017, in the Third Notification. Finally, Korea errs in assuming that the February 7, 2018, effective date of the safeguard measure is the last day relevant to its claims. Proclamation 9694 explicitly provides a further 30 days for consultations and an opportunity to modify the safeguard measure in response to the results. This allowed ample time for Korea to evaluate the final safeguard measure and consult with the United States.

57. Next, Korea contends that the United States acted inconsistently with Article 12.3 because consultations occurred on only "recommendations or hypotheticals" and not a final safeguard measure. Korea's own responses show the error in its argument. Korea agrees that the President announced the final proposed measure on January 23, 2018, and that consultations occurred on February 1, 2018. Therefore, the United States provided Korea with an adequate opportunity to hold prior consultations on a final proposed measure. Moreover, the United States explicitly allowed for

further consultations up through February 24, 2018, with the possibility for modification of the final safeguard measure.

Question 84

58. The United States provided Korea with an "adequate opportunity for prior consultations" and "exchanging views on the measure" in accordance with Article 12.3. The United States has explained in detail the factual and legal arguments that undermine Korea's assertion but highlights the following facts: (1) Korea had the opportunity to review information provided in the notifications, (2) Korea and its two LRW producers for the U.S. market, Samsung and LG, had both notice and opportunity to meaningfully participate or consult at every stage of the proceedings; (3) communications from Korea in December 2017 and on January 24, 2018, demonstrate the adequate opportunity for prior consultations under Article 12.3 and the actual knowledge Korea had of the measure; and (4) the January 24, 2018, communication shows that Korea had enough time to analyze and form a final legal conclusion on the measure, that it was inconsistent with the Safeguards Agreement – one day after the Presidential Proclamation was signed and before the U.S. notification.

59. Korea contends that the United States had insufficient time to consider the comments after the consultation and that the U.S. representative "was certainly not in a position to give due consideration to any comments received from Korea presumably because in any case the measure was scheduled to enter into force in less than one week". Korea provides no evidence or argument to support this statement but only conclusory speculation that the date of enactment of the measure somehow nullified the "adequate opportunity for prior consultations". To the contrary, Proclamation 9694 explicitly gave the President until February 24, 2018, to consider Korea's views regarding the final measure and "proclaim the corresponding reduction, modification, or termination of the safeguard measure within 40 days".

60. As noted above, there were in fact 30 days for consultations between the date of Proclamation 9694 and the final date for consultations.

CONCLUSION

61. For the foregoing reasons set out above, the United States requests that the Panel find that Korea has failed to establish any inconsistency with Article XIX of GATT 1994 or the Safeguards Agreement.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE EUROPEAN UNION

1. KOREA'S CLAIMS WITH REGARD TO IMPORTS INCREASED AS A RESULT OF "UNFORESEEN DEVELOPMENTS" AND AS THE EFFECT OF "OBLIGATIONS INCURRED"

1. The European Union agrees with the United States that a WTO panel must not conduct a *de novo* evidentiary review. Indeed, a panel must examine whether the explanation given by the competent authorities in their published report is reasoned and adequate without conducting a *de novo* review of the evidence nor substituting the authorities' conclusions; this does not mean that panels must simply accept the conclusions of the competent authorities.[1]

2. The Appellate Body has confirmed that the circumstances of **unforeseen developments** must be demonstrated as a matter of *fact* in the report of the competent authority and before a safeguard measure can be applied.[2]

3. Thus, it is not possible for a panel to evaluate whether an increase in imports was as a result of unforeseen developments based on argumentation and evidence presented exclusively in dispute settlement proceedings without conducting a *de novo* evidentiary review.

4. The European Union invites the Panel to objectively assess whether the brief reference in the USITC Report to the shifting in production from one country in Asia to another meets the required standard in order to amount to a demonstration of "unforeseen developments" and not to a mere allegation.

5. Normally, an investigating authority would clearly show in its findings that the issue of unforeseen developments has been examined and would present a reasoned and adequate explanation to that effect. The European Union recalls that previous panels have considered in numerous cases that there was a lack of adequate identification and explanation of the facts.[3]

6. Should the Panel consider that the brief reference to some individual companies' statements meets the required standard, then it should verify whether the circumstances invoked amount, indeed, to unforeseen developments.

7. A Member may meet its obligations under Article XIX:1(a) with respect to **"the effect of the obligations incurred"** in certain circumstances solely by showing in its published report that it has undertaken tariff obligations with respect to the product at issue. The European Union may imagine, for instance, a situation when a WTO Member has a bound level of 0% for the customs duties on a certain product. The circumstance "of the effect of the obligations" means that the obligation under the GATT 1994 to not impose any tariffs above 0% (or quantitative restrictions) constrained the respective Member's freedom of action to prevent the serious injury or threat thereof caused by the increase in imports.

8. Such obligations are self-evident and do not even require any additional explanation in the competent authority's published report. Unlike "as a result of unforeseen developments", which by definition are circumstances unforeseen when negotiating the obligations under the GATT 1994 and require explanations in the published report, the "of the effect of the obligations" does not necessitate an additional demonstration in the written report of the investigative authority if, as in the mentioned scenario, the safeguard measures go beyond the tariff level permitted according to the existing obligations under the GATT 1994.

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[1] Appellate Body Report, *US – Lamb*, paras. 105-107.
[2] Appellate Body Report, *US – Steel Safeguards*, para. 277.
[3] E.g. Panel Report, *US – Steel Safeguards*, e.g. para. 10.135, Panel Report, *Chile – Price Band System*, paras. 7.136-7.138, Panel Report, *US – Lamb*, paras. 7.29-7.32, Panel Report, *Argentina – Preserved Peaches*, para. 7.29, Panel Report, *Dominican Republic- Safeguard Measures*, paras. 7.131-7.140.

9. By contrast, the circumstances of the *India – Iron and Steel Products* case required further explanations in the written report of the Indian authorities. The rates imposed as safeguard rates from 20% to 10% were below India's tariff bindings on the product concerned, of 40% *ad valorem*.[4]

10. Similarly, in the *Dominican Republic – Safeguard Measures* case, where the Panel found fault with the lack of explanations in relation to "of the effect of the obligations",[5] the Dominican Republic had tariff bindings at the level of 40% ad valorem while the safeguards measures imposed were lower, i.e. between 38% and 14%.[6]

2. WITH REGARD TO THE DETERMINATION OF "SUCH INCREASED QUANTITIES"

11. The European Union recalls that both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 refer to "such increased quantities", as also noted by the Appellate Body in *Argentina – Footwear*.[7]

12. The plain meaning of these provisions, as clarified by the Appellate Body, requires authorities to analyze import trends over the entire period of investigation (POI).

13. Safeguard measures are emergency measures, as the very title of Article XIX suggests.[8] The use of the present tense of the verb ("is being imported") reinforces the idea that safeguard measures address situations in the recent past and not those which arose several years ago.[9] Thus, the POI should include data as recent as possible.

14. Accordingly, to impose a safeguard measure, there must be an increase in imports that is "recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'" to the domestic industry.[10]

15. Finally, one of Korea's assertions is that the USITC's report is devoid of any explanation as to why and how the USITC considered it was appropriate to cumulate imports of LRWs and imports of LRW parts. In this respect, the European Union recalls that the determination of "such increased quantities" should concern the product under investigation.

3. KOREA'S CLAIMS CONCERNING THE DEFINITION OF THE DOMESTIC INDUSTRY

16. ***Imported product.*** The first step in determining the scope of the domestic industry is the identification of the products which are 'like or directly competitive' with the imported product. Only when those products have been identified is it possible to identify the 'producers' of those products.[11] To the extent that imported products are not "like or directly competitive" with the product(s) that form(s) the domestic industry, they cannot cause injury.[12]

17. The relevant analysis in the context of Article 2.1 takes place at the level of the "like or directly competitive product" with respect to the imported product. While the starting point of the analysis is the imported product, there are no particular disciplines that apply to the definition of the imported product by the investigating authority. Hence the authority has some discretion in determining the scope of the imported product. This was also the position of a previous panel in *Dominican Republic – Safeguard Measures*.[13]

18. The European Union therefore considers that PSC/belt drive TL washers and CIM/belt drive FL washers may be included in the definition of "like or directly competitive" products even if they

[4] Panel Report, *India – Iron and Steel Products*, paras. 2.2 and 2.4; para. 7.121.
[5] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.146-7.147, 7.150.
[6] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 2.11, 2.19 and 7.57.
[7] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[8] Panel Report, *Ukraine – Passenger Cars*, para. 7.170.
[9] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130:
We believe that the relevant investigation period should not only end in the very recent past, the investigation period should be the recent past.
[10] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[11] Appellate Body Report, *US – Lamb*, para. 87.
[12] Appellate Body Report, *US – Lamb*, para. 86.
[13] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.181.

are expressly excluded from the definition of the imported product under investigation. In itself, such "mismatch" with the definition of the domestic industry alleged by Korea would not be inconsistent with the Agreement on Safeguards.

19. ***Inclusion of LRW parts and LRW units in the same domestic market.*** The European Union notes that LRW parts are used to repair LRW units and hence may constitute a so-called aftermarket. Aftermarkets are markets for the supply of products needed for, or in connection with, the use of what is often a relatively long-lasting piece of equipment that has already been acquired. This equipment is referred to as the 'primary product' (and hence its market is called 'primary market'). The complementary product(s) (typically spare parts or consumables) used in connection with the primary product are referred to as 'secondary products' (and their market is called 'secondary market' or 'aftermarket'). It is possible that the interaction between the primary market (LRW units) and the secondary market, or aftermarket (LRW parts), is such that the primary and secondary products form one single "system market" so that competition would take place between the LRW systems as a whole (including units and parts). A relevant question in this regard is whether a significant proportion of buyers make their choice taking into account the lifetime costs of the product in which case there may be one single system market.

20. It would not be sufficient for an authority to conclude that LRW units and LRW parts are "like or directly competitive" with each other by virtue of the fact that they are both imported products. The authority would have to assess whether LRW units are "like or directly competitive" with LRW parts. If one were to come to the conclusion that LRW units and LRW parts are not "like or directly competitive" in the present case (because they do not form an overall market for LRW systems, see above), the mere fact that both products are within the scope of the "imported product" as defined by the investigating authority would not justify their inclusion in one single domestic industry. Instead, separate injury analyses may have to be carried out for LRW units and LRW parts in order to prevent distorted outcomes.

21. ***Domestic and imported LRW parts as like and directly competitive products.*** While the European Union agrees that the terms "like" and "directly competitive" are alternatives, the European Union considers that particular caution should be exercised by an investigating authority before finding "likeness" in a situation where the products in question are found not to be "directly competitive". Artices 2 and 4 are about injury that is caused by increased imports. The EU submits that such causal relationship will normally be based upon a competitive relationship.

22. While the European Union does not conclude on this factual matter, it would seem that spare parts that are specifically manufactured for the respective LRW units of a particular brand may not be usable for LRW units of other brands. If so, this would significantly limit, if not exclude, their demand-side substitutability. This would speak in favour of placing LRW parts in separate domestic markets.

4. CONSEQUENTIAL VIOLATIONS

23. ***Relationship between Article 2.1 Agreement on Safeguards / Article XIX:1(a) GATT 1994 and Article 4.2.*** The European Union posits that if the condition of "increased imports" is not fulfilled, necessarily there is no basis for causation in Article 4.2 either. This is confirmed by the text of Article 4.2(a) and (b) which explicitly refers to the term "increased imports" in Article 2.1. This is confirmed by a comparison with the SCM Agreement and the AD Agreement. The requirement of "imports in such increased quantities" under Article 2.1 fulfils a function similar to Article 15.2 of the SCMA / Article 3.2 ADA which refer to a "significant increase" of subsidized or dumped imports. Previous panels have established that a violation of Article 15.2 SCMA leads to a consequential violation of the authority's causation analysis under Article 15.5 SCMA which is the equivalent of Article 4.2(b) of the Agreement on Safeguards.[14]

24. ***Consequential violations of Articles 2.1 and 4.2 due to incorrect definition of the domestic industry.*** If a domestic industry has been wrongly defined this will also render the injury and causation analysis WTO inconsistent. The term "domestic industry" as defined in Article 4.1(c) is used both in the context of Article 2 and Article 4 and hence is used uniformly throughout the authority's injury and causation analysis. An ill-defined domestic market will therefore also distort

[14] Panel Report, China X-Ray Equipment, para. 7.239; Panel Report, *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, para. 7.191.

the injury and causation analysis since such analysis is premised on a proper definition of the domestic industry. The panel in *US – Lamb* found that an inconsistent industry definition under the Agreement on Safeguards "would appear to compromise the investigation and the determination overall".[15] This is also the position of previous panels under the SCM Agreement and the Anti-Dumping Agreement.[16]

5. COMPETITIVE RELATIONSHOP AS REQUIREMENT FOR CAUSATION

25. The European Union considers the case law on the concepts of "like" and "directly competitive" products under the GATT 1994 to be of relevance in this context.[17] It establishes that the determination as to whether products are "like" (a term which is to be interpreted more narrowly than the term "directly competitive or substitutable"[18]) is essentially a determination about the nature and extent of the competitive relationship between these products[19] - and the determination of "direct compeititiveness" clearly also is about the competitive relationship. Case law relating to the AD Agremeent (which only contains the term "like" product) also clarified that a competitive relationship between the imported and domestic product is required for a finding of causation. The Appellate Body found: "[w]e do not see how such a [causation] finding can be made if the relevant imports are not substitutable for the domestic like products."[20] Therefeore, causation requires the existence of a competitive relationship.

26. Since an assessment of "likeness" is about the competitive relationship, the European Union takes the position that Article 2.6 ADA and footnote 46 SCMA do not require a separate assessment of the competitive relationship between imported and domestic products beyond the assessment of "likeness". This is supported by previous panels.[21] In case of sub-products the authority may however be required to carry out a competitive assessment for its causation analysis by sub-products.

6. OBLIGATION NOT TO DISREGARD EVIDENCE UNDER ARTICLE 4.2(A)

27. The European Union considers that the case law relating to Article 15.2 SCMA / Article 3.2 ADA and Article 15.4 SCMA / Article 3.4 ADA which establishes an obligation for an authority to examine the explanatory force of subject imports for the state of the domestic industry and not to disregard relevant evidence can be transposed to the Agreement on Safeguards.[22] The Appellate Body clarified that under Article 4.2(a) the authority must conduct an evaluation of "impact", notably of increased imports, on the "situation of the domestic industry". This is very similar to the "explanatory force" obligation under Article 15.4 SCMA / Article 3.4 ADA in the relationship between subject imports and the state of the industry.[23] Such explanatory force cannot be provided by the authority in case of evidence calling into question that explanatory force.

7. WITH REGARD TO THE WITHDRAWAL OR MODIFICATION OF THE US' CONCESSIONS WITHOUT JUSTIFICATION

28. The European Union considers that safeguard measures in the form of tariffs amounting to a withdrawal or modification of a concession (when the duties imposed exceed the bound levels provided in a schedule of concessions) and inconsistent with the Agreement on Safeguards are then inconsistent with Article II:1 of the GATT 1994.

[15] Panel Report, *US – Lamb*, para. 7.119.
[16] E.g., Panel Report, *Russia – Commercial Vehicles*, para. 7.16; Panel Report, *EC – Salmon (Norway)*, para. 7.124.
[17] Also see Panel Report, *Indonesia – Autos*, para. 14.174 (for the SCM Agreement).
[18] Appellate Body Report, *Japan – Alcoholic Beverages II*, paras. 112-113.
[19] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 170.
[20] Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.262.
[21] Panel Report, *EC – Salmon (Norway)*, para. 7.55; Panel Report, *EC – Fasteners (China)*, para. 7.267.
[22] Appellate Body Report, *China – GOES*, para. 149.
[23] Appellate Body Report, *US – Lamb*, para. 104; Appellate Body Report, *US – Wheat Gluten Safeguard*, para. 71.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Japan has a systemic interest in ensuring the proper and consistent interpretation of the WTO Agreements, including the provisions of the Agreement on Safeguards (the "Safeguards Agreement") and Article XIX of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994").

II. UNFORESEEN DEVELOPMENTS

A. WHETHER THE COMPETENT AUTHORITIES MUST MAKE AN AFFIRMATIVE FINDING THAT THE INCREASE IN IMPORTS IS THE RESULT OF UNFORESEEN DEVELOPMENTS

2. The requirement to determine whether the increase in imports is the result of "unforeseen developments" is an affirmative obligation that is based on the text of the first sentence of Article XIX: 1(a) of the GATT 1994. The phrase "as a result of unforeseen developments" indicates that such developments are "circumstances" that must exist *before* the "increased" imports, because the increased imports are a "result" of the "unforeseen developments". A "result" is "an effect, issue, or outcome from some action, process or design".[1] Thus, logically, the unforeseen developments must precede the increase in imports and are circumstances that must exist before a safeguard measure is applied. Since the "unforeseen developments" must occur *before* a safeguard measure is applied, competent authorities must make affirmative findings as to their existence in their published reports, as required under Articles 3.1 and 4.2(c) of the Safeguards Agreement.[2] A published report which does not discuss or offer any explanation as to why certain factors mentioned in it are to be considered "unforeseen developments" cannot be held to demonstrate that the safeguard measure has been applied "as a result of unforeseen developments".[3]

3. As to the timeframe for assessing the "unforeseen developments", panels and the Appellate Body have considered that such developments had to be unforeseen at the time when the relevant tariff concessions were negotiated, that is, usually the time at which the Member concerned joined the WTO.[4] The importing Member must demonstrate that, at that time, it did not foresee the developments that gave rise to the increased quantity of imports.[5] Thus, in accordance with Articles 3.1 and 4.2(c) of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994, the competent authorities' published report must contain, at a minimum, some discussion as to why the alleged "unforeseen developments" were "unexpected" to the importing Member concerned at the time that Member acceded to the WTO.

4. The panel's role is to examine and confirm if the published report at issue contains "detailed analysis" and "reasoned conclusions" on "pertinent issues" of "unforeseen development" pursuant to Articles 3.1 and 4.2(c) of the Safeguards Agreement. It is not possible for a panel to independently evaluate whether an increase in imports was as a result of unforeseen developments, based on subsequent argumentation and evidence presented exclusively in dispute settlement proceedings, and not contained in the published report.

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[1] Shorter Oxford English Dictionary, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2555 (cited in Appellate Body Report, *US – Steel Safeguards*, para. 315).

[2] Appellate Body Report, *US – Lamb*, para. 72.

[3] Ibid. para. 73.

[4] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.133. See also Appellate Body Reports, *Argentina – Footwear (EC)*, paragraph 96, and *Korea – Dairy*, paragraph 89, citing GATT Working Party Report, *US – Fur Felt Hats*, adopted 22 October 1951.

[5] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.133 and footnote 210. See also Appellate Body Report, *Korea – Dairy*, para. 89, citing GATT Working Party Report, *US – Fur Felt Hats*, adopted 22 October 1951.

B. LOGICAL CONNECTION BETWEEN THE UNFORESEEN DEVELOPMENTS AND THE INCREASE IN IMPORTS

5. The clause "as a result of unforeseen developments" in Article XIX:1(a) of the GATT 1994 has been interpreted to require a "logical connection" between the "unforeseen developments" and the increase in imports causing or threatening to cause serious injury.[6] In Japan's view, the conclusion that there is a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …" – and the conditions in the second clause of Article XIX:1(a) for the imposition of a safeguard measure is sound and reflects a correct application of the customary rules of interpretation of public international law.

6. Moreover, Japan notes that the increased imports must be found to cause or threaten to cause serious injury to the "domestic industry" of the importing Member in order to substantiate the explanation of the "logical connection". The "domestic industry" is defined under Article 4.1(c) of the Safeguards Agreement as the domestic producers "of the like or directly competitive products". Japan understands this to mean that the competent authorities must show *how* the "unforeseen developments" have modified such competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in an increase in imports that causes, or threatens to cause, serious injury to the domestic industry. The degree of detail required to explain how "unforeseen developments" resulted in increased imports causing or threatening to cause serious injury will depend on the circumstances of a particular case. When the alleged "unforeseen developments" are considered relating to only specific exporting countries, the competent authorities are required to explain how such "unforeseen developments" relating to a limited subset of Members resulted in increased imports – by, for example, analyzing import data per country.[7]

7. Furthermore, in the light of the ordinary meaning of the phrase "as a result of", the "unforeseen developments" must have occurred before the surge in the relevant imports. Japan observes that a determination to apply a safeguard measure without addressing whether the increased imports were the result of unforeseen developments is likely to violate Article XIX:1(a) as well as Articles 3 and 4.2(c) of the Safeguards Agreement.

C. THE EFFECT OF THE OBLIGATION INCURRED

8. The text of Article XIX:1(a) of the GATT 1994 establishes that the increase in imports must occur "as a result … of the effect of the obligations incurred by a Member". In the same way as the "unforeseen developments", the "logical connection" between the relevant GATT 1994 obligations and an increase in imports that has caused or is threatening to cause serious injury to the domestic industry is required. Japan further notes that, considering the possible "effect" of the GATT obligations – tariff concessions, in particular – in case of increased imports, the "effect" should mean how such obligations prevented the Member concerned from taking WTO-consistent measures in order to prevent or remedy the change generated by the "unforeseen developments" in the competitive relationship between imports and domestic like or directly competitive products.

9. Although both the "unforeseen development" and the "effect of the obligations" are the prerequisite circumstances referred to in the first clause of Article XIX:1(a) of the GATT 1994, their concrete "effects" to be explained are complementary. The former must have "result[ed]" in the increase in imports causing serious injury to the domestic industry, while the latter must have the "effect" of preventing the importing Member from taking appropriate measures to address such increase in imports.

[6] Appellate Body Report, *Korea – Dairy*, para. 85. See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.

[7] Panel Report, *US – Steel Safeguards*, paras. 10.127 and 10.133.

III. INCREASED IMPORTS

10. An increase in imports is one of the core prerequisites for the application of a safeguard measure.[8] The use of the word "such" which qualifies "increased quantities" in both Article 2.1 of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994 indicates that not any increase in imports is sufficient to satisfy this condition. This language "requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'".[9] Indeed, "the term 'such', which appears in the phrase 'such increased quantities' in both provisions, clearly links the relevant increased imports to their ability to cause serious injury or the threat thereof".[10]

11. Japan agrees with the United States' argument that "whether an increase in imports has been recent, sudden, sharp, and significant enough to cause or threaten serious injury to a domestic industry" "is not strictly a question of the timing and magnitude of the increase in import volume", but necessarily includes "a consideration of the present condition of the industry and the causal relationship between the increase in imports and any serious injury or threat of serious injury sustained by the industry".[11] However, the Panel will need to address whether descriptive statements, without any import data, comply with Articles 2.1 and 3.1 of the Safeguards Agreement. In particular, under Article 3.1, a published report must contain "findings and reasoned conclusions reached on all pertinent issues of fact and law".

IV. SERIOUS INJURY TO THE DOMESTIC INDUSTRY

12. In order to determine whether the domestic industry suffered serious injury or threat thereof caused by increased imports, the competent authorities must examine "at a minimum, each of the factors listed in Article 4.2(a)".[12] They also have to evaluate "all other factors that are relevant to the situation of the industry concerned".[13] The evaluation under Article 4.2(a) "is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere 'check list'".[14] In fact, "[u]nder Article 4.2(a), competent authorities must conduct a substantive evaluation of 'the '*bearing*', or the '*influence*' or '*effect*' or '*impact*' that the relevant factors have on the 'situation of [the] domestic industry'".[15] It is only "[b]y conducting such a substantive evaluation of the relevant factors, [that] competent authorities are able to make a proper overall determination, *inter alia*, as to whether the domestic industry is seriously injured or is threatened with such injury as defined in the Safeguards Agreement".[16]

13. The part of the U.S. International Trade Commission ("USITC") Report that addresses the "serious injury" requirement is titled "IV. Substantial Cause of Serious Injury or Threat of Serious Injury".[17] However, Japan has doubts that it appropriately explains the USITC's "findings and reasoned conclusions" pursuant to Article 3.1 of the Safeguards Agreement. First, in section "B. Existing Antidumping and Countervailing Duty Orders",[18] if the USITC considered the past AD/CVD measures on the relevant product as a background, it should have explained in more detail how the existence of these other trade remedy measures impacted its analysis and findings. Second, the part of the USITC Report addressing the "serious injury" requirement (section "D. The Domestic Industry is Seriously Injured") does not contain any evaluation on the two of the factors listed in Article 4.2(a) of the Safeguards Agreement ("the rate and amount of the increase in imports of the product concerned in absolute and relative terms", and "the share of the domestic market

[8] Appellate Body Report, *US – Steel Safeguards*, para. 331. See also Panel Report, *Ukraine – Passenger Cars*, para. 7.119.

[9] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131. (underlining added)

[10] Appellate Body Report, *US – Steel Safeguards*, para. 346.

[11] United States' first written submission, para. 189.

[12] Appellate Body Report, *Argentina – Footwear (EC)*, para. 136. See also Panel Report, *Korea – Dairy*, para. 7.55 ("The use of the wording 'in particular' makes it clear to us that, among 'all relevant factors' that the investigating authorities 'shall evaluate', the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry.")

[13] Appellate Body Report, *Argentina – Footwear (EC)*, para. 136.

[14] Appellate Body Report, *US – Lamb*, para. 104. (emphasis original)

[15] Appellate Body Report, *US – Lamb*, para. 104.

[16] Ibid.

[17] USITC Report (KOR-1), pp. 20-51.

[18] Ibid. pp. 22-23.

taken by increased imports"). Third, the key finding of the same section[19] is only that "a significant number of firms were unable to carry out domestic production operations at a reasonable level of profit", which relates to "profits and losses" as enumerated in Article 4.2(a) of the Safeguards Agreement.[20] Given that the domestic producer did not suffer serious injury in terms of the idling of production facilities ("capacity utilization") or "unemployment",[21] the finding on only one factor which showed a negative trend does not seem sufficient to demonstrate "serious injury" pursuant to Article 4.1 of the Safeguards Agreement – a significant "overall" impairment in the position of a domestic industry. Fourth, the short analysis on injury is not well-connected to the causation analysis in section "E. Increased Imports are a Substantial Cause of Serious Injury to the Domestic Industry".[22]

14. Japan additionally notes that, under Articles 4.1(a) and 4.2(a), "serious injury" shall be understood to mean "a significant overall impairment in the position of a domestic industry", which must be determined by evaluating "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry". It would be coherent that a finding of "overall" impairment would require examination of "all relevant factors" of the whole industry, including all sectors and segments. However, these provisions require an investigating authority to "[evaluate] all relevant factors", not to *find "impairment" for all segments* of the domestic industry. Even without taking such data into account, a determination of "serious injury" may still comply with these provisions, if the evaluation of all other "factors" of the other segments (i.e. the remaining part of the domestic industry after USITC excluding the domestic producers of belt driven washers from consideration), on the basis of objective evidence, still supports the "causal link" (Article 4.2(b) of the Safeguards Agreement) between the subject imports and the "serious injury" to the whole domestic industry. It is also necessary that detailed analysis and reasoned conclusion on the causal link is clearly demonstrated in the published report (Article 3.1 of the Safeguards Agreement).

V. CONDITIONS OF COMPETITION AND THE DETERMINATION OF CAUSATION

15. Article XIX:1 of the GATT 1994 envisages that the subject imported products substitute the domestic products in the market of the importing Member because their competitive relationship has been modified to the detriment of the domestic industry as a result of "unforeseen developments". Although nothing in the text in Articles 4.2(a) and (b) of the Safeguards Agreement provides direct guidance on how to examine the condition of competition, Japan considers that it would be difficult for an investigating authority to reach a "reasoned" affirmative conclusion on causation without having examined the condition of competition between the subject imports and the domestic products.

16. An investigating authority's examination should start with the market interaction between the domestic products and the subject imports. In Japan's view, an investigating authority can make a finding of serious injury to the whole domestic industry on the basis of the negative effect the subject imports can have on part of the domestic industry, depending on the significance of that part in the whole domestic industry. It is unlikely that an affirmative conclusion based upon the negative effect on a part of the domestic industry which is not competitive with the subject imports would be "reasoned". If there is no competition, the negative effect could not have been caused by the subject imports, and thus, should not be counted as part of injury to the domestic industry attributable to the subject imports.

VI. ONLINE PANEL MEETING AND THIRD PARTY RIGHTS

17. Finally, it is regrettable that the Panel has decided not to pose any questions to the third parties at the third party session even though Japan recognizes the Panel's responsibility for arranging and organizing the process.

[19] Ibid. pp. 33-37.
[20] Ibid. p. 33.
[21] Ibid. p. 37.
[22] Ibid. pp. 38-44.

18. In the light of Article 10.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") which provides that the third parties' interests "shall be fully taken into account during the panel process", the orally posed questions, which have been customarily put to third parties, often help the third parties understand the specific concerns of the Panel to enable them to later submit answers that are more responsive and helpful to the Panel. It also allows third parties to be more effective in communicating their own views to the Panel. Therefore, encouraging substantive discussions among Members, including third parties in this manner, is useful and important, and will ultimately contribute to "high-quality panel reports". Skipping this essential part of the panel process merely because of the mode of the third party session is not productive.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO*

1. Mexico is thankful for the opportunity to express its views on this dispute. Before we make our opinions known on certain substantive matters, Mexico considers it necessary to refer to the assessment by the United States that the DSU does not assign precedential value to panel reports adopted by the DSB, or to interpretations contained in those reports.[1]

2. In our opinion, a legal system cannot aspire to become a reliable and predictable basis that evolves in a logical and gradual manner unless it is subjected to certain guidelines that guarantee its predictability. For this reason, in proceedings under the WTO dispute settlement system, consideration of previous findings made by the DSB cannot be discretionary.

3. Precisely in this context, Article 3.2 of the DSU states that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. This is why it is imperative for the Members to have the certainty that the same issue will be resolved in the same way. Thus, the system offers fairly reasonable guidance as to what should be considered appropriate henceforth, on the basis of interpretations already made and adopted by the DSB in similar cases.

4. Mexico does not agree with the United States' interpretation of the term "unforeseen developments". The United States indicates in its written submission that the increase in imports in this case occurred as a result of unforeseen developments due to the fact that "*the negotiators of those tariff concessions did not foresee that a producer would be able to expand from producing zero or low volumes of an LRW model to producing large volumes in a very short time*".[2] A contrario, for the expansion of a producer to be disregarded as an unforeseen development, it must have been foreseen by the negotiators at the time of making tariff concessions. However, it is very difficult to contend that the negotiators of tariff concessions could not have imagined that, once the concessions were made, there would not be increases in import volumes, or even that there would be significant increases in a short time. To contend that the negotiators were hoping that increases would not result is a contradiction in terms because it would imply that concessions were being negotiated in order to avoid sudden increases. Obviously, this is unacceptable.

5. On the other hand, if what the United States is contending is that the negotiators could not foresee that that specific producer could expand by a specific amount in a specific period of time, then what the United States would be contending is that, for the expansion of a given producer in a period to be a foreseen consequence, the negotiators would have had to have known, decades before, specifically that that producer was going to increase its capacity by a specific amount in a determined period. Logically, it is impossible to predict such a thing, and for this reason, absolutely all future events have to be considered as "unforeseen developments", which is also unacceptable.

6. This last possible interpretation by the United States would mean that the condition set forth in Article XIX of the GATT related to "unforeseen developments" would have no practical effect, which runs counter to the principle of "effective treaty interpretation" or the principle of "effectiveness", which is part of the rules for its interpretation.

7. The United States also contends that the determination as to serious injury need not include unforeseen developments.[3] The United States bases its claim on the fact that the phrase "unforeseen developments" does not appear anywhere in the Safeguards Agreement and therefore is not one of the pertinent issues in determining whether the increase in imports has caused or threatened to cause serious injury.

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* Original in Spanish
[1] First written submission of the United States, paragraph 13.
[2] First written submission of the United States, paragraph 18.
[3] First written submission of the United States, paragraph 30.

8. The United States contradicts itself in its arguments as subsequently it states that "the requirements in the first clause of Article XIX:1(a) are not coequal 'prerequisites' with the requirements of the second clause. Rather, 'as a result of unforeseen developments and of the effect of the obligations concurred' are 'circumstances' that must be shown, whereas 'any product is being imported … in such increased quantities and under such conditions as to cause or threat serious injury' are 'conditions' that must be met".[4] (emphasis added).

9. On the one hand, the United States contends that the unforeseen developments are not a *sine qua non* for making a determination of serious injury. However, it does concede that unforeseen developments and the effects of obligations incurred "must be shown". The foregoing is simply devoid of meaning. Furthermore, the United States argues that there is a certain differential weighting in the requirements between the first and second clauses of Article XIX of the GATT. In Mexico's opinion, elements such as "conditions", "requirements" or "developments" established in a provision can only carry a different weight if it is possible to dispense with demonstrating any one of them. The fact that all must be shown confers the same attributes to them, irrespective of where they appear in the text of the provision containing them. In any case, WTO jurisprudence firmly establishes that Article XIX of the GATT forms, together with the Safeguards Agreement, one and the same set of rules that are complementary and must be complied with for the purpose of being able to duly impose a safeguard measure.

10. Along the same lines, the United States affirms that the extracts from *US – Lamb* cited by Korea in its submission regarding the logical connection between the first and second clauses of Article XIX of the GATT, indicate nothing about the considerations for evaluating whether one side of the connection (unforeseen developments) must appear in the report of the investigating authority, since there is simply nothing that would prevent a panel from evaluating the evidence presented in the dispute to demonstrate such a connection.[5]

11. In this regard, we agree that nothing prevents a panel from evaluating whether an increase in imports was a result of unforeseen developments. However, in our opinion, when the Appellate Body asserts that evaluation of compliance with Article XIX of the GATT would be vague and uncertain without a demonstration of the unforeseen developments in the report of the competent authorities, it does not mean that the panel cannot make this evaluation on the basis of elements of information brought in the dispute, but rather that the absence of such a reference in the report of the competent authorities would mean that the elements contained in the report of the authority do not permit an understanding of what the authority took into account and how, or of what it rejected, in issuing its findings. Obviously, this implies the possibility of the authority making a *post-hoc* reasoning to justify its findings, which is unacceptable.

12. Similarly, we disagree with the United States in its assertion that, as the Safeguards Agreement makes no reference to unforeseen developments, it is not necessary to mention it in its report.[6] The foregoing […], since it is clear that Article 3.1 of the Safeguards Agreement provides that the competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law, such as unforeseen developments.

13. Indeed, as the Appellate Body ruled in *US – Steel Safeguards*[7], demonstration of unforeseen developments is one of the issues of law that the investigating authority must include in its report, as it is this body and not the panel that has an obligation to publish in its report the observations and conclusions at which it has arrived.

14. Mexico thanks the panel and the parties for their attention and is available to respond to any questions the panel may consider pertinent.

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[4] First written submission of the United States, paragraph 41.
[5] First written submission of the United States, paragraphs 44 and 46.
[6] First written submission of the United States, paragraphs 49 and 50.
[7] Report of the Appellate Body, *US — Steel Safeguards* (DS248, 249, 251, 252, 253, 254, 258, 259), paragraph 326.