United States – Safeguard Measure on Imports of Large Residential Washers

(DS546)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

May 7, 2021

TABLE OF CONTENTS

TABLE OF REPORTS iv

TABLE OF EXHIBITS vii

TABLE OF ACRONYMS ix

INTRODUCTION AND EXECUTIVE SUMMARY 1

ARGUMENT 5

I. Korea Continues to Misapply GATT 1994 Article XIX Obligations to the Facts of This Dispute 5

A. Korea Errs in Arguing that the Use of "Effect" and "Result of" in GATT 1994 Article XIX:1(a) Require Use of the Same Analysis Used to Determine Whether Increased Imports Cause Serious Injury 6

B. Korea's Characterization of the USITC's Identification of Tariff Obligations as "Out of Context" is a Misnomer. 7

C. "*Ex Post*" Explanations Are Often a Feature of Claims Under the DSU, Including Those Involving Article XIX. 8

II. The Commission Defined the Domestic Industry In Accordance With the Safeguards Agreement 9

A. The Commission Correctly Included Producers of Belt-Driven Washers in the Domestic Industry 10

B. The Commission Correctly Included Covered Parts Production in the Domestic Industry 12

1. The Commission's inclusion of covered parts production in the domestic industry was consistent with Articles 2.1 and 4.1(c) of the Safeguards Agreement 12

2. The text of Article 4.1 (c) plainly reflects that the term "like" has an independent meaning separate from the meaning of "directly competitive" 15

3. The Commission reasonably defined the domestic industry to include covered parts production under the facts of the case 17

III. The Commission's Analysis of Increased Imports Was Consistent with the Safeguards Agreement 21

A. The Commission relied on accurate data concerning increased imports 22

B. The near doubling of import volume found by the Commission satisfied the increased imports requirement under SGA Article 2.1 22

IV. The Commission's Finding that the Domestic Industry Was Seriously Injured Was Consistent with the Safeguards Agreement 26

A. The presence of positive factors does not subject serious injury findings to "a heightened evidentiary burden" 27

B. The Commission evaluated the rate and amount of the increase in imports and the share of the domestic market taken by increased imports in accordance with the Safeguards Agreement 29

C. The Commission provided a reasoned and adequate explanation for its serious injury finding 32

V. The Commission's Causation Analysis Was in Accordance with the Safeguards Agreement 37

A. The Commission demonstrated a causal link between increased imports and the domestic industry's serious injury in accordance with the Safeguards Agreement 38

1. Objective data supported the Commission's finding that the domestic industry was in a cost-price squeeze 38

2. Objective data supported the Commission's finding that increased volumes of low-priced imports depressed and suppressed the domestic industry's sales prices 39

B. The Commission Complied with the Non-Attribution Requirement 43

1. The Commission's reliance on statutory language was not an admission of injury caused by other factors 44

2. The Commission provided a reasoned and adequate explanation for its finding that joint pricing explained none of the domestic industry's serious injury 46

3. The Commission provided a reasoned and adequate explanation for its finding that respondents' brand deterioration argument explained none of the domestic industry's serious injury 48

VI. Korea Bases its Article 5.1 Argument on a Legal Standard That Does Not Exist 50

A. The Disciplines Governing the Competent Authorities' Findings and Report Do Not Apply to Article 5.1 50

B. Korea's Attempt to Impose an Ambiguous, "Compelling Alternate Explanation" Standard with Respect to Article 5.1 Totally Lacks Support 51

VII. Korea Has Not Established That the Notifications and Opportunity to Consult Provided by the United States Was Inconsistent with Safeguards Agreement Articles 8 and 12 53

A. Korea's Arguments Regarding Initiation of the USITC Investigation Rely on a Semantic Distinction that Does Not Demonstrate An Inconsistency with Article 12.1(a). 54

B. Korea Provides No Valid Support for its Argument That Article 12.1(b) Requires Competent Authorities to Announce Their Injury Determinations Only After They Have Issued Their Reports. 56

C. The United States Provided Numerous, Substantial Opportunities for Prior Consultations, and Korea has Failed to Establish that these Opportunities were not "Adequate" for Purposes of Article 12.3 of the Safeguards Agreement. 57

CONCLUSION 59

TABLE OF REPORTS

Short Title	Full Citation
Argentina – Footwear (EC) (AB)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
Argentina – Footwear (EC) (Panel)	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
China – Broiler Products (Panel)	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
Dominican Republic – Safeguard Measures (Panel)	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
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Bananas III (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EC – Large Civil Aircraft (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
India – Iron and Steel Products (Panel)	Panel Report, *India – Certain Measures on Imports of Iron and Steel Products*, WT/DS518/R, circulated 6 November 2018

Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
Korea – Dairy (Panel)	Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
Korea – Pneumatic Valves (Panel)	Panel Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/R, circulated 12 April 2018
Thailand – H-Beams (Panel)	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R
Ukraine – Passenger Cars (Panel)	Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R, adopted 20 July 2015
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Lamb (AB)	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
US – Lamb (Panel)	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 20012001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R
US – Large Civil Aircraft (II) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012

US – Line Pipe (AB)	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
US – Steel Safeguards (AB)	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
US – Steel Safeguards (Panel)	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / 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
US – Tyres (AB)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011
US – Upland Cotton (Article 21.5 – Brazil) (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton– Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008
US – Upland Cotton (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Wheat Gluten (AB)	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

TABLE OF EXHIBITS

Number	Exhibit
U.S. First Written Submission	
Exhibit US-1	*Large Residential Washers; Institution and Scheduling of Safeguard Investigations and Determinations That the Investigation is Extraordinarily Complicated*, 82 Fed. Reg. 27075 (June 13, 2017)
Exhibit US-2	Hearing Transcript, pp. 4-7, 56-57, 85-86, 98-99, 157, 160-62, 205, 227-28
Exhibit US-3	Petition, pp. 5-9, 40-41
Exhibit US-4	*Large Residential Washers from China*, Inv. No. 731-TA-1306 (Preliminary), USITC Pub. 4591 (Feb. 2016), pp. 8-9
Exhibit US-5	*Large Residential Washers from China*, Inv. No. 731-TA-1306 (Final), USITC Pub. 4666 (Jan. 2017), pp. 7-9
Exhibit US-6	Petitioner's Comments on the Draft Questionnaires, pp. 4-6
Exhibit US-7	LG's Comments on the Draft Questionnaires, pp. 24-26
Exhibit US-8	Samsung's Comments on the Draft Questionnaires, p. 22
Exhibit US-9	Trade Act of 1974, §§ 201-205
Exhibit US-10	Proclamation 9694 Annex
Exhibit US-11	USITC Regulation, 19 C.F.R. §206.14
U.S. Responses to Panel's First Set of Questions	
Exhibit US-12	Hearing Transcript, pp. 90, 142
Exhibit US-13	Table C-2 from December 2017 USITC Report (Directional Version)
Exhibit US-14	Table II-1 from December 2017 USITC Report (Directional Version)

Exhibit US-15	*LG Electronics, Inc. v. U.S. Int'l Trade Comm'n*, 26 F.Supp.3d 1338, 1343, 1350 (Ct. Int'l Trade 2014)
Exhibit US-16	G/SG/N/8/USA/10/Suppl.2
Exhibit US-17	G/SG/N/8/USA/10/Suppl.1
Exhibit US-18	G/SG/N/10/USA/8
Exhibit US-19	G/SG/201
Exhibit US-20	G/SG/174
Exhibit US-21	G/SG/171
Exhibit US-22	G/SG/164/Suppl.1
U.S. Second Written Submission	
Exhibit US-23	*China – GOES* U.S. Appellee Submission
Exhibit US-24	Remedy Hearing Transcript, pp. 199-201
Exhibit US-25	Samsung Posthearing Remedy Brief, p. 14
Exhibit US-26	Injury Hearing Transcript, pp. 54-55, 61, 101
Exhibit US-27	LRWs from China, USITC Pub. No. 4666 (Jan. 2017), pp. 36-38
Exhibit US-28	Whirlpool Amended Petition
Exhibit US-29	Notice of Institution
Exhibit US-30	USITC Letter to USTR
Exhibit US-31	Korea Comments to USTR and Testimony for January 3, 2018 Hearing
Exhibit US-32	Email from Chun to Mroczka
Exhibit US-33	Letter from Kim to Wilson

TABLE OF ACRONYMS

Acronym	Full Name
COGS	Cost of Goods Sold
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT	General Agreement on Tariffs and Trade
LRW	Large Residential Washer(s)
MFN	Most-Favored Nation
R&D	Research and Development
SGA	Agreement on Safeguards
TRQ	Tariff-Rate Quota
USITC	United States International Trade Commission
WTO	World Trade Organization

INTRODUCTION AND EXECUTIVE SUMMARY

1. 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.

2. 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 ("LRW") 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.

3. 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. 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.

4. 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.[1] 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.[2] 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.[3]

5. 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.[4] 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.[5] 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

[1] *See* USITC Report, pp. 22-23, I-3-4 (Exhibit KOR-1).

[2] *See* USITC Report, pp. 29-30, 36 (Exhibit KOR-1).

[3] USITC Report, p. 53 n.219 (Exhibit KOR-1).

[4] USITC Report, pp. 20, 38-39 (Exhibit KOR-1).

[5] USITC Report, pp. 27-32, 40-44 (Exhibit KOR-1).

spending that imperiled the industry's competitiveness.[6] 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.[7] Rejecting these arguments as unsupported by the record, the Commission found that increased imports were "the only explanation" for the industry's serious injury.[8]

6. 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.[9] 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.[10] 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.[11]

7. Finally, 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.[12] 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.[13] As discussed in the following sections, the Panel should reject Korea's challenges to these and other aspects of the Commission's affirmative

---

[6] USITC Report, pp. 33, 38, 44 (Exhibit KOR-1).

[7] USITC Report, pp. 45, 47 (Exhibit KOR-1).

[8] USITC Report, pp. 38, 45-51 (Exhibit KOR-1).

[9] USITC Report, pp. 16-17 (Exhibit KOR-1).

[10] USITC Report, pp. 20, 38-44 (Exhibit KOR-1); see also Korea Resp. Panel 1st Questions, Question 24.

[11] USITC Report, pp. 33-37 (Exhibit KOR-1)

[12] USITC Report, pp. 24-25, 40-41 & n.255 (Exhibit KOR-1).

[13] *See* USITC Report, pp. 21-22, 51 (Exhibit KOR-1).

serious injury determination and uphold the determination as fully consistent with the Safeguards Agreement.

8. 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.

9. Finally, regarding Korea's Articles 8 and 12 claims, the United States notified the Committee on Safeguards at each relevant step of the process toward adoption of the LRWs safeguard measure, from its 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 reports have accepted as "immediate" for purposes of Safeguards Agreement Article 12 – and provided an opportunity for prior consultations beginning in early December of 2017, approximately two months before the measure took effect. 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.

ARGUMENT

I. KOREA CONTINUES TO MISAPPLY GATT 1994 ARTICLE XIX OBLIGATIONS TO THE FACTS OF THIS DISPUTE

11. 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, which the United States has already demonstrated to be unpersuasive.[14]

12. The U.S. first written submission explained that the text of GATT 1994 Article XIX:1(a) distinguishes between what past reports have correctly described as the "*circumstances*" listed in the first clause and the *conditions* in the second clause. The "conditions" are imports in such increased quantities and under such conditions as to cause or threaten serious injury, concepts mirrored in the "conditions" for imposition of safeguard measure in Article 2.1 of the Safeguards Agreement and clarified in the disciplines of Safeguards Agreement Articles 2, 3, and 4. The "circumstances" are the existence, as a matter of fact, of unforeseen developments and obligations incurred, concepts that do not appear in the Safeguards Agreement. 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.[15] Thus, Article 3.1 cannot permissibly be read to require the competent authorities to make findings as to unforeseen developments and obligations incurred.

13. The selective excerpts from the Appellate Body reports in *US – Lamb* and *US – Steel Safeguards,* on which Korea exclusively relies, reflect an incorrect understanding of the relevant obligations. The reasoning reflected in these excerpts did not address all of the potentially relevant arguments, and disregarded the ordinary meaning of the terms in their context and in light of the object and purpose of the relevant agreements, contrary to the rules of interpretation reflected in Article 31 of the Vienna Convention.

14. 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 ("LRW") 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

[14] U.S. first written submission, paras. 20-21, 39-51.

[15] U.S. first written submission, paras. 49-50 (discussing *Korea – Dairy* and *United States – Line Pipe*).

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.

15. Accordingly, the United States refers the Panel to the arguments in its previous submissions.[16] The following sections elaborate on some of those arguments in response to certain references in Korea's recent responses to the Panel on GATT 1994 Article XIX questions.

A. Korea Errs in Arguing that the Use of "Effect" and "Result of" in GATT 1994 Article XIX:1(a) Require Use of the Same Analysis Used to Determine Whether Increased Imports Cause Serious Injury.

16. Korea argues that the clause "if as a *result* of unforeseen developments and the *effect* of the obligations incurred,"[17] 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.[18] It provides no valid support for this assertion.

17. Korea's references to the *Dominican Republic – Safeguard Measures* and *Ukraine – Cars* panel reports do not support this assertion.[19] The sole substantive point these reports make is that to demonstrate compliance with the first clause of Article XIX:1(a), a Member must demonstrate that the increased imports are the effect of obligations incurred, including tariff concessions. The United States did this when it explained that its tariff concession on large residential washers prevented it from increasing tariffs to modulate the increase in imports. Article XIX:1(a) does not require anything more.

---

[16] U.S. first written submission, paras. 18-55; U.S. Opening Statement at First Panel Videoconference, paras. 8-11; U.S. Resp. Panel 1st Questions, paras. 82-93.

[17] GATT 1994, art. XIX:1(a) (emphasis added).

[18] Korea Resp. Panel 1st Questions, para. 220 (emphasis added). "Genuine and substantial relationship of cause and effect" is familiar parlance in WTO reports on causal link in the injury context. *See US – Large Civil Aircraft (II) (AB)*, para. 913 (referring to *US – Upland Cotton (AB)*, para. 438; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 374; *EC – Large Civil Aircraft (AB)*, para. 1232).

[19] *See*, *e.g.*, *Dominican Republic – Safeguard Measures (Panel)* (stating the competent authority must "identify those obligations incurred under the GATT 1994 that are linked with the increase in imports", and that "[t]hese findings and conclusions must be reflected in the report of the competent authority"); *cf. China – GOES (AB)*, paras. 135, 147, 151 (stating that the relevant AD and SCM Agreement provisions postulate certain inquiries as to the effect of subject imports on domestic prices, and distinguishing between price effects and causation at large).

18. Korea also purports to find support for its interpretation in arguments made by the United States in *China – GOES*.[20] However, that dispute addressed different obligations under different agreements – Articles 3 of the Antidumping Agreement and 15 of the SCM Agreement. Those Articles set out explicit considerations for evaluating the "effect" of dumped or subsidized imports on prices. Article XIX:1 does not call for use of these considerations in evaluating unforeseen developments or obligations incurred. Moreover, the United States' specific argument in that dispute was that the obligations concerning the establishment of a causal link under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, such as the non-attribution of factors other than increased imports, were not applicable to the price effects provisions in Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement.[21] The analogous point in this proceeding is that the obligations concerning a competent authority's evaluation of whether increased imports "cause or threaten to cause" serious injury are not applicable to the evaluation of "the result of" unforeseen developments or "the effect of" obligations concerned.

B. Korea's Characterization of the USITC's Identification of Tariff Obligations as "Out of Context" is a Misnomer.

19. Korea concedes that the USITC report does contain a description of the tariff lines at issue, including the bound (MFN) rates.[22] These are the tariff concessions that the United States made, which prevented it from increasing applied tariffs so as to modulate the increase in imports. According to Korea, however, this recitation is "out of context."

20. The tariff concessions speak for themselves. 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.

21. More fundamentally, no additional context is needed in the identification of such tariff concessions because, as the Appellate Body correctly noted in *Korea – Dairy*, 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. [23]

22. Even if this Panel were to adopt the view reflected in the *Ukraine – Passenger Cars* and *Dominican Republic – Safeguard Measures* panel reports that the effect of the obligations incurred is a pertinent issue of fact or law under Safeguards Agreement Article 3.1, nothing in

---

[20] Korea Resp. Panel 1st Questions, paras. 215-16 & n.180.

[21] *See China – GOES (AB)*, U.S. Appellee Sub., paras. 36-43 (Exhibit US-23).

[22] *See* Korea Resp. Panel 1st Questions, para. 221.

[23] *Korea – Dairy (AB)*, para. 84.

Article 3.1, or Article 4.2(c), which pertains to the competent authority's report, dictates or specifies a particular structure or order of analysis for the report. WTO reports correctly reflect the understanding that the competent authorities have discretion in presenting relevant information, including as to structure, format and sequence.[24] Thus, Korea's objection to the location and form of the USITC's reference to these concessions is unpersuasive.

C. "*Ex Post*" Explanations Are Often a Feature of Claims Under the DSU, Including Those Involving Article XIX.

23. In its responses to the Panel, Korea asserts that the U.S. explanation of events that could constitute unforeseen developments is "an *ex post* justification that is not admissible in WTO proceedings,[25]" that the Panel could not consider them without conducting *de novo* review, and that, consequently, the Panel "does not need to examine the United States' arguments."[26] Korea erroneously conflates three separate concepts.

24. First, and as a general matter, 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. To cite two examples, such would likely be the case in a dispute challenging an import ban under GATT Article XI, or a claim brought under the TRIPS Agreement. The exception to crediting *ex post* justifications is limited to disciplines that call for a Member to explain its rationale *before* taking actions, such as obligations under the Antidumping Agreement, SCM Agreement, and Safeguards Agreement disciplines that pertain to an investigating or competent authority's record-based determination.

25. This exception is related to the second point concerning *de novo* review. As the United States highlighted in its responses to the Panel, whether the report of a competent authority complies with the obligations placed upon *competent authorities* is separate from the question of whether the Member has complied with obligations placed directly on the *Member*. 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.[27] 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,

---

[24] *US – Steel Safeguards (AB)*, para. 295 ("{W}e agree with the United States that competent authorities 'may choose any structure, any order of analysis, and any format for {the} explanation that they see fit, as long as the report complies' with Article 3.1.").

[25] Korea Resp. Panel 1st Questions, para. 223.

[26] Korea Resp. Panel 1st Questions, para. 229.

[27] U.S. first written submission, para. 15 (citing *US – Lamb (AB)*, paras. 105-07; *Korea – Dairy (Panel)*, para. 7.30) (emphasis added).

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.

26. 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, therefore, properly base its evaluation of such claims on argumentation and evidence presented exclusively in a WTO dispute settlement proceeding.

27. As such, to address the final point, 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.[28] 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.

28. Korea thus has no basis to suggest that the Panel may disregard the U.S. arguments simply because they contain explanations outside of those the competent authority was obligated to provide in its report. The Panel, not Korea, will determine the persuasiveness of the U.S. views in light of the text of Article XIX and the facts before it.

* * * * *

29. For the foregoing reasons and those provided at length in the U.S. first written submission, statements to the Panel, and responses to the Panel's questions to date, Korea has not demonstrated that the United States acted inconsistently with its GATT Article XIX obligations.

II. THE COMMISSION DEFINED THE DOMESTIC INDUSTRY IN ACCORDANCE WITH THE SAFEGUARDS AGREEMENT

30. Korea's challenge to the Commission's definition of the domestic like product, and its corresponding definition of the domestic industry to encompass all domestic producers of the like product, amounts to a disagreement over the Commission's inclusion of domestic production of covered parts and belt-driven washers in the domestic industry. But there is no dispute that Articles 2.1 and 4.1(c) require competent authorities to include producers of all articles "like or directly competitive" with the product under investigation in the domestic industry. Nor does Korea dispute the factual basis of the Commission's conclusion that domestically produced covered parts were like the imported covered parts subject to investigation or that domestically produced belt driven washers were like imported large residential washers ("LRWs"). Instead,

[28] *See*, *e.g.*, *EC – Bananas (III) (AB)*, para. 143.

Korea urges the application of obligations found nowhere in the Safeguards Agreement, arguing that domestic "like" products must be perfectly competitive and perfectly parallel with the product under investigation. As explained below, the Commission defined the domestic industry in accordance with the Safeguards Agreement, contrary to Korea's argument.

A. The Commission Correctly Included Producers of Belt-Driven Washers in the Domestic Industry

31. Korea's suggests that any "good faith" interpretation of Articles 2.1 and 4.1(c) of the Safeguards Agreement would impose a requirement that competent authorities define the domestic like product to include only articles that are perfectly parallel to articles within the products under investigation.[29] Korea then appears to contradict its position by acknowledging that the Agreement requires competent authorities to define the domestic industry to include domestic producers of all articles "like or directly competitive" with the product under investigation, while excluding producers of articles that are not "like or directly competitive" with the product under investigation.[30] As Korea correctly recognizes, the task for competent authorities is to identify the domestically produced articles "like or directly competitive" with the products under investigation, not the articles "parallel" or perfectly identical in all respects to the products under investigation. Indeed, Korea cites with approval the panel's finding in *Dominican Republic – Safeguard Measures* that "{i}f a product is like or directly competitive with respect to the imported product, that product must be considered for the purpose of defining the domestic industry."[31] The United States agrees that producers of all domestically produced articles "like or directly competitive" with the products under investigation must be included in the domestic industry.

32. During the safeguard investigation of LRWs, respondents LG and Samsung argued that domestically produced belt-driven washers were like imported LRWs. As explained in paragraph 162 of the U.S. first written submission, respondents argued in their joint prehearing brief that belt-driven washers "clearly compete with the domestic industry and with in-scope imports" of LRWs and testified at the Commission's hearing that "excluded washers," meaning belt driven washers, "compete directly with in-scope washers," meaning LRWs, "and no clear dividing line distinguishes them."[32] Respondents even introduced physical exhibits to demonstrate their point that belt-driven washers were virtually indistinguishable from LRWs, with the sole exception of "'the combination of a controlled induction motor and a belt drive

---

[29] Korea Resp. Panel 1st Questions, para. 9. See Korea first written submission, paras. 172, 202, 204, 207.

[30] Korea Resp. Panel 1st Questions, paras. 10, 14.

[31] Korea Resp. Panel 1st Questions, para. 16 (quoting Dominican Republic – Safeguard Measure (Panel), para. 7.191).

[32] *See* LG and Samsung's Prehearing Injury Brief at 28-29; Hearing Transcript, p. 227 (Smith) (Exhibit US-2).

system.'"[33] Whirlpool agreed with respondents, and urged the Commission to define the domestic like product to include belt-driven washers.[34]

33. Recognizing that all parties were in agreement that belt-driven washers were like LRWs, the Commission reasonably took this unanimous perception into account in defining the domestic like product to include belt-driven washers. As explained in paragraph 161 of the U.S. first written submission, the Commission's analysis of its traditional like product factors also supported this definition. The application of these factors showed that domestic belt driven washers were like imported LRWs in terms of at least four of the five factors considered: physical characteristic, customs treatment, manufacturing processes, and uses.[35] Korea does not challenge the factual basis of the Commission's analysis or the factors considered by the Commission, which are similar to factors past reports have considered relevant to analyzing likeness.[36] Based on the preponderance of similarities between domestic belt driven washers and imported LRWs, the Commission reasonably found that belt driven washers were like LRWs and therefore reasonably included them in its definition of the domestic like product.

34. Once the Commission defined the domestic like product to include belt driven washers, it was obligated to define the domestic industry to include producers of belt driven washers. SGA Article 4.1(c) provides in relevant part that "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 . . . ." As explained by the panel in *Dominican Republic – Safeguard Measures*, "nothing in the text of {Article 4.1(c)} . . . allows the domestic industry to be defined on the basis of a limited portion of {like} products."[37] Accordingly, the Commission explained that "{c}onsistent with our definition of the like or directly competitive product, we define 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."[38]

35. Having defined the domestic industry to include domestic producers of all articles "like or directly competitive" with the products under investigation, [39] the Commission acted consistently with Articles 2.1 and 4.1(c). The Panel should therefore reject Korea's challenge to this aspect of the Commission definition of the domestic industry.

---

[33] Hearing Transcript, p. 228 (Smith) (Exhibit US-2); Samsung's Posthearing Injury Brief, 5-7 (quoting *LRWs from China*, USITC Pub. 4591 at 9) (Exhibit KOR-10).

[34] USITC's Report, p.15 (Exhibit KOR-1).

[35] USITC's Report, pp. 15-16 (Exhibit KOR-1).

[36] *See* U.S. first written submission, para. 151; *EC – Asbestos (AB)*, para. 101.

[37] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.191.

[38] USITC Report, p. 19 (Exhibit KOR-1).

[39] Korea Resp. Panel 1st Questions, para.14.

B. The Commission Correctly Included Covered Parts Production in the Domestic Industry

36. As with belt-driven washers, Korea attempts to impose non-existent obligations in its challenge to the Commission's inclusion of domestic covered parts production in the domestic industry. Korea does not contest the Commission's factual basis for finding domestically produced covered parts like imported covered parts or the factors considered.[40] Rather, Korea asserts that competent authorities may only find a domestically produced article "like" an imported article subject to investigation if the two products are "close to perfect substitutes" with "intense competition" between the domestic and imported articles.[41] There is no basis for such an obligation under the Safeguards Agreement.

1. The Commission's inclusion of covered parts production in the domestic industry was consistent with Articles 2.1 and 4.1(c) of the Safeguards Agreement

37. As an initial matter, Korea has substantially narrowed its challenge to the Commission's inclusion of covered parts in the domestic industry in response to the Panel's questions following the first substantive meeting. Korea has now clarified that its view is *not* that the Commission could only define the domestic like product to include covered parts if domestic covered parts were "like or directly competitive" with all imported articles subject to investigation, including finished LRWs.[42] Korea now agrees with the United States that "different product 'types' can be included in a domestic industry definition" as long as each domestically produced product type is like or directly competitive with an imported product type subject to investigation.[43] Korea also agrees with the United States that "{t}here is no condition that the domestic products must be 'like or directly competitive' with *all* products constituting the PUC, nor is there requirement that the domestic industry must be internally homogenous."[44] Korea appears to concede that there would be a sufficient basis to include domestic LRW parts in the domestic industry if those parts are like or directly competitive with imported LRW parts.[45] In other words, the sole basis of Korea's challenge to the Commission's inclusion of covered parts in the domestic industry comes down to its position that domestic covered parts could not be "like" imported covered

[40] *See* Korea Resp. Panel 1st Questions, para.38.

[41] Korea Resp. Panel 1st Questions, paras. 30, 38, 49, 59-60.

[42] Korea Resp. Panel 1st Questions, paras 37, 40. *But see* Korea first written submission, paras. 209-215.

[43] Korea Resp. Panel 1st Questions, para. 32; *see* U.S. first written submission, paras 130-133, 171-175.

[44] Korea Resp. Panel 1st Questions, para. 37; *see* U.S. first written submission, paras 130-133, 171-175.

[45] Korea Resp. Panel 1st Questions, para. 40.

parts, within the meaning of Articles 2.1 and 4.1(c), because they are not "close to perfect substitutes" and in "intense competition" with one another.[46]

38. Nothing in Articles 2.1 and 4.1(c) requires competent authorities to limit their definition of the domestic like product to domestically produced articles that are "close to perfect substitutes" with imported articles subject to investigation or in "intense competition" with such imports. As explained in the U.S. first written submission, those articles define the "domestic industry" for purposes of safeguard investigations as "producers as a whole of the like or directly competitive products."[47] Based on this definition, as a matter of logic, "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."[48] However, the Safeguards Agreement is silent on how competent authorities are to identify "the like or directly competitive products" for this purpose. As with the definition of the product under investigation, the Safeguards Agreement does not impose specific obligations with respect to the definition of the domestic articles "like or directly competitive" with the imported products under investigation.[49] Competent authorities therefore have the discretion to apply reasonable methodologies in defining the domestic like product, as with other aspects of their serious injury analyses.[50]

39. The relevant meaning of "like" as used in Article 4.1(c) is "the same or nearly the same (as in nature, appearance, or quantity)."[51] Thus, in defining the domestic like product for purposes of Articles 2.1 and 4.1(c), competent authorities must include within the definition all domestically produced merchandise that is the same or nearly the same as the imported merchandise described by the scope of the investigation.

40. Furthermore, as the United States explained in its first written submission and responses to the Panel's questions, the context of the term "like" in the Safeguards Agreement makes clear that a domestic article "like" an imported article subject to investigation need not be "directly competitive" with the imported article. SGA Articles 2.1 and 4.1(c) define "domestic industry" in the disjunctive as the producers of like ***or*** directly competitive products. Thus, competent authorities may define the domestic industry to include producers of articles "like" the imported articles subject to investigation or producers of articles "directly competitive" with the imported articles. While Korea recognizes that "not every product that is in competition with another is

---

[46] *See* Korea Resp. Panel 1st Questions, paras. 38, 49.

[47] *See* U.S. first written submission, paras. 123-124.

[48] *US – Lamb (AB)*, para. 87.

[49] *See Dominican Republic – Safeguard Measures (Panel),* para. 7.181.

[50] *US – Lamb (AB)*, para. 137 ("{W}e note that the *Agreement on Safeguards* provides no particular methodology to be followed in making determinations of serious injury or threat thereof.").

[51] Webster's Third New International Dictionary Unabridged (1981), p. 1310.

'like' the other product," the converse is also true.[52] Not every domestically produced product that is "like" an imported product subject to investigation will be "directly competitive" with the imported product. Thus, the very text of the Safeguards Agreement underscores that competent authorities may find that a domestically produced article is "like" a product under investigation irrespective of the degree of competition between the two.

41. Consistent with the ordinary meaning of "like" in the context of Article 4.1(c), the U.S. Congress explained that for purposes of section 201 of the Trade Act of 1974, the U.S. law governing safeguard investigations, "like" products differ importantly from "directly competitive" products The statute defines the term "domestic industry" as "the producers as a whole of the like or directly competitive article . . . ."[53] Indeed, the panel in *U.S. – Lamb Meat* recognized that the definition of "domestic industry" under U.S. law is "virtually identical" to the relevant text of Article 4.1(c).[54] As the Commission explained in its report:

> The legislative history distinguishes between products that are "like" and products that are "directly competitive" with the imported articles, explaining that "like" articles are those that are "substantially identical in inherent or intrinsic characteristics (*i.e.*, materials from which made, appearance, quality, texture, etc.)," whereas "directly competitive" articles are those that "are substantially equivalent for commercial purposes, that is, are adapted to the same uses and are essentially interchangeable therefor."[55]

42. In determining that domestically produced covered parts were like imported covered parts, the Commission considered factors that have largely been found to be relevant to a "likeness" analysis under the Safeguards Agreement, the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, and Articles I and III of GATT 1994.[56] Specifically, the Commission compared domestically produced covered parts to imported covered parts in terms of their physical properties, customs treatment, manufacturing processes, uses, and marketing channels.[57] Three of the factors considered by the Commission are factors past reports have recognized as relevant to "analyzing 'likeness,'" including "the physical

---

[52] Korea first written submission, para. 225.

[53] 19 U.S.C. 2252(c)(6)(A)(1) (section 202(c)(6)(A)(i) of the Trade Act of 1974) (Exhibit US-9).

[54] *U.S. – Lamb Meat (Panel),* para. 7.48.

[55] USITC Report, p. 6 (Exhibit KOR-1) (quoting H.R. Rep. No. 571, 93rd Cong., 1st Sess. 45 (1973); Senate Finance Committee, Report on Trade Reform Act of 1974 H.R. 10710, S. Rep. No. 1298, 93rd Cong., 2d Sess. at 121-22 (1974)).

[56] *See* USITC's Report, p. 6. As explained in the U.S. first written submission, the Commission did not define the domestic industry with respect to domestic producers of articles "directly competitive" with the products under investigation. *See* U.S. first written submission, para. 125; USITC Report, pp. 12-17 (Exhibit KOR-1).

[57] *See* USITC's Report, pp. 16-17 (Exhibit KOR-1).

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."[58] Indeed, Korea itself has acknowledged that "the four or five specific criteria for determining 'likeness' that the USITC considered . . . have been frequently used by earlier panels in the context of different covered agreements."[59] The Commission's application of many of these same criteria in defining the domestic like product to include covered parts was reasonable and fully consistent with the ordinary and textual meaning of "like" under Article 4.1(c).

43. In applying its likeness methodology, the Commission provided a reasoned and adequate explanation for its finding that domestically produced covered parts were like imported covered parts. Specifically, the Commission explained that imported covered parts were like domestic covered parts because they were "substantially identical in inherent or intrinsic characteristics" to domestic parts based on an analysis of the Commission's traditional factors.[60] The Commission concluded that because imported and domestic parts shared the same physical characteristics, the manufacturing process used to produce domestic and imported parts would likely be similar, noting that respondents did not argue otherwise.[61] Based on the objective evidence showing a preponderance of similarities between domestic and imported covered parts, the Commission reasonably found that domestic covered parts were like imported covered parts.[62]

44. In sum, the Commission defined the domestic industry to include domestic covered parts production in accordance with Articles 2.1 and 4.1(c) of the Safeguards agreement, having found that domestically produced covered parts were like the imported covered parts subject to investigation in terms of their inherent or intrinsic characteristics. The Panel should therefore reject Korea's challenge to this aspect of the Commission's definition of the domestic industry.

2. The text of Article 4.1 (c) plainly reflects that the term "like" has an independent meaning separate from the meaning of "directly competitive"

45. In contrast to the Commission's reasonable methodology for defining the domestic like product, Korea's preferred approach finds no support in the ordinary meaning of "like" in the context of Article 4.1(c) of the Safeguards Agreement.[63] The ordinary meaning of "like" is not "close to a perfect substitute," "perfectly competitive," or "in intense competition," as Korea

---

[58] *EC – Asbestos (AB)*, para. 101. Notably, neither substitutability nor interchangeability were among the factors the Appellate Body deemed relevant to the analysis of likeness. *See id.*

[59] Korea first written submission, para. 226.

[60] USITC Report, pp. 16-17 (Exhibit KOR-1).

[61] USITC Report, p. 17 (Exhibit KOR-1).

[62] USITC Report, p. 17 (Exhibit KOR-1).

[63] Vienna Convention on the Law of Treaties, Article 31(1).

argues, and Korea cites no accepted definition of the term that encompasses such concepts.[64] A domestically produced article that is "the same or nearly the same" as an imported article subject to investigation in terms of "nature, appearance, or quantity," or "substantially identical in inherent or intrinsic characteristics," need not be perfectly substitutable or in intense competition with the imported article. It need only be "the same or nearly the same" with respect to relevant attributes.

46. For example, as the United States pointed out in its responses to the Panel's questions, a competent authority could find that high-end widgets produced domestically possess characteristics closely resembling those of imported low-end widgets within the scope. On this basis, the authority could reasonably define the domestic like product as high-end widgets, even though high-end and low-end widgets compete in different segments of the market.

47. Korea's preferred construction also ignores the disjunctive structure of the definition of "domestic industry" under Article 4.1(c), which permits competent authorities to define a domestic industry as domestic producers of either "like" products or "directly competitive" products. Korea's mistaken construction of the word "like" to mean "close to a perfect substitute," "perfectly competitive," or "in intense competition," would mean that all domestic producers of "like" products would necessarily also produce "directly competitive" products. If "like" products were merely a subset of "directly competitive" products, as Korea maintains, competent authorities could always define a domestic industry in terms of domestic producers of "directly competitive" products, and would never need to define a domestic industry in terms of domestic producers of "like" products. Thus, Korea's argument that "like" effectively means "directly competitive" to a perfect degree would effectively read the term "like" out of Article 4.1(c), contrary to the interpretative principle that "{o}ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty."[65] Under Article 4.1(c), a competent authority may define the domestic industry as <u>either</u> domestic producers of "like" products <u>or</u> domestic producers of "directly competitive" products. If "like" products were a subset of "directly competitive" products under Article 4.1(c), then competent authorities could always define the domestic industry as producers of "directly competitive" products, and the term "like" would be superfluous.

48. Korea's reliance on the Appellate Body report in *Philippines – Distilled Spirits* is misplaced.[66] *Distilled Spirits* addressed like product in the context of Article III:2 of the GATT 1994, concerning national treatment on internal taxation and regulation. The textual context for the discussion of the term "like product" in that dispute is different from that of the Safeguards Agreement. As discussed above, the Safeguards Agreement provides for a flat choice between "like" or "directly competitive" prior to conducting the substantive injury analysis. By contrast,

[64] *See* Webster's Third New International Dictionary Unabridged (1981), p. 1310.

[65] *US – Gasoline (AB),* p. 23.

[66] *See* Korea Resp. Panel 1st Questions, paras. 30, 38, 49, 59, 174.

as set out in the Ad Note to Article III:2, that Article specifically contemplates a cross-consideration of the degree to which like domestic products compete with the taxed imported products.[67]

49. Furthermore, a consideration of the object and purpose of the respective agreements shows that these terms are used in different manners. Under Article III:2 of the GATT 1994, different obligations apply depending on whether the imported article subject to taxation corresponds to "like domestic products" under the first sentence of that Article or to "directly competitive or substitutable" domestic products under the second sentence of that Article. Unlike under Article III:2 of the GATT 1994, different obligations do not apply under the Safeguards Agreement depending upon whether a domestic industry consists of producers of "like" products or "directly competitive" products. Rather, under Article 4.1(c), a competent authority may define the domestic industry as either domestic producers of "like" products or domestic producers of "directly competitive" products. If "like" products were a subset of "directly competitive" products under Article 4.1(c), as they are under Article III:2 of the GATT 1994, then competent authorities could always define the domestic industry as producers of "directly competitive" products, and the term "like" would be superfluous.

50. Accordingly, the term "like" could only have utility under Article 4.1(c) if it means something other than "directly competitive"; namely, "the same or nearly the same (as in nature, appearance, or quantity)," consistent with the relevant dictionary definition of "like," and "substantially identical in inherent or intrinsic characteristics (*i.e.*, materials from which made, appearance, quality, texture, etc.)." The Commission properly applied this meaning of "like" when it found domestically produced parts "like" imported covered parts, and therefore included domestic parts production in the domestic industry. Therefore, there is no legal support for Korea's effort to read the term "like" out of the Safeguards Agreement.

3. The Commission reasonably defined the domestic industry to include covered parts production under the facts of the case

51. Korea's argument that the Commission was somehow prohibited from defining the domestic industry to include covered parts production because such parts were not "directly competitive" with imported covered parts would not only read the term "like" out of the Safeguards Agreement. Under the particular facts of this case, Korea's argument would also have the Commission ignore a portion of the product under investigation, key conditions of competition, and actions clearly necessary to remedy the serious injury and facilitate adjustment.

---

[67] The Ad Note to Article III:2 states:

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

52. First, Korea's argument that the Commission should have excluded covered parts from its definition of the domestic industry conflicts with the obligation under Article 4.1(c) for competent authorities to define the domestic industry as producers of all articles "like" the imported product under consideration. Korea acknowledges that the "{Safeguards}Agreement does not impose any disciplines in respect of this definition {of the product under consideration}, which is largely for the importing Member to determine."[68] The panel in *Dominican Republic – Safeguard Measures* recognized that "the Agreement on Safeguards does not impose specific obligations with respect to the definition or the scope of the product under investigation."[69] As explained in the U.S. first written submission, the Commission reasonably defined the product under consideration here in accordance with the defined scope of the investigation.[70] Korea does not challenge the Commission's definition of the product under investigation to include covered parts.

53. Korea also recognizes that competent authorities are "not permitted to define the domestic industry based on a limited portion of these products {under consideration}."[71] As explained by the panel in *Dominican Republic – Safeguard Measures*, "nothing in the text of {Article 4.1(c)} . . . allows the domestic industry to be defined on the basis of a limited portion of {like} products."[72] Thus, once the Commission defined the product under consideration to include LRWs and covered parts, the Commission was obligated to define the domestic industry to include domestic producers of all like products, which in this case included domestically produced covered parts. Korea does not explain how the absence of direct competition between domestically produced covered parts and imported covered parts could have absolved the Commission of its obligation to define the domestic industry to include domestic producers of all domestic articles "like" the product under consideration.[73]

54. Second, Korea recognizes that a competent authority's injury assessment "must be made in light of the conditions of competition with the imports," but would have the Commission

---

[68] Korea Resp. Panel 1st Questions, para. 12.

[69] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.181.

[70] *See* U.S. first written submission, paras. 135-144.

[71] Korea Resp. Panel 1st Questions, para. 13.

[72] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.191.

[73] Nor is there any basis in the Safeguards Agreement for Korea's argument that the Commission should have conducted a separate serious injury analysis with respect to imports of covered parts alone. *See* Korea Resp. Panel 1st Questions, para. 53. As explained by the panel in *Dominican Republic – Safeguard Measures*, "the definition adopted by the competent authority is that which governs the product under investigation, as well as the way in which the relevant data should have been analyzed in the investigation." *Dominican Republic – Safeguard Measures (Panel)*, para. 7.236. Because the product under investigation included both LRWs and covered parts, the Commission appropriately conducted its serious injury analysis with respect to imports of LRWs and covered parts in the aggregate. *See* U.S. first written submission, paras. 197-199.

overlook the conditions of competition that it found relevant to covered parts.[74] In particular, the Commission found that that there was no separate domestic industry producing covered parts, but rather a single domestic industry producing covered parts primarily for assembly into LRWs in vertically integrated production facilities.[75] As the United States explained in its responses to Panel questions, where domestic producers of an article manufacture various components internally for assembly into the article, nothing in the Safeguards Agreement requires competent authorities to limit their definition of the domestic industry to only the final assembly operations of those producers. On the contrary, to define a domestic industry as "producers as a whole of the like or directly competitive products," as provided for in SGA Article 4.1(c), competent authorities would have the discretion to include all stages of production undertaken by such producers in the definition, particularly when the like product includes intermediate products.[76] Korea does not explain how the Commission could have excluded covered parts production from its consideration of the domestic industry, given that the integrated nature of covered parts and LRW production made doing so a practical impossibility.

55. Another implication of the vertically integrated nature of covered parts and LRW production is that the increased imports that seriously injured the domestic industry producing LRWs would have also injured domestic production of covered parts. The cost of producing covered parts is integral to the cost of producing LRWs. Thus, the domestic industry's increasing ratio of COGS to net sales during the period of investigation – which directly resulted in the industry's increasing financial losses – would have reflected, in part, the increasing inability of domestic producers to cover the cost of producing covered parts for assembly into LRWs with the revenues generated on sales of LRWs. Therefore, the domestic industry's increasing financial losses on sales of LRWs, caused by increasing imports of low-priced LRWs, would have included financial losses on the internal production of covered parts for assembly into LRWs.

56. Similarly, the Commission found that the conditions of competition pertaining to imports of covered parts made them no less essential to imports of completed LRWs. Specifically, the Commission found that "imports of covered parts do not compete with domestically produced covered parts because they may only be installed in specific imported LRW models, for purposes

---

[74] Korea Resp. Panel 1st Questions, para. 144.

[75] USITC Report, p. 19 (Noting that "virtually all domestically produced LRWs are assembled from covered parts produced domestically in the same facilities as the LRWs," the Commission reasoned that "the production facilities producing assembled LRWs necessarily include the facilities for producing covered parts."). (Exhibit KOR-1).

[76] *See Dominican Republic – Safeguard Measures (Panel)*, para. 7.191 (finding that "{i}f a product is like or directly competitive with respect to the imported product, that product must be considered for the purposes of defining the domestic industry" because "nothing in the text of {Article 4.1(c)} allows the domestic industry to be defined on the basis of a limited portion of these products").

of repairing them."[77] The Commission also found that such parts were sold not to end consumers but to authorized service centers and distributors for the repair of LRWs.[78] The clear implication of these conditions of competition is that imports of covered parts were an essential complement to imports of LRWs. As imports of LRWs nearly doubled during the period of investigation, significantly increasing their penetration of the U.S. market, importers would have needed to ensure an adequate supply of covered parts for the repair of the imported LRWs. In particular, imported LRWs were sold to consumers pursuant to warranties, which provided consumers with the right to have their imported LRWs repaired during the warranty period.[79] The Commission appropriately considered imports of covered parts and LRWs in the aggregate pursuant to its definition of the product under consideration to include both covered parts and LRWs.[80] It was likewise logical for the Commission to include covered parts in its analysis of increased imports because there could have been no significant increase in imports of LRWs without the imports of covered parts needed to repair them.

57. Finally, in arguing that the Commission was somehow prohibited from considering covered parts, Korea overlooks the critical importance of covered parts to the Commission's remedy recommendations and to the measure imposed by the President. As the Commission explained, the inclusion of covered parts in the safeguard measure was necessary to both remedy the serious injury and facilitate adjustment:

> LG and Samsung's proposal that the Commission impose no import restrictions on covered parts would make it possible for LG and Samsung partially to circumvent the safeguard remedy by importing covered parts for simple assembly into finished LRWs at their new U.S. plants and could alter their business decision regarding the specific operations to conduct at those plants.[81]

In other words, excluding covered parts would have undermined the remedial effect of the safeguard measure by encouraging LG and Samsung to replace injurious imports of low-priced LRWs with injurious imports of low-priced covered parts for simple assembly into low-priced LRWs at their new U.S. plants. It would have also undermined the domestic industry's positive adjustment by encouraging LG and Samsung to reduce the scope of the operations at their new

---

[77] USITC Report, p. 16 (Exhibit KOR-1).

[78] USITC Report, p. 17 (Exhibit KOR-1).

[79] USITC Report, p. II-2 n.4, V-26 (Exhibit KOR-1).

[80] *See* U.S. first written submission, para. 199.

[81] USITC Report, p. 74 (Exhibit KOR-1). To remedy the serious injury and facilitate positive adjustment, the Commission recommended that the President impose a tariff rate quota on imports of covered parts that permitted LG and Samsung to import in-quota, with no additional tariff, a volume of covered parts sufficient for the service and repair of existing LRWs plus an additional volume that Samsung and LG were likely to need as a hedge against possible disruptions to their domestic production of covered parts at their respective U.S. plants. *Id.* The President adopted the Commission's recommendation with respect to covered parts.

U.S. plants from the production of covered parts for assembly into LRWs to the simple assembly of imported kits.[82] Indeed, during the remedy phase of the Commission's investigation, LG and Samsung argued that their planned new LRW production facilities in the United States were critical to the domestic industry's positive adjustment to import competition, and emphasized that the plants would domestically produce all of the covered parts required by the operations.[83]

III. THE COMMISSION'S ANALYSIS OF INCREASED IMPORTS WAS CONSISTENT WITH THE SAFEGUARDS AGREEMENT

58. The Commission based its analysis of increased imports on the questionnaire responses of five importers – including primarily the two largest importers, LG and Samsung – that accounted for virtually all imports of LRWs.[84] Based on these data, which respondents certified to be accurate, the Commission found that subject import volume "increased steadily" during every year of the 2012-16 period in absolute terms,[85] nearly doubling during the period of investigation.[86] The Commission also found that the absolute volume of subject imports remained "substantial" in January-March ("interim 2017"), though down from January-March 2016 ("interim 2016"), due to "supply disruptions related to LG and Samsung's transfer of production from China to Thailand and Vietnam and Samsung's recall" of 2.8 million units.[87] 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. As the United States observed in its first written submission, 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 *U.S. – 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.[88] None of Korea's challenges to the Commission's finding in this dispute withstand scrutiny.

---

[82] *See* USITC's Report, p. 78 (Exhibit KOR-1).

[83] *See* USITC's Report, p.71 (Exhibit KOR-1); Remedy Hearing Tr. at 200 (Aranoff) ("{I}t's important to remember that Mr. Fraley just testified to you that {Samsung is} going to build all of those covered parts at the Newberry plant."); *id*. at 201 (Toohey) (speaking on behalf of LG, "We have no intention of importing any of the covered parts.") (Exhibit US-24); Samsung's Posthearing Remedy Brief at 14 ("Samsung will produce all covered parts –the 'heart and soul' of a washer, Tr. at 65 (Mr. Tubman) – in Newberry.") (Exhibit US-25).

[84] USITC Report, pp. 5, II-1-3 (Exhibit KOR-1).

[85] USITC Report, p. 20 (Exhibit KOR-1).

[86] USITC Report, p. 39 (Exhibit KOR-1).

[87] USITC Report, pp. 30, 38 (Exhibit KOR-1). Samsung recalled these products because they posed "a risk of personal injury or property damage." *Id.*

[88] *See* Unites States' first written submission, paras. 211-213.

A. The Commission relied on accurate data concerning increased imports

59. First, the Panel should reject Korea's efforts to interject data appended to Whirlpool's safeguard petition as Exhibit 2D that the Commission did not rely upon in analyzing increased imports, and that do not reflect only imports of LRWs.[89] As the United States explained at the first substantive meeting and in response to the Panel's subsequent questions, the Commission had no need to rely on petitioner's estimate of imports of LRWs contained in Exhibit 2A of its petition, or the raw data contained in Exhibit 2D upon which the estimate was based, because it collected complete, accurate, and reliable data on imports of LRWs from the importers themselves, including LG and Samsung.

60. Korea's continued focus on the data in Exhibit 2D ignores that, as the United States also explained, these data include imports of out-of-scope belt-driven washers and domestically produced LRWs assembled with imported parts (other than covered parts) that were classified as imported LRWs upon withdrawal from Foreign Trade Zones ("FTZs").[90] Because these are broader than the scope and do not reflect only imports of LRWs, Korea's argument that the data conflict with the Commission's analysis of increased imports is irrelevant.

61. Far from "accepting" Whirlpool's estimate of imports of LRWs in Exhibit 2A, as Korea' mistakenly contends,[91] the Commission relied on the volume of imports of LRWs reported by importers accounting for virtually all imports. These data support its finding that imports nearly doubled between 2012 and 2016. Notably, no party asked the Commission to rely on the data contained in Exhibit 2A, or challenged the accuracy of the import data reported by LG, Samsung, and other importers.[92]

B. The near doubling of import volume found by the Commission satisfied the increased imports requirement under SGA Article 2.1

62. Second, there is no textual basis for Korea's argument that most of an increase in import volume must occur at the end of a period of investigation for the increase to satisfy the increased imports requirement under SGA Article 2.1.[93] As the United States explained in its first written submission, there is no requirement under the Safeguards Agreement that "imports . . . have a positive rate of increase – that is, an acceleration – as Korea claims.[94] In *Dominican Republic – Safeguard Measures*, the panel explained that "{t}here is nothing in the text of Article XIX:1(a)

---

[89] Korea's response, paras. 88-91.

[90] *See* USITC Report, III-4-5 (Exhibit KOR-1); Petition, Exhibit 2B (Addendum to Exhibit KOR-5).

[91] Korea Resp. Panel 1st Questions, para. 91.

[92] *See* Korea Resp. Panel 1st Questions, paras 89, 92.

[93] *See* Korea Resp. Panel 1st Questions, paras. 76-81, 84.

[94] Korea first written submission, para. 143.

of the GATT 1994 or the Agreement on Safeguards to indicate that the rate of the increase in imports must accelerate (or be positive) at every moment of the period of investigation or that it is *rising* and *positive* only if every percentage increase is greater than the preceding increase."[95] Rather, "an absolute increase . . . is sufficient" for purposes of satisfying the increased imports requirement under SGA Article 2.1,[96] just as the Commission found here. Panels have even found that a "steady" increase in import volume and an increase in import volume that sharply decelerated over the last three years of the period of investigation, turning into a decline in the last year, were sufficient to satisfy the increased imports requirement under Article 2.1.[97] Plainly, the near doubling of import volume between 2012 and 2016 found by the Commission, after a steady increase in import volume in every year of the period, satisfied the increased imports requirement under SGA Article 2.1.

63. Nor is it correct that the Commission failed to mention or discuss that import volume was lower in interim 2017 than in interim 2016, as Korea continues to claim.[98] The Commission explicitly recognized this fact, and explained that the lower level of import volume in interim 2017 was due to temporary factors and not a secular decline in impot volume.[99] The Commission also found that import volume remained substantial in interim 2017, as confirmed by the fact that imports as a share of apparent U.S. consumption were higher in interim 2017 than in interim 2016.[100] The increase in import market share in interim 2017 relative to interim 2016 could not have been due to sales of Flexwash and Sidekick, as Korea claims (without citation to any evidence), because Samsung only introduced Flexwash LRWs in March 2017 and LG's Sidekick LRWs were "new" as of the Commission's injury hearing in September 2017.[101] Indeed, respondents made no such argument during the investigation. And even if the increase had partly consisted of such models, the increase still would have had adverse effects on the domestic industry given the Commission's findings that domestically produced LRWs were like imported Flexwash and Sidekick LRWs, and that imported LRW models that respondents identified as particularly innovative were priced no less aggressively than other models.[102]

---

[95] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.235 (citing and quoting *Argentina – Footwear (EC) (AB)*, para. 131).

[96] *US – Steel Safeguards (Panel)*, para. 10.233-234.

[97] *See* U.S. first written submission, paras. 211-212 (citing *US – Steel Safeguards (Panel)*, para. 10.233-234; *Dominican Republic – Safeguard Measures (Panel)*, para. 7.235).

[98] Korea Resp. Panel 1st Questions, paras. 78-79.

[99] USITC's Report, pp. 25-26, 38 (Exhibit KOR-1).

[100] USITC's Report, pp. 38-39 (Exhibit KOR-1).

[101] *See* LG and Samsung's Prehearing Injury Brief, 30 ("In March 2017, Samsung introduced its FlexWash dual-chamber washer to the U.S. Market.") (Exhibit KOR-11); Hearing Tr. 205 (Riddle) ("{T}his slide showcases LG's *new* TWINWash system . . . .") (emphasis added) (Exhibit US-2).

[102] USITC's Report, pp. 13-15, 42 (Exhibit KOR-1).

64. Furthermore, it was reasonable for the Commission to treat the steady and significant increase in imports of LRWs over the 2012-16 period as more significant than the slight decline in January-March 2017 relative to January-March 2016, such that "the overall evaluation is that of a clearly discernable increase" including "in the most recent past."[103] The interim period consisted of only three months. Consequently, imports of LRWs had peaked at nearly double the level of 2012 a mere three months before the end of the period of investigation, in 2016. As the United States explained in its first written submission, the decline in the absolute volume of imports of LRWs found by the Commission in interim 2017 relative to interim 2016 was less significant than the declines in import volume toward the end of the periods of investigation at issue in *US – Steel Safeguards*, with respect to welded pipe, and *Dominican Republic – Safeguard Measures*, with respect to plastic bags, in which the panels found no error with increased import findings.[104] The Panel should likewise uphold the Commission's analysis of increased imports in this case.

65. The Commission's analysis of import market share was consistent with the Safeguards Agreement. Shifting from its original argument that the Commission failed to evaluate the significance of the increase in imports relative to consumption "at all,"[105] Korea now argues instead that the Commission's finding of a significant increase in subject import market share somehow conflicted with its finding that the domestic industry's market share in 2016 was similar to that in 2012.[106] There is no conflict between these two findings, as the United States explained in response to the Panel's questions. The reason that the domestic industry's market share did not decline between 2012 and 2016 by the same amount as the significant increase in subject import market share is that the increase corresponded to a decline in the market share of out-of-scope imports of belt-driven washers.[107] In other words, the significant increase in subject import market share primarily replaced out-of-scope imports of belt-driven washers, which petitioner described as "an obsolescing dinosaur," with imports of LRWs that were substitutable with domestically produced LRWs and priced pervasively lower than domestically produced LRWs.[108]

66. Similarly unavailing is Korea's argument that an increase in import volume could not be recent, sudden, sharp, and significant enough to cause serious injury if it does not capture market share from the domestic industry.[109] SGA Article 2.1 requires competent authorities to find an

---

[103] *U.S. – Steel Safeguards (Panel)*, para. 10.233-234.

[104] *See* U.S. first written submission, para. 203 (citing *US – Steel Safeguards (Panel)*, para. 10.233-234; *Dominican Republic – Safeguard Measures (Panel)*, para. 7.231.).

[105] Korea first written submission, para. 137.

[106] Korea Resp. Panel 1st Questions, paras. 74-75, 94-96.

[107] U.S. responses, paras. 23-25.

[108] Hearing Transcript at 90 (Levy) (Exhibit US-12).

[109] Korea Resp. Panel 1st Questions, paras. 84-85.

increase in imports, either "absolute *or* relative to domestic production." In suggesting that an absolute increase is quantitative while a market share change is qualitative, Korea attempts to convert this disjunctive obligation into one requiring a finding of both types of increases. But the text of Article 2.1 clearly belies any such dual requirement.

67. Of course, whether the increase occurred "under such conditions" as to cause or threaten serious injury to a domestic industry necessarily involves 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, pursuant to SGA Articles 4.2(b) and (c). In response to the Panel's questions, Korea recognizes that the obligation to evaluate import market share under SGA Article 4.2(b) does not extend to the analysis required under Article 2.1, as they are "different provisions concerned with different obligations of the Agreement on Safeguards and, thus, have different focuses."[110] Accordingly, the Panel may find the Commission's analysis of increased imports consistent with SGA Article 2.1 based on the significance of the increase in imports alone.[111]

68. Furthermore, in its analysis of serious injury and causation, the Commission thoroughly explained how the increase in subject import volume was sufficiently recent, sudden, sharp, and significant, both quantitatively and qualitatively, as to cause serious injury to the domestic industry, contrary to Korea's argument.[112] Specifically, the Commission found that the volume of subject imports increased "steadily" in every year of the 2012-16 period in absolute terms and relative to domestic production, nearly doubling during the period, and remained "substantial" in interim 2017, though down from interim 2016.[113] The Commission also found that the significant and growing volume of subject imports was priced lower than domestic LRWs.[114]

69. Given their moderate to high degree of substitutability with domestic LRWs and the importance of price to purchasers, the Commission found that the significant and increasing volumes of low-priced imports had forced domestic producers to defend their market share by reducing their sales prices, thereby depressing and suppressing domestic like product prices.[115] As prices declined in an environment of generally increasing costs, the domestic industry's COGS to net sale ratio increased, yielding increasing financial losses and reduced capital and R&D expenditures.[116] Only by cutting prices and sacrificing its financial performance was the

---

[110] Korea Resp. Panel 1st Questions, paras. 82, 87.

[111] *See US – Steel Safeguards (Panel)*, para. 10.233-234.

[112] Korea first written submission, para. 134.

[113] USITC Report, pp. 20, 38-39 (Exhibit KOR-1).

[114] USITC Report, p. 42 (Exhibit KOR-1).

[115] USITC Report, p. 40 (Exhibit KOR-1).

[116] USITC Report, pp. 40-44 (Exhibit KOR-1).

domestic industry able to maintain its market share in the face of intense low-priced import competition.[117] Thus, consistent with SGA Article 2.1, the Commission provided a reasoned and adequate explanation of how the significant increase in subject import volume was "quantitatively and qualitatively" sufficient to cause serious injury to the domestic industry under the "conditions of competition" and "relevant factors" prevailing in the U.S. market.[118]

IV. THE COMMISSION'S FINDING THAT THE DOMESTIC INDUSTRY WAS SERIOUSLY INJURED WAS CONSISTENT WITH THE SAFEGUARDS AGREEMENT

70. Based on a thorough evaluation of all relevant factors, the Commission provided a reasoned and adequate explanation for its finding that the domestic industry was seriously injured, consistent with Articles 3.1, 4.2(a), and 4.2(c). The Commission based this analysis on the whole record of objective evidence, including the factors that moved in a negative direction during the period of investigation, as well as those factors that were positive for the industry. As the Commission explained, the domestic industry had invested heavily in competitive new LRWs during the 2012-15 period on the expectation of strong demand growth and trade relief from dumped and subsidized imports, but did not foresee that low-priced import competition would continue as LG and Samsung moved LRW production to avoid the disciplining effects of the antidumping and countervailing duty orders.[119] The Commission found that the domestic industry's increasing capacity, production, and rate of capacity utilization, and thus the industry's increased employment and productivity, was "{i}n line with the domestic industry's substantial capital expenditures" during the period.[120] As low-priced imports of LRWs increased significantly, however, the domestic industry was forced to defend its market share, and thus its production, capacity utilization, and employment, by reducing its sales prices significantly.[121]

71. Although the domestic industry should have been well positioned to capitalize on the increase in apparent U.S. consumption during the period,[122] the Commission found that the industry's declining sales prices and increasing COGS to net sales ratio directly resulted in dramatically worsening operating and net losses, "necessitating cuts to capital investment and

---

[117] *See* U.S. first written submission, para. 242.

[118] *See US – Wheat Gluten (AB)*, para. 78 ("{T}he competent authorities should determine whether the increase in imports, not alone, but in conjunction with the other relevant factors, cause serious injury."); *U.S. – Steel Safeguards (Panel)*, para. 10.320 ("*{P}rice* . . ., in the Panel's view, is an important, if not the most important, factor in analysing the conditions of competition in a particular market.").

[119] USITC Report, p. 36 & n.219 (Exhibit KOR-1). Whirlpool opined that LG's and Samsung's production moves would have cost hundreds of millions of dollars. *Id.*, p. 36 n.219. Indeed, Korea conceded in its closing statement for the first substantive meeting of the Panel that

[120] USITC Report, pp. 36-37 (Exhibit KOR-1).

[121] USITC Report, p. 40 (Exhibit KOR-1).

[122] USITC Report, p. 33 (Exhibit KOR-1).

R&D spending that imperil{ed} the industry's competitiveness."[123] Based on these factors, the Commission reasonably concluded that there was a significant overall impairment in the position of the domestic industry, within the meaning of SGA Article 4.1(a).

72. From a factual perspective, in challenging these findings Korea overlooks that the Commission evaluated all relevant factors, as evinced by the Commission's determination. Korea also relies on an erroneous legal interpretation of SGA Article 4.2(a), and seeks to add new obligations to that Article.

A. The presence of positive factors does not subject serious injury findings to "a heightened evidentiary burden"

73. Nothing in the Safeguards Agreement supports Korea's contention that the Commission was somehow obligated to provide a "compelling explanation" for how the Commission's evaluation of relevant factors supported its finding of serious injury, under a "heightened evidentiary burden," because all relevant factors were not adverse to the domestic industry.[124] Undercutting its own argument, Korea recognizes that the Commission was required to support each of its findings, including the serious injury finding, with a "reasoned and adequate explanation," and the United States agrees that this is the standard the Panel should apply in reviewing the Commission's findings.[125] Applying a different evidentiary burden depending on the ratio of positive to negative relevant factors would conflict with the Appellate Body's recognition "that the contribution of each relevant factor is to be counted in the determination of serious injury according to its 'bearing' or effect on the situation of the domestic industry," with some factors potentially more important to an authority's assessment of serious injury than others.[126] Indeed, the panel in *Dominican Republic – Safeguards Measures* explained that a competent authority need not show that all or most factors evaluated displayed negative trends before finding that a domestic industry is seriously injured so long as the authority provides a "sufficient explanation" of how the factors evaluated support the serious injury finding.[127] The evidentiary burden applicable to serious injury findings does not increase with the number of positive relevant factors. Rather, irrespective of the ratio of positive to negative factors, competent authorities must provide a reasoned and adequate explanation for how their evaluation of all relevant factors supported their serious injury finding, no more and no less.

74. None of the panel or appellate reports cited by Korea support its argument that a heightened evidentiary burden applies to serious injury findings in cases where relevant factors

---

[123] USITC Report, pp. 33, 38, 44 (Exhibit KOR-1).

[124] Korea Resp. Panel 1st Questions, para. 131..

[125] Korea's response, para. 122*; see also* U.S. first written submission, para. 15.

[126] *US – Wheat Gluten (AB)*, para. 72.

[127] *Dominican Republic – Safeguards Measures (Panel)*, para. 7.313.

are not uniformly negative. In *Argentina – Footwear*, the Appellate Body made the common sense observation that if there is no coincidence between increased imports and the domestic industry's condition, as when "there were no 'increased imports'" and "there was no 'serious injury,'" then "{i}t would be difficult, indeed, to demonstrate a 'causal link,'" and doing so would require "'a very compelling analysis.'"[128] The panel in *U.S. – Steel* made a similar observation in the context of causation.[129] These findings pertain to a competent authority's causation analysis in cases where there is *no* coincidence between increased imports and a domestic industry's condition, and are therefore inapplicable to the Commission's analysis of serious injury in this case, particularly given the Commission's finding of a clear coincidence between increased imports and the domestic industry's performance.

75. In *Thailand – H-Beams*, the panel considered the investigating authority's examination of listed factors under Article 3.4 of the Antidumping Agreement, and could not find that "the determination of injury could be reached on the basis of an 'unbiased or objective evaluation' or an 'objective examination' of the disclosed factual basis."[130] Specifically, the panel found that the investigating authority had failed to consider certain listed factors or to provide "even a minimally satisfactory explanation of how the factors relied upon by the Thai authorities support their affirmative injury determination."[131] Thus, the "compelling explanation" the Panel was seeking in *Thailand – H-Beams* was under a different agreement, under different standards, in the context of a very different investigation.

76. As noted, the panels in *Dominican Republic – Safeguard Measures* and *India – Iron and Steel* expressly reviewed whether the competent authorities' serious injury findings in those cases provided a "reasoned and adequate explanation," and not under any heightened evidentiary burden related to the number of positive factors.[132] Specifically, in *Dominican Republic – Safeguard Measures*, the panel did not hold the competent authority to any heightened "compelling explanation" standard, as Korea mistakenly suggests, but rather found that the competent authorities had failed to provide "an adequate and reasoned conclusion with respect to the existence of serious injury."[133]

77. Although the panel in *India – Iron and Steel* referenced panel reports seeking a "compelling explanation" for positive trends under Article 3.4 of the Antidumping Agreement,

---

[128] *Argentina – Footwear (AB)*, para. 145.

[129] *US – Steel Safeguards (Panel)*, para. 10.308 (explaining that a compelling explanation is only required to establish a causal link in the absence of coincidence or when a coincidence analysis is not undertaken).

[130] *Thailand – H-Beams (Panel)*, para. 7.256.

[131] *Thailand – H-Beams (Panel)*, paras. 7-255-256.

[132] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.305; *India – Iron and Steel (Panel)*, para. 7.177.

[133] *Dominican Republic—Safeguard Measures (Panel)*, para. 7.313.

inappropriately in the view of the United States, those panels nevertheless framed their analysis in terms of "whether . . . the Indian competent authority provided a reasoned and sufficient explanation in its Final Findings."[134] Thus, they did not impose a more rigorous examination to account for the number of positive factors. The panel found that the competent authority provided a reasoned and adequate explanation for its finding that the domestic industry was seriously injured, though "several factors showed some amelioration or did not show a deteriorating trend at all."[135] Specifically, the authority explained that "the domestic industry increased its production capacity and had available capacity to meet the growing demand, but its performance did not improve in step with the increasing demand" with "many factors remain{ing} 'stagnant' during the POI."[136]

78. The Commission's explanation of the positive trends in this case was similar, and was likewise reasoned and adequate. The Commission found that certain measures of the domestic industry's performance improved as a result of the industry's investments in competitive new LRWs, but the industry was unable to capitalize on increasing demand as increasing volumes of low-priced imports depressed and suppressed the industry's sales prices.[137] For this reason, and the others discussed below, Korea has not established the Commission failed to provide a reasoned and adequate explanation for its finding that the domestic industry was seriously injured.

B. The Commission evaluated the rate and amount of the increase in imports and the share of the domestic market taken by increased imports in accordance with the Safeguards Agreement

79. In its questions following the first videoconference with the parties, the Panel asked Korea whether it continued to maintain that the Commission failed to examine the rate and amount of the increase in imports and import market share, even though the United States had pointed to specific parts of the Commission's report in which the factors were examined.[138] Korea answered in the affirmative, insisting that "these factors were not evaluated as required."[139] As the Panel correctly pointed out, however, the United States identified the

---

[134] *India – Iron and Steel (Panel)*, para. 7.209.

[135] *India—Iron and Steel (Panel)*, para. 7.213.

[136] *India—Iron and Steel (Panel)*, para. 7.213.

[137] USITC Report, pp. 33, 37 (Exhibit KOR-1).

[138] Korea Resp. Panel 1st Questions, question 24.

[139] Korea Resp. Panel 1st Questions, para. 134-135. Particularly unpersuasive is Korea's response to the Panel's question concerning the Commission's analysis of "the domestic industry's defense of its market share," which necessarily involved an evaluation of import market share. *See Id.* at question 24(c). Denying that the Commission "genuinely evaluated the market share as an injury factor at all," Korea asserts that the Commission failed to consider the respondents' argument concerning the domestic industry's alleged inability "to effectively serve a newly emerging market segment" dominated by imports. *Id.* at para. 149. As explained in the U.S. first

Commission's analysis of the rate and amount of the increase in imports and import market share in its first written submission and responses to the first set of questions from the Panel.[140] Specifically, the Commission evaluated the rate and amount of the increase in imports on page 20 of its report, the share of the domestic market taken by imports on pages 38-40 of its report, and both increased import volume and market share on pages 38-44 of its report.[141] Having evaluated these and all other relevant factors having a bearing on the domestic industry's situation, the Commission established that the domestic industry was seriously injured in accordance with SGA Article 4.2(a).

80. Article 4.2(a) contains no obligation that competent authorities demonstrate the "explanatory force" of each relevant factor for any serious injury sustained by a domestic industry, as Korea mistakenly argues.[142] As the United States explained in response to the Panel's questions, this argument confuses the inquiry into the condition of a domestic industry required under SGA Article 4.2(a) with the inquiry into the causal link between increased imports and an industry's serious injury required under SGA Article 4.2(b).[143] Korea's citation to *China – GOES* does not justify ignoring this distinction. That report was interpreting the obligations under ADA Article 3.2 and ASCM Article 15.2 for investigating authorities "to consider whether a first variable – that is, subject imports – has explanatory force for the occurrence of significant depression or suppression of a second variable – that is, domestic prices," which is plainly a question of causation.[144] Indeed, ADA Article 3.5 and ASCM Article 15.5 explicitly obligate investigating authorities to demonstrate that subject imports are causing injury in part through the price effects examined under ADA Article 3.2 and ASCM Article 15.2.

81. Article 4.2(a) of the Safeguards Agreement, by contrast, contains no obligation for competent authorities to evaluate the price effects of subject imports on the domestic industry,

---

written submission, however, the Commission found that domestically produced LRWs were comparable to subject imports in terms of non-price factors, including innovation, and that domestic producers struggled to defend their market share against increasing volumes of low-priced subject imports, not innovative subject imports commanding a price premium. U.S. first written submission, paras. 264-268. As the Commission explained, "{r}espondents' claim that sales of imported LRWs were driven by features and innovations favored by consumers, which should have commanded a price premium, is belied by both the extent to which imported LRWs were priced lower than domestically produced LRWs, and the declining prices of the imported LRW models that respondents identified as particularly innovative." USITC Report, p. 42 (Exhibit KOR-1). Korea does not contest the factual basis of the Commission's finding that that domestic and imported LRWs were comparable in terms of non-price factors, with a moderate to high degree of substitutability, even though the Panel invited Korea to do so. Korea Resp. Panel 1st Questions, para. 159.

[140] U.S. first written submission, paras. 229-236; U.S. responses, paras. 22-25.

[141] Exhibit KOR-1.

[142] Korea Resp. Panel 1st Questions, paras. 97-104, 138-146, 148.

[143] *See* U.S. responses, paras. 33-41

[144] *China – GOES (AB)*, para. 136.

much less to establish a causal link between subject imports and serious injury. Nor would it make any sense for competent authorities to consider the "explanatory force" of most of the relevant factors listed under Article 4.2(a), including "changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment," because they are measures of industry performance and not causes of injury. Rather, Article 4.2(a) requires competent authorities to "evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry" in assessing whether the industry is seriously injured, using the reasonable methodology of their choice.[145] The obligation to demonstrate a causal link between increased imports and serious injury appears in Article 4.2(b), not Article 4.2(a).

82. Furthermore, the Commission did not merely "list" the data pertaining to the rate and amount of the increase in imports and import market share, as Korea mistakenly claims, but fully evaluated both factors in the context of its causation analysis.[146] As explained in the U.S. first written submission, the Commission evaluated the market share taken by increased imports, and revisited its analysis of the rate and amount of the increase in imports, in analyzing causation because the factors were relevant to the Commission's demonstration of "the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof" under Article 4.2(b).[147] Because neither Article 3.1 nor Article 4.2(c) dictates the organization of the reports that competent authorities are required to publish under those articles, the Commission was free to satisfy Article 4.2(a) by incorporating its evaluation of these factors into the causation section of its report, where their analysis was most logical.[148]

83. In the causation section of its report, the Commission fully explained how the significant increase in import volume and market share seriously injured the domestic industry, even though the industry was able to maintain a relatively stable market share. Specifically, the Commission explained that the domestic industry had 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."[149] Based on the moderate to high degree of substitutability and the importance of price to purchasers, the Commission found that "the significant and growing quantity of low-priced imports depressed and suppressed prices for the domestic like product" by forcing domestic

---

[145] *See Dominican Republic – Safeguard Measures (Panel)*, para. 7.305 (assessing the competent authority's compliance with SGA Article 4.2(a) by examining "whether the competent authority gave a reasoned and adequate explanation of the existence of significant overall impairment of the position of the domestic industry, sufficient to demonstrate the existence of serious injury"); *India – Iron and Steel*, para. 7.177 ("Article 4.2(a) does not provide any specific methodology as to how the relevant factors shall be examined.").

[146] *See* Korea Resp. Panel 1st Questions, paras. 136-146.

[147] *See* U.S. first written submission, para. 235.

[148] *See* U.S. first written submission, paras. 232-236.

[149] USITC Report, p. 40 (Exhibit KOR-1).

producers to either lower their own prices or else lose retailer floor spots and sales.[150] While the domestic industry's market share in 2016 remained similar to that in 2012, the industry's sales prices declined on all six pricing products during the period of investigation, by between 6.2 and 43.7 percent, despite increasing demand and production costs.[151] The Commission found that the domestic industry's declining sales prices and increasing COGS to net sales ratio directly resulted in worsening operating and net losses during the period of investigation.[152] Thus, upon thorough evaluation of the objective evidence showing increasing volume and market share of low-priced imports, the Commission reasonably concluded that these relevant factors caused the domestic industry's serious injury by forcing the industry to reduce its sales prices.[153]

84. Given the Commission's reasoned and adequate explanation of its evaluation of the rate and amount of the increase in imports and import market share, the Panel should reject Korea's argument and uphold the Commission's analysis of the factors as fully consistent with the Safeguards Agreement.

C. The Commission provided a reasoned and adequate explanation for its serious injury finding

85. Equally unpersuasive is Korea's persistence in arguing that the Commission predicated its serious injury finding on a single relevant factor, profits and losses, without providing a "compelling explanation" for the positive trends in certain other factors.[154] As discussed above, the Panel should review the Commission's serious injury finding for a reasoned and adequate explanation, not a "compelling" one with a heightened evidentiary burden. Furthermore, as the United States explained in its first written submission, the Commission evaluated all relevant factors, including all those enumerated under Article 4.2(a),[155] and provided a reasoned and adequate explanation for how the factors supported its finding that the domestic industry was seriously injured.[156]

86. Contrary to Korea's argument, the Commission found that six relevant factors exhibited trends adverse to the domestic industry, including three of the eight listed factors and three additional factors "of an objective and quantifiable nature having a bearing on the situation of {the} industry." Specifically, the Commission found that there had been a significant increase in both the volume and market share of low-priced subject imports during the period of

[150] USITC Report, p. 43 (Exhibit KOR-1).

[151] USITC Report, pp. 43, V-28 (Exhibit KOR-1).

[152] USITC Report, pp. 38, 44 (Exhibit KOR-1).

[153] *See* USITC Report, pp. 38, 40, 44 (Exhibit KOR-1).

[154] Korea Resp. Panel 1st Questions, paras. 115-133, 151-158.

[155] *See* U.S. first written submission, paras. 227-236.

[156] *See* U.S. first written submission, paras. 237-251.

investigation, directly resulting in the "precipitously" declining financial performance of the domestic industry.[157] As the Commission explained, increased imports of low-priced subject imports caused the industry's increasing financial losses by depressing and suppressing prices, thereby increasing the producers' COGS to net sales ratio as they were increasingly unable to cover their cost of production with sales revenues.[158] The Commission also found that the industry's massive financial losses forced producers to slash their capital expenditure and R&D expenses in 2016 to a level far below that in 2012 and 2015.[159] Noting the extent to which LRW sales were driven by innovation and features, the Commission found that the industry's "greatly reduced level of capital investment and R&D spending in 2016" imperiled the industry's competitiveness.[160] Thus, the Commission provided a reasoned and adequate explanation for how these six adverse factors supported its conclusion that there had been a significant overall impairment in the position of the domestic industry.

87. Korea's argument that the Commission relied on one adverse factor not only overlooks the Commission's evaluation of import volume and market share, as addressed above, but also urges the Panel to ignore the Commission's evaluation of adverse factors that were, in its view, related to the industry's financial performance.[161] Each of the adverse factors the Commission relied upon – the industry's worsening operating and net losses, declining sales prices, increasing COGS to net sales ratio, and slashed capital investment and R&D expenses – are "factors of an objective and quantifiable nature having a bearing on the situation of {the} industry" within the meaning of Article 4.2(a). Indeed, the Commission's report provides separate data concerning the trends for each of these factors during the period of investigation.[162] These factors are no less independent of "profits and losses" than "production," "capacity utilization," and "employment" are independent of "sales" under Article 4.2(a). Although a reduction in sales would generally result in reduced production, capacity utilization, and employment, Article 4.2(a) nevertheless requires competent authorities to evaluate the four factors separately, as independent factors.

88. In finding a significant overall impairment in the position of the domestic industry, the Commission also provided a reasoned and adequate explanation for the weight it accorded to the industry's growing financial losses and resultant cuts to capital and R&D spending. Contrary to

---

[157] USITC Report, pp. 33, 39 (Exhibit KOR-1).

[158] USITC Report, pp. 36-37, 42-43, V-28 (Exhibit KOR-1).

[159] USITC Report, p. 33, 36-37 (Exhibit KOR-1).

[160] USITC Report, p. 33, 36-37 (Exhibit KOR-1).

[161] Korea Resp. Panel 1st Questions, paras. 154-156.

[162] *See* USITC Report, pp. III-11-12 & Table III-11 (addressing "operating income or loss," "net income or loss," "capital expenditures," and "R&D expenses"), V-28 & Table V-19 (addressing "price trends"); *see also id.* at Table C-2 (containing separate line items for "operating income or (loss)," "net income or (loss)," "capital expenditures," "COGS/net sales," "operating income or (loss)/sales," and "net income or (loss)/sales") (Exhibit US-13).

Korea's simplistic assertion that the relative numbers of positive and negative factors are determinative, some factors are potentially more important to an authority's assessment of serious injury than others because "the contribution of each relevant factor is to be counted in the determination of serious injury according to its 'bearing' or effect on the situation of the domestic industry".[163] Emphasizing the importance of prices and profitability to a competent authority's assessment of serious injury, past reports have also recognized that "price changes have an immediate effect on profitability, all other things being equal" and that "profitability is a useful measure of the state of the domestic industry."[164] Indeed, in a market economy, no industry can sustain large and increasing financial losses indefinitely because such losses make continued investment in the industry untenable, by leaving investors with no reasonable expectation of an acceptable economic return. As the panel explained in *Korea – Pneumatic Valves*, "under normal market conditions, a company's ability to raise capital is strengthened if it is profit making, and is weakened when it is loss making."[165] Applying this instructive understanding, it was eminently reasonable for the Commission to consider the domestic industry's profitability, and the impact of that profitability on investment and R&D, as critical barometers of the industry's condition.

89. The Commission found that, with the exception of 2015, the domestic industry's operating and net losses worsened "dramatically" from 2012 to 2016, both in absolute terms and relative to net sales, emphasizing the large magnitude of the industry's operating and net losses as a share of net sales in 2016.[166] In sworn testimony at the Commission's hearing, the Chairman and CEO of Whirlpool stated that "our washer business has incurred massive operating {losses}, literally hundreds of millions of dollars accumulated in the last few years, and it's getting worse every year."[167] To appreciate the ruinous nature of the industry's financial losses in 2016, it is worth recalling that the Commission had already found the domestic industry materially injured by subject imports in February 2013, from which the industry's financial performance was found to have "declined precipitously."[168] And as the United States has explained in previous written submissions, the Commission reasonably based its evaluation of the domestic industry's financial performance on the financial data reported and certified as accurate by domestic producers of LRWs, and determined to be accurate and reliable by Commission staff.[169]

---

[163] *US – Wheat Gluten (AB)*, para. 72.

[164] *US – Steel Safeguards (Panel)*, para. 10.320 (emphasis in original).

[165] *Korea – Pneumatic Valves (Panel)*, para. 7.185.

[166] USITC Report, p. 37 (Exhibit KOR-1).

[167] Hearing Tr. at 54 (Fettig) (Exhibit US-26), cited in USITC Report, p. 36 n.218 (Exhibit KOR-1).

[168] USITC Report, pp. 33, I-3 (Exhibit KOR-1).

[169] *See* U.S. first written submission, paras. 260-263, 269-274; U.S. responses, paras. 42-47. As the Commission reasonably explained, the financial performance relevant to its analysis was that reported and certified

90. The Commission also found that "{a}s a direct consequence of the domestic industry's inability to earn an adequate return on its investments in new LRW models," the industry "greatly reduced" its capital investment and R&D expenditures in 2016 relative to 2012 and 2015, with both Whirlpool and GE cancelling and curtailing numerous critical investments in new LRW products and platforms that year.[170] As Whirlpool's Chairman and CEO further testified at the Commission hearing, "we cannot continue to incur these types of losses" and "recently were forced to {cancel} or curtail major capital projects," including "an extra-wide large capacity top load washing machine," the "scale back" of "a jumbo capacity washer built on our new Advantage platform," and "a new platform for top load washers."[171] The Commission

---

as accurate by domestic producers of LRWs, and not Whirlpool's financial results on sales of all appliances throughout North America (of which LRWs were a small minority), particularly when Whirlpool's reported financial results on sales of LRWs had been thoroughly verified and found accurate in *LRWs from China*. USITC Report, p.34 n.210 (Exhibit KOR-1); *see also* U.S. first written submission, paras. 260-262. Thus, Korea is mistaken that the Commission "did not examine arguments concerning Whirlpool's financial data." Korea Resp. Panel 1st Questions, para. 170.

The Commission also reasonably predicated its analysis on the questionnaire responses of the "{t}hree U.S. producers {that} reported usable financial results on their LRWs operations: GE Appliances, Staber, and Whirlpool." USITC Report, p. III-8. As explained in the U.S. responses to the Panel's questions, the Commission relied on all data reported by Alliance but its financial data, which were determined to be unreliable and thus unusable. U.S. responses, para. 43. Because the three producers that reported usable financial data accounted for the vast majority of domestic sales of the like product, as Korea has acknowledged, these data were "sufficiently representative" to support the Commission's analysis of the domestic industry's worsening financial losses during the period of investigation. Korea first written submission, para. 294.

Nor is there any basis in the Safeguards Agreement for Korea's argument that the Commission had to provide a reasoned and adequate explanation for its determination that Alliance's financial data were unusable and its reliance on all financial data found to be usable. Korea Resp. Panel 1st Questions, para. 163-165. As the panel recognized in *India – Iron and Steel*, "Article 4.2(a) does not provide any specific methodology as to how the relevant factors shall be examined." *India – Iron and Steel*, para. 7.177. The financial data on which the Commission relied was sufficiently representative to permit "reasoned conclusions" within the meaning of Article 3.1, as well as "objective and quantifiable" within the meaning of Article 4.2(a).

[170] USITC Report, p. 36 (Exhibit KOR-1). The Commission's finding that the domestic industry greatly reduced its R&D expenditures in 2016 relative to 2015 and 2012 was not contradicted by the interim data, as Korea mistakenly argues. Korea Resp. Panel 1st Questions, para. 157. Because the interim period consisted of only three months of data, R&D expenses that were "somewhat higher" in interim 2017 compared to interim 2016 could not be considered a reversal of the "greatly reduced level of capital investment and R&D spending in 2016," particularly when interim 2017 capital expenditures were "somewhat lower" than in interim 2016. USITC Report, pp. 36-37, III-12 (Exhibit KOR-1). Furthermore, extensive testimony by representatives of the domestic industry at the Commission's hearing, and the industry's cancellation and postponement of critical LRW products and platforms in 2016, supported the Commission's finding that the industry's worsening losses had forced domestic producers to curtail their capital investment and R&D expenditures. *See id.* at 36 & nn.218-221 (Exhibit KOR-1).

[171] Hearing Tr. at 54-55 (Fettig) (Exhibit US-26).

reasonably attached great weight to these cuts "given the extent to which LRW sales are driven by innovation and features."[172]

91. Finally, contrary to Korea's argument, the Commission explained that the relevant factors showing seemingly positive or neutral trends were driven by the domestic industry's investments in new models and the industry's defense of its market share by cutting prices, which both yielded worsening financial losses. Specifically, the Commission found that the domestic industry's increasing capacity, production, and rate of capacity utilization, and thus the industry's increased employment and productivity, was "{i}n line with the domestic industry's substantial capital expenditures" during the period.[173] Despite the domestic industry's competitive new LRWs and strong demand growth, however, the Commission found that these investments yielded worsening financial losses.[174] Furthermore, the Commission explained that the domestic industry "defended its market share," contributing to the industry's increasing production, capacity utilization, and employment, "by reducing its sales prices in response to competition from the increasing volume of low-priced imports of LRWs."[175] As subject imports depressed and suppressed the domestic industry's sales prices to a significant degree, the industry's relatively stable market share was accompanied by worsening financial losses.[176] Based on these considerations, the Commission reasonably concluded that the domestic industry's "inability to earn an adequate return on its investments in new LRWs" and its stable market share, reflecting sales of LRWs sold at an increasing loss, were consistent with an industry experiencing serious injury, not a healthy one.

92. Because the Commission provided a reasoned and adequate explanation for how its evaluation of all relevant factors supported its conclusion that the domestic industry was seriously injured, the Panel should reject Korea's claims and uphold the Commission's serious injury finding as consistent with SGA Article 4.2(a).

---

[172] In its analysis of substitutability, the Commission found that responding purchasers ranked "features" and "features/design/technology/innovations" as among the most important factors influencing their LRW purchasing decisions, although many more purchasers ranked price among their top three factors and as the most important purchasing factor. USITC Report, p. 27 (Exhibit KOR-1). The Commission found that in the absence of safeguard relief, the likely continuation of the domestic industry's large financial losses and reduced level of capital and R&D expenditures posed an threat to the viability of the industry. USITC Report, p. 79 (Exhibit KOR-1).

[173] USITC Report, pp. 36-37 (Exhibit KOR-1).

[174] *See* USITC Report, pp. 33, 36 (Exhibit KOR-1).

[175] USITC Report, p. 40 (Exhibit KOR-1).

[176] USITC Report, p. 44 (Exhibit KOR-1).

V. THE COMMISSION'S CAUSATION ANALYSIS WAS IN ACCORDANCE WITH THE SAFEGUARDS AGREEMENT

93. As detailed in the previous U.S. written submissions, the Commission provided reasoned and adequate explanations for its demonstration of a causal link between increased imports and the domestic industry's serious injury, and its finding that neither of the alternative causes of injury alleged by respondents were supported by the record.[177] Having found a coincidence between increased import volume and market share and the industry's dramatically worsening financial performance, the Commission explained that increased imports were the "only explanation" for the industry's worsening financial losses in light of the industry's competitive new LRWs and strong demand growth during the period of investigation.[178]

94. Based on the moderately high degree of substitutability between domestic LRWs and subject imports and the importance of price to purchasing decisions, the Commission found the increasing volumes of low-priced imports forced domestic producers to defend their market share by reducing their prices, thereby depressing and suppressing domestic prices to a significant degree.[179] The resulting increase in the industry's COGS to net sales ratio, as prices declined while costs generally increased, directly resulted in the industry's worsening financial losses and greatly reduced capital and R&D expenditures.[180]

95. Upon its thorough examination of the record evidence, the Commission also found that neither of the alternative causes of injury argued by respondents – the joint pricing theory and brand deterioration – could explain *any* of the serious injury sustained by the domestic industry.[181] The Commission therefore demonstrated a causal link between increased imports and serious injury, and ensured that no injury caused by other factors was attributed to subject imports, in accordance with the Safeguards Agreement. None of Korea's arguments to the contrary are any more persuasive for being repeated in response to the Panel's written questions.

---

[177] *See* U.S. first written submission, paras. 275-338; U.S. responses, paras. 48-80.

[178] USITC Report, p. 38 (Exhibit KOR-1).

[179] *See* USITC Report, pp. 40-44 (Exhibit KOR-1).

[180] USITC Report, pp. 38. 43-44 (Exhibit KOR-1).

[181] *See* USITC Report, pp. 45 (finding "the record does not support 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"), 46 (finding that "even if the domestic industry's sales of dryers were more profitable than its sales of LRWs, the greater profitability of dryers could not explain the domestic industry's . . . worsening operating and net losses on sales of LRWs during the period of investigation . . . ."), 48 (finding that "respondents' 'brand deterioration theory does not explain the domestic industry's declining sales prices during the period of investigation, or any of the resulting injury.") (Exhibit KOR-1).

A. The Commission demonstrated a causal link between increased imports and the domestic industry's serious injury in accordance with the Safeguards Agreement

96. In its responses to the Panel's written questions, Korea repeats several arguments from its first written submission that the United States has thoroughly rebutted. Korea argues that the Commission's finding that the domestic industry suffered a cost-price squeeze was unsupported by the record, while acknowledging that the Commission found a significant increase in the industry's COGS to net sales ratio consistent with such a squeeze. Korea also contends that the Commission could not establish a causal link between increased imports and serious injury without pricing data on the domestic industry's sales of agitator-based TL LRWs, though such data would have yielded few if any quarterly price comparisons and respondents themselves endorsed the Commission's pricing products as representative of competition in the U.S. market. As further discussed below, none of Korea's claims withstand scrutiny.

1. Objective data supported the Commission's finding that the domestic industry was in a cost-price squeeze

97. In acknowledging the Commission's finding that the domestic industry's COGS to net sales ratio increased during the period of investigation, Korea contradicts its own argument that the domestic industry suffered no cost-price squeeze.[182] As the United States pointed out in its first written submission, past reports have recognized that "{a} higher COGS/sale ratio . . . indicates that such costs make up a higher portion of sales value, leaving a smaller margin for selling, general and administrative expenses, and profits."[183] Accordingly, when a domestic industry's COGS to net sales ratio increases, the industry is said to be experiencing a "cost-price squeeze" because the combination of increasing costs and declining prices "squeezes" the industry's profits. In this case, the Commission observed that "{t}he industry's average unit COGS and its ratio of GOGS to net sales generally increased during the period of investigation," based on evidence that the industry's COGS to net sales ratio "increased steadily" in every year of the period and was higher in interim 2017 than in interim 2016.[184] As a "direct consequence" of the industry's increasing COGS to net sales ratio, the Commission found that the industry's operating and net income declined in every year of the period but 2015, in absolute terms and relative to net sales.[185] These objective data all supported the Commission's finding that the domestic industry suffered a worsening cost-price squeeze during the period of investigation.

---

[182] Korea Resp. Panel 1st Questions, para. 180.-82

[183] *US – Tyres (AB)*, para. 243; *see* U.S. first written submission, para. 290.

[184] USITC Report p. 43 & n.264 (Exhibit KOR-1).

[185] USITC Report, pp. 33-34, 38 (Exhibit KOR-1).

98. None of the trends highlighted by Korea prevented the domestic industry's COGS to net sales ratio from increasing throughout the period of investigation. Although the industry's average unit COGS declined in 2015 and 2016, as Korea notes, the industry's average unit sales values declined by more, resulting in an increase in the industry's COGS to net sales ratio in those years.[186] Evidence that the domestic industry's unit COGS increased throughout the rest of the period of investigation supported the Commission's finding that the industry's "costs generally increased," notwithstanding the stability of raw material costs. As the United States pointed out in its first written submission, the domestic industry's unit COGS was also influenced by trends in other factory and labor costs, and Whirlpool reported that "total raw material costs for LRWs generally increased as various models used more raw materials on a per unit basis."[187] Neither the decline in unit COGS in 2015 and 2016, nor the stability of raw material costs, prevented the industry from experiencing a cost-price squeeze as its ratio of COGS to net sales relentlessly increased.

2. Objective data supported the Commission's finding that increased volumes of low-priced imports depressed and suppressed the domestic industry's sales prices

99. The Commission also provided a reasoned and adequate explanation, based on objective evidence, for its finding that increasing volumes of low-priced imports caused the domestic industry's cost-price squeeze by depressing and suppressing the domestic industry's sales prices. As the Commission explained, subject imports were priced lower than comparable domestically produced LRWs in 70 of 92 quarterly comparisons, or 76.1 percent of the time, with a weighted-average underselling margin of 14.2 percent.[188] The Commission also found that the volume of subject import shipments in quarters with underselling, 3,860,937 units, far exceeded the volume of subject import shipments in quarters with overselling, at 613,567 units.[189] Based on the moderately high degree of substitutability between domestically produced LRWs and subject imports and the importance of price to purchasers, the Commission found that increasing volumes of low-priced subject imports forced domestic producers to defend their market share by reducing their prices. The record showed that the domestic industry's sales prices declined on all six pricing products during the period of investigation, by between 6.2 and 43.7 percent, despite increasing demand and production costs.[190] The Commission found that "the domestic industry experienced increasing operating and net losses during the period of investigation as its

---

[186] USITC Report, p. III-11 (Exhibit KOR-1) ("lower gross profit ratios in 2014-15 and 2015-16 reflect declines in average unit sales value which were only partially offset by corresponding declines in average unit COGS").

[187] USITC Report, V-20 (Exhibit KOR-1).

[188] USITC Report, p. 42 (Exhibit KOR-1).

[189] USITC Report, p. 42 (Exhibit KOR-1).

[190] USITC Report, pp. 43, V-28 (Exhibit KOR-1).

sales prices declined while its costs generally increased," placing the industry in a classic cost-price squeeze.[191] Contrary to Korea's argument, the Commission predicated its causal link analysis on pricing data that was representative of competition in the U.S. market, as well as a thorough evaluation of the record evidence concerning agitator-based TL LRWs.

100. As the United States has explained in its previous written submissions, the Commission based its analysis of the price effects of subject imports on pricing data that was representative of competition in the U.S. market.[192] Domestic producers and importers reported the quarterly quantity and value of their sales of six strictly defined pricing products, which were selected with input from the parties.[193] As the Commission noted, respondents themselves had endorsed the inclusion of four of the pricing products in their comments on the draft questionnaires, and originally recommended a fifth pricing product in LRWs from China, as being representative of competition in the U.S. market.[194] The six pricing products on which data were collected included three impeller-based TL LRWs and three FL LRWs, which were the types of LRWs that accounted for "virtually all" subject imports and around half of domestic industry shipments in 2016.[195] They were also the very types of LRWs in which the domestic industry had invested so heavily during the period of investigation. In this regard, the Commission found that "the domestic industry invested a major proportion of its substantial capital expenditures on R&D expenses during the period of investigation in commencing and expanding the domestic production of FL LRWs and the development and production of more energy-efficient and fully featured TL LRWs."[196] Consistent with the importance of these types of LRWs to competition in the U.S. market, the Commission found that the pricing data covered an "appreciable percentage of domestic producer and importer U.S. shipments . . . well within the range that the Commission has considered reliable in previous investigations."[197] Thus, the Commission provided a reasoned and adequate explanation for its finding that the pricing data "provide{d} a reliable basis for apples-to-apples price comparisons based on specifically defined LRW products."[198]

---

[191] USITC Report, pp. 38, 43-44 (Exhibit KOR-1).

[192] *See* U.S. first written submission, paras. 300-305; U.S. responses, paras. 51, 59-64.

[193] USITC Report,

[194] USITC Report, p. 41 n.255 (Exhibit KOR-1).

[195] USITC Report, pp. 24-25, 32, 50 (Exhibit KOR-1).

[196] USITC Report, pp. 32, 50 (Exhibit KOR-1).

[197] USITC Report, p. 41 (Exhibit KOR-1).

[198] USITC Report, p. 41 (Exhibit KOR-1); *see China – Broiler Products (Panel)*, para. 7.109 ("Whatever the sampling methodology, . . . application of sampling as an analytical tool is valid where it can be demonstrated that the sample is sufficiently representative to allow for a reasoned conclusion about the population as a whole.").

101. The absence of a pricing product corresponding to agitator-based TL LRWs did not, as Korea argues, render the Commission's pricing data any less representative.[199] As the United States explained in response to the Panel's questions, the Commission sought to define pricing products "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."[200] Given the Commission's finding that "agitator-based TL LRWs accounted for . . . few import shipments . . . ,"[201] the definition of a pricing product corresponding to agitator-based LRWs would have satisfied neither selection criteria. Such a product would have increased the reporting burden on domestic producers without yielding either applies-to-apples price comparisons or increased coverage of importer shipments. It was therefore reasonable for the Commission "to have only collected data for the specific models for which there were imports to compare."[202]

102. Nor did the Commission need pricing data on agitator-based TL LRWs to provide a reasoned and adequate explanation for its finding that "imported LRWs competed with domestically produced LRWs in all segments of the U.S. market."[203] The record contained ample evidence supporting the finding, as detailed in the U.S. responses to the Panel's questions.[204] In particular, the Commission found 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 reporting that consumers were sometimes or frequently willing to switch between TL and FL LRWs based on relative pricing."[205] As the United States has explained and Korea acknowledges, the Commission's cross-shopping finding extended to impeller-based and agitator-based TL LRWs, meaning that subject imported impeller-based TL LRWs and FL LRWs competed with domestically produced agitator-based TL LRWs for sales to consumers.[206] Contrary to Korea's assertion that there was no evidentiary basis for the Commission's analysis of cross-shopping, the Commission relied on a confidential "cross-shopping study" submitted by Whirlpool, which respondents did not contest during the

[199] Korea Resp. Panel 1st Questions, para. 190.

[200] USITC Report, p. 41 n.255 (Exhibit KOR-1); *see* U.S. responses, paras. 64-67.

[201] USITC Report, p. 32 (Exhibit KOR-1).

[202] LG Electronics, Inc. v. U.S. Int'l Trade Comm'n, 26 F.Supp.3d 1338, 1350 (Ct. Int'l Trade 2014) (Exhibit US-15).

[203] USITC Report, p. 32 (Exhibit KOR-1).

[204] *See* U.S. responses, paras. 51-56.

[205] USITC Report, p. 32

[206] Korea Resp. Panel 1st Questions, para. 183; *see also* U.S. responses, para. 50.

investigation, as well as on the responding purchasers' confirmation that consumers often cross-shop TL and FL LRWs.[207]

103. The Commission also found that "pricing 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."[208] As support, the Commission found overlap between importer prices on sales of pricing products and the average unit value of domestic industry shipments of agitator-based TL LRWs.[209] The Commission also 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.[210] It also relied on petitioner's confidential hearing exhibit 1, which sorted all pricing product sales reported by domestic producers and importers in *LRWs from China* and the safeguard investigation into "pricing buckets" corresponding to "ranges of wholesale prices," and showed that domestically produced and imported LRWs competed across all "pricing buckets."[211] As additional support, the Commission noted that the record contained "some evidence 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.[212] Given the importance of price to purchasers, it stands to reason that, all else being equal, lower prices on more fully featured subject imports would shift sales away from less fully featured domestically produced agitator-based TL LRWs absent price cuts on the less fully featured models.[213] Based on this wide array of objective evidence, the Commission reasonably

---

[207] Korea Resp. Panel 1st Questions, para. 183; USITC Report, p. 32 & n.201. Far from contesting the evidence that consumers cross-shopped different types of washers, Samsung argued that consumers cross-shopped out-of-scope belt-driven washers and in-scope LRWs, just as they cross-shopped agitator-based LRWs with other types of LRWs. *See* Samsung's Posthearing Brief at 5-6 (Exhibit KOR-10) ("The Commission itself previously concluded that the '*only* physical difference' between in-scope and excluded {belt-driven} front loaders is 'the combination of a controlled induction motor and a belt drive system' in the latter. This solitary difference, moreover, is not readily apparent to consumers cross-shopping such models. . . . Whirlpool has insisted that consumers cross-shop even conventional top load agitator models . . . If agitator models should be considered as part of the LRW market, so must imported front load CIM/belt washers.").

[208] USITC Report, p. 32 (Exhibit KOR-1).

[209] USITC Report, p. 32 & n.202 (Exhibit KOR-1); *see* U.S. responses, para. 51.

[210] USITC Report, p. 32 n.202 (Exhibit KOR-1); *see* U.S. responses, para. 53. The pricing products in *LRWs from China* did not include an agitator-based LRW model, and "{a}lthough the agitator-based top load LRW model that Whirlpool reported for product 9 did not meet the definition of product 9, the questionnaire instructions directed domestic producers to report pricing product data for the ten pricing products 'or any products that were competitive with these products.'" *LRWs from China*, USITC Pub. 4666 at 24 n.151 (Exhibit US-5).

[211] *See* U.S. responses, para. 54; USITC Report, p. 32 n.202 (Exhibit KOR-1).

[212] *See* U.S. responses, para. 55; USITC Report, p. 32-33 n.202 (Exhibit KOR-1).

[213] The Commission adopted by reference its finding from *LRWs from China* that "lower prices on more fully featured subject imports adversely affected the sales volumes and prices of less fully featured domestically

concluded that subject imports competed with domestically produced agitator-based TL LRWs, even though there were few imports of such washers.

104. In sum, the Commission provided a reasoned and adequate explanation for its finding that subject imports depressed and suppressed domestic prices to a significant degree, resulting in the industry's cost-price squeeze and worsening financial losses. It relied on pricing data representative of competition in the U.S. market to find that increasing volumes of imports priced pervasively lower than comparable domestic LRWs depressed and suppressed domestic prices to a significant degree, given the moderately high degree of substitutability between imported and domestic LRWs and the importance of price to purchasers. It also relied on a wide array of other evidence, including pricing data from *LRWs from China*, to find that the same imports would have adversely affected the domestic industry's sales of domestically produced agitator-based TL LRWs. The Commission reasonably concluded that by depressing and suppressing domestic prices, subject imports caused the domestic industry's cost-price squeeze and resulting financial losses. Indeed, 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," given "strong demand growth, rising costs, and the competitiveness of the domestic industry's LRWs."[214] The Panel should therefore reject Korea's claims against the Commission's causal link analysis.

B. The Commission Complied with the Non-Attribution Requirement

105. As the United States has explained, the Commission thoroughly analyzed respondents' arguments that the domestic industry's injury resulted from the joint pricing of LRWs and matching dryers and the deterioration of U.S. brands and found the arguments unsupported by the record.[215] Because neither argument could explain *any* of the serious injury sustained by the domestic industry, there was no injury from alternative causes for the Commission to separate or distinguish from injury caused by subject imports. As the Commission made abundantly clear, increased imports were "the only explanation" for the domestic industry's serious injury. Korea's persistence in arguing that there was some injury caused by these other factors that the Commission somehow overlooked is based on a fundamental mischaracterization of the Commission's analysis.

---

produced LRWs," including domestically produced agitator-based TL LRWs. Confidential Views, *LRWs from China*, at 35-36, cited in USITC Report, pp. 32-33 n.202 (Exhibit KOR-1); *LRWs from China*, USITC Pub. 4666 at 24-25 (Exhibit US-5) (containing the public version of pages 35-36 of the confidential views); *see also* U.S. responses, para. 55 & n.94.

[214] USITC Report, p. 38 (Exhibit KOR-1) (emphasis added).

[215] USITC Report, pp. 45-51 (Exhibit KOR-1); U.S. first written submission, paras. 311-337; U.S. responses, paras. 75-80.

1. The Commission's reliance on statutory language was not an admission of injury caused by other factors

106. Korea's principal basis for arguing that the Commission somehow "acknowledged" the possibility of injury caused by the other factors identified by respondents is the Commission's finding that neither of the alleged other factors was "an important cause of injury" or "a more important cause than imports."[216] The Commission, however, specifically couched its non-attribution analysis in these terms in order to comply with the statutory requirement that the Commission find that increased imports are "'a cause which is important and not less than any other cause.'"[217] Indeed, the Commission prefaced its analysis with a summary of the statutory factors for making an affirmative safeguard determination and then referenced the relevant statutory language in each section of its report, in confirming that each statutory factor had been satisfied. The statute required the Commission to find that imports increased "either actual or relative to domestic production"; to determine whether the domestic industry was seriously injured, meaning "a significant overall impairment in the position of a domestic industry"; and to determine whether increased imports are a "substantial cause" of the injury, meaning "a cause which is important and not less than any other cause."[218] In accordance with these statutory requirements, the Commission found that imports increased "in absolute terms and relative to domestic production," that there had been "a significant overall impairment in the position of the domestic industry," that "imports were a substantial cause of serious injury," and that "imports are an important cause of serious injury not less than any other cause."[219] Thus, the Commission's references to the statutory non-attribution standard were meant to confirm that the standard had been satisfied, and did not alter the Commission's conclusion that "{n}either of respondents' alleged alternative causes of injury is supported by the record evidence."[220]

107. In *United States – Coated Paper*, which concerned Indonesia's challenge to an affirmative threat determination by the Commission, the panel recognized that the Commission's use of statutory language in the conclusion of its likely price analysis did not alter its factual findings concerning the likely price effects of subject imports. In that dispute, the Commission had made an affirmative threat determination based in part on its finding that subject imports were likely to cause "significant price depression or suppression," even though the Commission's analysis had concluded that only significant price depression was likely. Although Indonesia initially challenged what it characterized as the Commission's likely price

---

[216] Korea Resp. Panel 1st Questions, paras. 193-197. Korea has confirmed that its challenge is limited to the Commission's application of the substantial cause standard. *Id.*, para. 193.

[217] USITC Report, pp. 21-22 (Exhibit KOR-1) (quoting 19 U.S.C. § 2252(b)(1)(B) (Exhibit US-9)).

[218] USITC Report, pp. 20, 20-22 (Exhibit KOR-1) (quoting 19 U.S.C. §§ 2252(b)(1)(A), 2252(c)(6)(C), 2252(b)(1)(B) (Exhibit US-9)).

[219] USITC Report, pp. 20, 37, 44, 51 (Exhibit KOR-1).

[220] USITC Report, p. 51 (Exhibit KOR-1).

suppression finding, the United States explained "that the USITC only made reference to 'significant price depression *or* suppression' to couch its likely-price-effects finding in terms of the US statute, and that likely price suppression was not a basis for the USITC's final determination of threat of material injury."[221] The panel found that "the United States' explanations are in line with our reading of the USITC's determination – although the determination concludes by stating that the domestic industry would be likely experiencing significant price depression or suppression in the future, the preceding analysis focuses on price depression, and there is no suggestion in the determination that the USITC considered or made a finding of likely future price suppression."[222]

108. Based on the same reasoning, the Panel in this dispute should recognize that the Commission only referred to the alternative causes of injury argued by respondents as not being "important causes of serious injury to the domestic industry" to couch its non-attribution analysis in terms of the U.S. statute. The Commission did not mean for this language to alter its findings that neither factor caused any injury to the domestic industry, or to acknowledge that the factors might have caused some small amount of injury, as Korea maintains. Indeed, the Commission emphasized that neither factor caused any injury in the concluding paragraph of its non-attribution analysis:

> {R}espondents' "joint pricing" theory cannot explain the domestic industry's dramatically worsening operating and net losses during the period of investigation. Respondents' argument concerning the alleged deterioration of U.S. brands purports to explain only an injury that did not occur, a loss of market share by the domestic industry, when the domestic industry's serious injury resulted from declining sales prices. Neither of respondents' alleged alternative causes of injury is supported by the record.[223]

That these findings were bookended by references to the relevant statutory standard does not make them any less definitive. The Commission found that neither of the alternative causes of injury argued by respondents could explain any of the serious injury experienced by the domestic industry. Accordingly, the Panel should reject Korea's argument claims concerning non-attribution.

---

[221] *United States – Coated Paper (Panel)*, para. 7.317.

[222] *United States – Coated Paper (Panel)*, para. 7.317.

[223] USITC Report, p. 51 (Exhibit KOR-1).

2. The Commission provided a reasoned and adequate explanation for its finding that joint pricing explained none of the domestic industry's serious injury

109. The Commission's thorough analysis of all evidence pertaining to respondents' joint pricing theory, spanning three pages and 12 footnotes,[224] belies Korea's assertion that the Commission dismissed the theory "based on a statement by Whirlpool's CEO."[225] As the United States has explained, the Commission provided a reasoned and adequate explanation for its finding that "the record does not support 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."[226] The Commission not only relied on the sworn testimony of Whirlpool's Chairman and CEO that Whirlpool engaged in no such practice.[227] It also relied on GE's statement that it was incapable of engaging in such a practice because it imported its dryers pursuant to a contract manufacturing agreement that precluded outsize profits on sales of dryers.[228] The Commission also noted that, consistent with Whirlpool's testimony and GE's statement, domestic producers reported in their questionnaire responses that few LRWs were sold "paired" with matching dryers.[229] Furthermore, the Commission examined all the evidence proffered by respondents and concluded that the evidence did not rebut the sworn testimony of the Whirlpool and GE officials themselves that they seldom sell LRWs and matching dryers together at wholesale and never at the same net wholesale price.[230] Thus, the Commission thoroughly explained how objective evidence supported its conclusion that respondents' joint pricing theory was unsupported by the record.

110. The Commission also provided a reasoned and adequate explanation for its finding that "even if the domestic industry's sales of dryers were more profitable than its sales of LRWs, the greater profitability of dryers could not explain the domestic industry's . . . worsening operating and net losses on sales of LRWs during the period of investigation . . . ."[231] Contrary to Korea's suggestion that the United States used the term "arguendo" to somehow diminish this aspect of the Commission's analysis, the United States properly characterized the analysis as "arguendo"

---

[224] USITC Report, pp. 45-47 (Exhibit KOR-1).

[225] Korea Resp. Panel 1st Questions, para. 201.

[226] USITC Report, pp. 34-35, 45; *see* U.S. first written submission, paras. 317-329; U.S. responses, paras. 75-77.

[227] USITC Report, pp. 45-46 (Exhibit IOR-1).

[228] USITC Report,

[229] USITC Report, p. 46 n.277 (Exhibit KOR-1).

[230] USITC Report, p. 46 n.277 (citing Hearing Tr., 157 (Tubman) (Exhibit US-2), 160-61 (Tubman), 162 (Pepe)) (Exhibit KOR-1); *see also* U.S. first written submission, paras. 321-223.

[231] USITC Report, pp. 46-47 (Exhibit KOR-1).

because the Commission assumed that the respondents' joint pricing theory was true "for the sake of argument," even after finding that the record did not support the theory.[232] As the United States explained in response to the Panel's questions, the Commission reasonably found that respondents' joint pricing theory, if true, might explain LRW profit margins that were consistently lower than the profit margins on matching dryers but could not explain Whirlpool's dramatically worsening losses on sales of LRWs during the period of investigation.[233] It would have been impossible as an economic matter for Whirlpool to "have earned increasing profits on sales of dryers when dryer prices would have declined with matching LRW prices during the period of investigation."[234] Thus, not only was respondents' theory unsupported by the record, it was also incapable of explaining any of Whirlpool's dramatically worsening financial losses on sales of LRWs.[235]

111. Although Korea contends that the Commission was somehow required to request information from Whirlpool concerning its alleged joint pricing strategy,[236] Korea overlooks that the Commission did, in fact, request domestic producers to report the percentage of their LRWs sold "bundled" with matching dryers, and these data did not support respondents' "joint pricing" theory.[237] The Commission did not request more detailed information because it already knew that Whirlpool employed no "joint pricing" strategy based on the sworn testimony of Whirlpool's Chairman and CEO at the hearing for *LRWs from China*, which was on the record of the safeguard investigation.[238] Based on that testimony and other evidence, the Commission rejected respondents' "joint pricing" theory in *LRWs from China*, finding "no evidence on the record to support respondents' assertion that Whirlpool and GEA purposely priced their LRWs to sell at a loss on the expectation that profitable sales of matching dryers would compensate."[239] Thus, the Commission reasonably requested only targeted information on respondents' joint pricing theory from Whirlpool because the theory had already been rejected by the Commission and concerned products, dryers, that were not subject to investigation.[240]

---

[232] Korea Resp. Panel 1st Questions, para. 200.

[233] *See* U.S. responses, para. 78-80.

[234] USITC Report, p. 47 (Exhibit KOR-1).

[235] *See also* U.S. responses, para. 79.

[236] Korea's response, para. 201.

[237] USITC Report, p. 46 & n.277, V-23 (Exhibit KOR-1).

[238] *See* USITC Report, p. 45 (noting that Whirlpool's Chairman and CEO "rejected respondents' position" at the hearing for the safeguard investigation, "as he did at the hearing for *LRWs from China*").

[239] *LRWs from China*, USITC Pub. 4666 at 36 (Exhibit US-27).

[240] USITC Report, p. 34 (Exhibit KOR-1) (explaining that "under the statute, the focus of out analysis must be the domestic industry producing LRWs, {belt drive washers}, and covered parts, as the producers as a whole of

3. The Commission provided a reasoned and adequate explanation for its finding that respondents' brand deterioration argument explained none of the domestic industry's serious injury

112. Contrary to Korea's argument that there existed some "innovation demand" that only subject imports could serve, the Commission reasonably explained that the record did not support the assertions that consumers increasingly favored subject imports over domestically produced LRWs for non-price reasons, including brand, innovation, repair rates, mold issues, Whirlpool's alleged failure to differentiate Maytag LRWs from Whirlpool LRWs, and the domestic industry's alleged reliance on agitator-based TL LRWs.[241] The Commission also observed that respondents' argument that the domestic industry lost market share to subject imports due to the alleged deterioration of U.S. brands purported to explain an injury, loss of market share, that did not actually occur.[242] Respondents made no argument that the alleged deterioration of U.S. brands explained the industry's declining prices, which were caused by increasing volumes of low-priced imports and resulted in the industry's worsening financial losses.[243]

113. Nor did the record evidence show that the domestic industry failed to adjust to consumer demand for innovative LRW products, as Korea argues.[244] To the contrary, the Commission found that the domestic industry made substantial investments during the period of investigation to develop and produce competitive new impeller-based TL and FL LRWs.[245] The Commission reasonably found domestically produced LRWs "competitive" based on evidence that purchasers found them interchangeable with subject imports and comparable to subject imports in terms of 23 factors that influenced purchasing decisions, including consumer preferences for particular features resulting in high store turnover, frequency of returns/reliability, and product range.[246] The Commission also found that domestically produced LRWs, like subject imports, possessed numerous innovative features, and that numerous domestically produced LRWs were ranked among the ten best impeller-based TL LRWs and FL LRWs by independent reviewers at Consumer Reports and Reviewed.com.[247] Furthermore, the Commission found that

---

the like or directly competitive article, and no party has argued that domestically produced dryers are like or directly competitive with imported LRWs.").

[241] *See* USITC Report, pp. 48-51 (Exhibit KOR-1).

[242] USITC Report, pp. 48, 51 (Exhibit KOR-1).

[243] USITC Report, pp. 48, 51 (Exhibit KOR-1).

[244] *See* Korea Resp. Panel 1st Questions, paras. 202-213.

[245] USITC Report, pp. 24-25 (Exhibit KOR-1).

[246] USITC Report, p. 48 (Exhibit KOR-1).

[247] USITC Report, p. 48 (Exhibit KOR-1). As the Commission noted, Consumer Reports ranked domestic LRWs among three of the top five and four of the top ten recommended FL LRWs models and six of the top ten

"{r}espondents' claim that sales of imported LRWs were driven by features and innovations favored by consumers, which should have commanded a price premium, is belied by both the extent to which imported LRWs were priced lower than domestically produced LRWs, and the declining prices of the imported LRW models that respondents identified as particularly innovative."[248] Thus, the Commission reasonably rejected respondents' argument that subject imports increased due to their superior innovation relative to domestically produced LRWs.

114. Korea's listing of innovative features and models from LG and Samsung, including Flexwash and Sidekick LRWs, does not detract from the Commission's finding that domestically produced LRWs and subject imports were comparable in terms of innovation and other non-price factors.[249] As the Commission explained, "{a}ll producers of LRWs seek to differentiate their LRWs in the marketplace through exclusive features and innovations, and FlexWash and Sidekick are examples of such product differentiation."[250] The Commission found that domestic producers introduced numerous innovative features on their own LRWs, such as "Load and Go," "bulk detergent dispensing, and Wi-Fi connected washers," and that purchasers found domestically produced LRWs and subject imports comparable in terms of consumer preferences for particular features resulting in high store turnover, as well as 22 other non-price factors.[251] Nor could FlexWash or SideKick have driven increased imports, as Korea suggests, because those models were new at the end of the period of investigation and respondents made no such argument during the investigation.[252]

115. In a tacit admission that the record evidence considered by the Commission does not support its claim that subject imports were superior with respect to innovation, Korea attempts to support its argument with extra-record information concerning "innovation leadership" that was not before the Commission at the time it made its affirmative safeguard determinations.[253] This information from the Commission's determinations in its first five-year reviews of the antidumping and countervailing duty orders on LRWs from Korea and Mexico, which were issued in April of 2019, did not exist when the Commission issued its determinations in the

---

recommended impeller-based TL LRW models. *Id.* Reviewed.com ranked domestic LRWs among six of the top ten TL LRW models and among four of the top ten FL LRW models. *Id.*

[248] USITC Report, p. 42 (Exhibit KOR-1).

[249] *See* Korea Resp. Panel 1st Questions, paras. 212-213.

[250] USITC Report, p. 14 (Exhibit KOR-1).

[251] USITC Report, pp. 25, 29 & n.179, V-1-2 (Exhibit KOR-1); Hearing Tr. at 61, 101 (Tubman) (Exhibit US-26).

[252] *See* LG and Samsung's Prehearing Injury Brief, 30 ("In March 2017, Samsung introduced its FlexWash dual-chamber washer to the U.S. Market.") (Exhibit KOR-11); Hearing Tr. 205 (Riddle) ("{T}his slide showcases LG's *new* TWINWash system . . . .") (emphasis added) (Exhibit US-2).

[253] Korea Resp. Panel 1st Questions, paras. 204, 211 (citing USITC, *LRWs from Korea and Mexico (Sunset Review)* (Exhibit KOR-20)).

safeguard investigations in December of 2017.[254] Consistent with the appropriate standard of review, the Panel may not consider Korea's extra-record evidence.[255]

116. For all the foregoing reasons, the Commission provided a reasoned and adequate explanation for its finding that the alternative causes of injury argued by respondents were unsupported by the record, and accounted for none of the serious injury sustained by the domestic industry. Korea has accordingly failed to establish that the Commission's non-attribution analysis was inconsistent with SGA Article 4.2(b).

VI. KOREA BASES ITS ARTICLE 5.1 ARGUMENT ON A LEGAL STANDARD THAT DOES NOT EXIST

117. Korea 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.[256]

118. The United States set out in its first written submission principles for evaluating claims under Article 5.1.[257] Without unnecessarily repeating those arguments in full, the United States further addresses below both of Korea's faulty bases for its insistence that the U.S. LRWs measure went beyond the extent necessary to remedy the serious injury to the domestic industry and facilitate adjustment.

A. The Disciplines Governing the Competent Authorities' Findings and Report Do Not Apply to Article 5.1

119. At the outset, the United States once again recalls that nothing in Article 5.1 obligates a Member to demonstrate, at the time of taking a safeguard measure, how the measure complies with this article.[258] Just as with most other WTO obligations, a Member alleged to have acted inconsistently with Article 5.1 remains free to explain, *ex post*, how its actions comply with the obligations. In *US – Line Pipe*, the Appellate Body explained, correctly, that "{i}t is clear, therefore, that apart from one exception, Article 5.1, including the first sentence, does not oblige

---

[254] *See* Exhibit KOR-20.

[255] *Korea – Dairy (Panel)*, para. 7.30 ("the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it has collected.").

[256] Korea first written submission, para. 237.

[257] U.S. first written submission, paras. 344-49.

[258] *US – Line Pipe (AB)*, para. 233; *Korea – Dairy (AB)*, para. 99.

a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary.'"[259] Korea, in fact, concedes as much.[260]

120. Yet Korea also insists that the disciplines that apply to the competent authorities' investigation, determination, and findings (in the report of the competent authorities) also govern Article 5.1. It asserts:

> In addition, Article 3.1 requires that the competent authorities publish a report setting forth their "findings and reasoned conclusions reached on all pertinent issues of fact and law".
>
> * * * * *
>
> [W]here the USITC makes certain findings or recommendations about the level of the measure or the extent to which the industry is adjusting, these must meet the required standard of being sufficiently reasoned and adequate and the measure ultimately adopted can be examined in the light of these findings. Korea does not consider that it is for the Panel to determine whether the measure was necessary to remedy serious injury or not. Rather, it if [sic.] for the Panel to examine Korea's arguments based on the facts on the record and the findings made.[261]

121. Korea is once again mixing apples and oranges. If Korea agrees with the United States and the Appellate Body that a Member does not need to justify at the time of taking a safeguard measure whether it has applied the measure "only to the extent necessary", then it need not set out anywhere in the competent authority's report a reasoned and adequate explanation that the measure met this standard. Even the notion that there would be relevant "findings" or a "determination" or "facts on the record," reflects Korea's misguided logic, for the relevant disciplines under Articles 2, 3, and 4 containing these concepts apply only to what competent authorities are required to include in their reports. They do not apply to the separate evaluation of the action that would prevent or remedy serious injury and facilitate adjustment for purposes of Article 5.1.

B. Korea's Attempt to Impose an Ambiguous, "Compelling Alternate Explanation" Standard with Respect to Article 5.1 Totally Lacks Support

122. The Panel directly asked Korea to explain its position that "total silence" by the competent authorities constitutes a breach of Article 5.1, given that Korea also concedes that a

---

[259] *US – Line Pipe (AB)*, para. 233.

[260] Korea Resp. Panel 1st Questions, para. 237.

[261] Korea Resp. Panel 1st Questions, paras. 231-32.

"clear justification" is not the relevant standard.[262] Korea asserts, without further explanation, that "'total silence' is [not] permitted when the explanations that are provided such as in the USITC Report reveal that the LRW safeguard measure was not calibrated to address only what was necessary to facilitate adjustment." As support for this assertion, Korea cites the separate recommendation expressed by two Commissioners on a single topic, along with two recommendations of the full Commission, and then argues (again without further explanation) that "[g]iven these explanations, a compelling alternative explanation was required to support the measure adopted."[263]

123. But Korea provides no basis for the Panel to conclude that the publication of nonbinding *recommendations* by the Commission (which the Safeguards Agreement does not require), including any separate recommendations of individual Commissioners (which the Safeguards Agreement does not require) can create an obligation to explain how a safeguard measure complies with Article 5.1 (which the Safeguards Agreement does not require). Korea's entire argument is a *non sequitur*. And, assuming *arguendo* that an obligation to explain could be derived in this fashion, Korea provides no basis to assert that it would need to be "compelling."

124. In addition to being wrong on the law, Korea is wrong on the facts. The United States has already explained why the evidence identified by Korea does not show the measure was applied to a greater extent than that necessary.[264] The 14.2 percent margin of underselling in the USITC pricing comparisons does not indicate the tariff level necessary to remedy serious injury or facilitate adjustment. Korea provides no basis to consider that importers would pass the full amount of the tariff on to their customers. Nor is the underselling margin a proxy for the extent of the serious injury identified by the USITC, including the domestic industry's dramatically worsening financial losses and greatly reduced level of capital investment and research and development spending.

125. Likewise, the recommendations of Vice Chairman Johansen and Commissioner Broadbent against an in-quota tariff, are not *evidence* that the final measure exceeds what is necessary to remedy serious injury and facilitate adjustment. They simply represent the individual perspective of those Commissioners, and demonstrate at most that reasonable minds may differ. Two other Commissioners – Chairman Schmidtlein and Commissioner Williamson – recommended an in-quota TRQ at essentially the same level eventually adopted by the President.[265] The United States has explained that the TRQ alone would address the quantitative

---

[262] Panel 1st Questions, No. 56.

[263] Korea Resp. Panel 1st Questions, para. 237.

[264] *See* U.S. first written submission, paras. 350-73.

[265] USITC Report, p. 75 (Exhibit KOR-1). The sole difference is that Chairman Schmidtlein and Commissioner Williamson recommended a 15 percent in-quota duty rate for the third year of the TRQ, while the washers safeguard measure provided for a 16 percent in-quota duty rate in the third year. *Compare* USITC Report, p. 2 (Exhibit KOR-1) *with* Proclamation 9694, Annex (Exhibit US-10).

aspect of the serious injury to the domestic industry, and that the TRQ and in-quota tariff were both necessary to address injurious underselling. The fact that Vice Chairman Johansen and Commissioner Broadbent recommended differently does not detract from this logic. Indeed, assuming *arguendo* that the Panel were to consider that the United States needed to provide an *ex ante* compelling explanation for the in-quota tariff level, the United States considers that the reasoning of Chairman Schmidtlein and Commissioner Williamson provide such an explanation.

126. Korea's continued assertion that there was no consideration of adjustment plans also is incorrect. Nothing in the Safeguards Agreement requires a domestic industry to submit a plan,[266] but the USITC did consider and summarize the domestic producers' adjustment plans in its views and recommendations on remedy.[267] It also noted the potential positive effects on the industry of Samsung and LG's plans to open domestic production facilities.[268] The United States has explained how the safeguard measure facilitated these planned adjustments. Thus, there is no basis for Korea's assertion that the United States failed to take account of the need to facilitate adjustment for purposes of Articles 5.1.

* * * * *

127. For the foregoing reasons, Korea has failed to establish the United States acted inconsistently with Article 5.1.

VII. KOREA HAS NOT ESTABLISHED THAT THE NOTIFICATIONS AND OPPORTUNITY TO CONSULT PROVIDED BY THE UNITED STATES WAS INCONSISTENT WITH SAFEGUARDS AGREEMENT ARTICLES 8 AND 12

128. The United States notified the Committee on Safeguards at each relevant step of the process toward adoption of the LRWs safeguard measure, from its 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 Safeguards Agreement Article 12 – and provided an opportunity for prior consultations beginning in early December of 2017, approximately two months before the measure took effect.[269]

---

[266] *Korea – Dairy (Panel)*, para. 7.108.

[267] USITC Report, pp.119-24 (Exhibit KOR-1).

[268] USITC Report, p.78 (Exhibit KOR-1).

[269] The United States refers to December 11, 2017, the date its notice was circulated to Members, in its first written submission. The United States communicated the measure on December 9, 2017. The USITC's determination was issued on December 4, 2017.

129. As set out in the United States' first written submission,[270] Safeguards Agreement Article 12.1 governs the timing of notifications by imposing an obligation to formally notify the Committee on Safeguards "immediately" at certain points in the process of moving from initiation of a safeguard proceeding through taking a safeguard measure. Article 12.2 governs the content of notifications at two stages of a proceeding – the finding of serious injury or threat thereof and the finalization of a safeguard measure. Article 12.3 calls on Members to provide an adequate opportunity for prior consultations "with a view to . . . reviewing the information provided under paragraph 2, [which in turn governs 'the notifications referred to in paragraphs 1(b) and 1(c)', *plural*], exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in [Article 8.1, governing compensation and the maintenance of a substantially equivalent level of concessions]."

130. These obligations are ones of transparency.[271] 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.

131. 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.[272] 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.

A. Korea's Arguments Regarding Initiation of the USITC Investigation Rely on a Semantic Distinction that Does Not Demonstrate An Inconsistency with Article 12.1(a).

132. Korea erroneously suggests that the United States changed its position that the investigation was initiated for purposes of Article 12. 1 of the Safeguards Agreement on June 13, 2017, rather than June 5, 2017, and accuses the United States of "trying to deny that the investigation was initiated on the date that it itself indicated that it was."[273] Korea is seeking to

---

[270] U.S. first written submission, paras. 378-80, 411.

[271] *See India – Iron and Steel (Panel)*, para. 7.356.

[272] U.S. first written submission, paras. 375-417; U.S. Resp. Panel 1st Questions, paras. 99-115.

[273] Korea Resp. Panel 1st Questions, para. 242.

exploit a semantic, rather than substantive, difference. Under U.S. law, the date a safeguard petition is properly filed is the "initiation" date, and forms the basis for calculation of subsequent deadlines in the proceeding.[274] However, the USITC has regulatory requirements for properly filing a safeguard petition, and must determine whether a document meets those requirements.[275] In this case, U.S. producers of LRW proffered a petition on May 31, 2017.[276] The USITC evaluated the filing, and sent the producers a letter identifying deficiencies on June 2, 2017. The producers filed an amendment to the petition on June 5, 2017.[277] The Commission then commenced its internal process for evaluating whether the amended petition was properly filed under the agency's regulations. On June 7, 2017, the USITC concluded that the amended petition was indeed properly filed, and issued a notice instituting the investigation, effective June 5, 2017.[278] On June 8, 2017 (a Thursday), the USITC sent a letter to USTR notifying it of the institution of the investigation.[279] On June 12, 2017 (the following Monday) USTR informed the WTO Committee on Safeguards of the institution.

133. Thus, for purposes of U.S. law, the "initiation" was deemed to have occurred on June 5, 2017. However, at that actual point in time, it was unclear to USTR, the agency responsible for filing U.S. notifications under the Safeguards Agreement, whether the Commission would consider the amended document to be a properly filed petition that would serve as the basis to begin an investigation. It was only upon receipt of the June 8 letter from the Commission that USTR received official notice that an investigation had begun, effective June 5, 2017. To have filed a notification before that time would have incorrectly created the impression that the June 5 amended petition was valid and that an investigation was definitely going to move forward, which the Commission had not yet officially determined and neither agency yet knew definitively to be true. Thus, 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."[280]

---

[274] 19 U.S.C. §2252(b)(1)(A). (Exhibit US-9).

[275] 19 CFR § 206.14 (Exhibit US-11).

[276] Whirlpool Petition (Original) (Exhibit KOR-5).

[277] Whirlpool Am. Petition (Exhibit US-28).

[278] Notice of Institution (Exhibit US-29).

[279] USITC Letter to USTR (Exhibit US-30).

[280] To the extent Korea suggests there is a disconnect between the United States' notification of institution to the WTO on June 12 and the official Federal Register publication on June 13, this concern reflects a misunderstanding of the U.S. procedures for publication in the Federal Register. There is inevitably a lag between the date an agency sends a notice for publication to the Office of Federal Register (OFR) and the date the notice is actually published in that journal, Here, the Commission Secretary signed and sent the notice to OFR on June 7, 2017, but it was not published in the Federal Register until June 13, with an effective date of June 5. As discussed

134. The United States showed that, assuming *arguendo* that the USITC initiated its investigation on June 5, 2017, the notification was sufficiently immediate to satisfy Article 12.1(a). Korea, however, seeks to distinguish the reasoning in *India – Iron and Steel*, that an eight-day interval between initiation of the investigation and the Article 12.1 notification is consistent with the immediate obligation to notify, from the facts of this dispute. According to Korea, India's explanation of the administrative steps that must be taken before a measure is filed is the basis on which to distinguish India's conduct from that of the United States'.[281]

135. This is a distinction without a difference. The United States also explained the administrative complexities it faced in preparing and publishing notifications under Articles 12.1(b) and (c) notifications. Its initial responses to Korea's arguments on Article 12.1(a) focused on Korea's misidentification of the relevant date of initiation, but the administrative difficulties of filing Article 12.(b) and (c) notifications apply equally to an Article 12.1(a) notification.

136. Korea also attempts to distinguish the facts in *India – Iron and Steel* on the basis that India is a developing country. While India has identified itself as a developing country at the WTO in general, the panel's finding on Article 12.1 in *India – Iron and Steel* did not rest in any way on this status. In fact, the panel in that dispute, at the end of its report, expressly rejected the relevance of such status (of the parties) to any of the disciplines at issue in that case – including Article 12 – and noted the parties themselves made no such argument.[282]

B. Korea Provides No Valid Support for its Argument That Article 12.1(b) Requires Competent Authorities to Announce Their Injury Determinations Only After They Have Issued Their Reports.

137. Korea errs in arguing that the Article 12.1 obligation to notify the Committee on Safeguards upon taking certain steps in a proceeding also imposes substantive obligations on how a Member conducts those proceedings.[283] That is not the case. Articles 3 and 4 of the Safeguards Agreement lay out the substantive obligations regarding the investigation of serious injury, and Article 5 lays out the substantive obligations regarding the decision to apply a safeguard measure. All of these Articles, however, leave Members substantial discretion in how they structure their proceedings. Article 12.1 merely obligates a Member to notify the Committee on Safeguards when it has taken one of a limited number of steps in such a proceeding. The obligation under Article 12.1(b) to notify "making a finding of serious injury or threat thereof caused by increased imports" does not dictate how or when a Member's authorities

---

above, in the interim, the Commission posted the notice of institution and notified USTR of the institution. (*See* Exhibits US-29, US-30.)

[281] Korea Resp. Panel 1st Questions, para. 244.

[282] *India – Iron and Steel (Panel)*, para. 7.432.

[283] Korea Resp. Panel 1st Questions, paras. 247-249.

make such a finding. It certainly does not foreclose a structure in which the competent authorities make and announce relevant findings at different points over the course of a proceeding, or impose a particular order in which to make such findings.[284] Article 12.1(b) merely requires that if they do so, the Member immediately notifies the Committee on Safeguards of each finding. That is what the United States did at each point that the USITC issued a finding regarding serious injury.

138. Consequently, and as noted previously,[285] the United States' third notification on December 9, 2017 (circulated on December 11, 2017), is, on its face, not a correction but a supplement. It notifies the Committee on Safeguards of additional findings underlying the determination of serious injury announced on October 5, 2017.

C. The United States Provided Numerous, Substantial Opportunities for Prior Consultations, and Korea has Failed to Establish that these Opportunities were not "Adequate" for Purposes of Article 12.3 of the Safeguards Agreement.

139. Article 12.3 states that a Member proposing to apply a safeguard measure "shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned." Korea's most recent arguments ignore critical aspects of this obligation, namely that there be an "opportunity" and that it is "adequate." In accordance with the ordinary meaning of these terms, the Oxford English Dictionary defines "opportunity" as "a time, condition, or set of circumstances permitting or [favorable] to a particular action or purpose,"[286] and "adequate" as "[f]ully satisfying what is required; quite sufficient, suitable, or acceptable in quality or quantity."[287] Taken together, an "adequate opportunity" for prior consultations represents a set of circumstances that are sufficient to permit the parties to consult.

140. Korea has offered no explanation as to how the United States failed to provide an adequate opportunity for Korea to engage in the activities envisaged in Article 12.3 – review information provided in the notifications, exchange views on the measure, and reach an

---

[284] At one point, Korea asks rhetorically "Under which scenario can a Member reach a conclusion of serious injury without first having determined the pertinent information supporting this conclusion?" This formulation, however, misses the point that reaching a conclusion is different from setting out that conclusion in writing for public consumption. A decisionmaker may logically reach a conclusion based on a collection of evidence, submissions, internal memoranda, and their own reasoning, and only afterward integrate all of the material into a single written explanation. Article 12.1(b) does not impose an obligation on the competent authorities to announce all of their findings at once, and only after their findings and reasoned conclusions are set out in their report.

[285] U.S. first written submission, para. 399.

[286] Oxford English Dictionary, *available at* https://www.oed.com/view/Entry/131973?redirectedFrom=opportunity#eid.

[287] Oxford English Dictionary, *available at* https://www.oed.com/view/Entry/2299?rskey=BhHFDz&result=1#eid.

understanding on "adequate means of trade compensation for the adverse effects of the measure on their trade" for purposes of Article 8.1. Nor could it: Korea and its two LRW producers for the U.S. market, Samsung and LG, had both notice and opportunity to meaningfully participate or consult – and seized that opportunity – at every stage leading up to imposition of the measure, including during both the injury and remedy phases at the USITC, and during the period in which the President was considering what action if any to take.[288]

141. With respect to prior consultations, Korea's own course of conduct only underscores that from early December 2017 (no later than December 11 of that year, when the United States' third notification was circulated), there was a meaningful opportunity to consult under Article 12.3. For example, on December 27, 2017, the Korean Embassy requested by email a meeting with the United States "based on Article 12.3 of the WTO Safeguard Agreement."[289] Korea followed up with a formal letter on January 24, 2018 – the day after Proclamation 9694 was released to the public and two days *before* the WTO circulated the United States' fifth notification – requesting consultations under Article 12.3 and expressing its already-formed opinion that the measure was inconsistent with Articles I, II, X, XI, XIII, and XIX of the GATT 1994 and Articles 2, 3, 4, 5, 7, and 12 of the Safeguards Agreement.[290]

142. Korea nonetheless repeatedly refers to "learning" of the final measure just 12 days before it was to take effect, namely, on January 26, 2018 .[291] That statement is untrue. As we have noted, on January 24, 2018, Korea formally requested Article 12.3 consultations with the United States to discuss questions including "Presidential Proclamation to Facilitate Positive Adjustment to Competition from Imports of Large Residential Washers, signed on January 23, 2018."[292] Thus, Korea had *actual knowledge* of the final terms of the safeguard measure almost as soon as Proclamation 9653 was signed, and before circulation of the U.S. notification.

143. This inaccuracy also illustrates a legal error in Korea's interpretation of Article 12.3. It repeatedly argues for evaluation of the adequacy of the opportunity for consultations based exclusively on the date of the final U.S. notification under Article 12.1(c) of the terms of the final safeguard measure. But Article 12.3 embodies no such obligation. It instead frames consultations in terms of "reviewing the *information* provided under paragraph 2." Thus, the key question is not the date of the relevant notification, but rather when the Member taking the safeguard measure was able to review the relevant *information* with affected Members. It is also instructive that paragraph 2 specifies the contents of notifications of the finding of serious injury and the decision to take the safeguard measure. Any evaluation of the adequacy of the

---

[288] *See* U.S. Resp. Panel 1st Questions, para. 109; Korea Comments to USTR and Testimony for January 3, 2018 Hearing (Exhibit US-31).

[289] Email from Seo-hyun Chun to Victor Mroczka of 12/27/17 (Exhibit US-32).

[290] Letter from Young-moo Kim to Christopher Wilson of 1/24/18 (Exhibit US-33).

[291] Korea Resp. Panel 1st Questions, para. 251.

[292] Letter from Young-moo Kim to Christopher Wilson of 1/24/18 (Exhibit US-33).

opportunity for prior consultations must accordingly take account of the entirety of the information and the amount of time available to review it. As Korea has focused on a small number of the terms of the final safeguard measure, it has failed to establish that, taken as a whole, the opportunity for prior consultations was inadequate.

144. Korea's request for consultations on January 24, 2018, further belies its contention that the United States did not provide an adequate opportunity for prior consultations. As noted above, among other information, that request included Korea's *conclusion* that the final measure breached a number of obligations under the GATT 1994 and Safeguards Agreement. Korea insists that the 12 days between this notification and the effective date of the measure did not leave enough time "to … analyz[e] the measure, [consider] its likely consequences, [conduct] appropriate consultations domestically, and [prepare] for consultations with the United States."[293] Clearly if Korea had already formed the opinion that the measure was WTO-inconsistent on January 24, 2018, it must have completed these steps. Therefore, Korea has provided no basis to conclude that the United States failed to provide an adequate opportunity for prior consultations.

145. Finally, Korea persists in its view that consultations may only take place before the measure takes effect. The United States explained at length in its first written submission and further elaborated in its responses to the Panel why this is not the case.[294] Article 12.3 calls for an *adequate opportunity* for prior consultations. If a Member having a substantial interest as an exporter of the product does not fully use that opportunity, that failure has no bearing on whether the "opportunity" was "adequate." In addition, if the Member taking a safeguard measure provides for continuation of consultations *after* the measure takes effect, with the possibility of modifying to address concerns raised over the course of the consultations, that would provide further evidence of adequacy.

CONCLUSION

146. For the reasons set out above and in its prior submissions, the United States maintains its request that the Panel find that Korea has failed to establish any inconsistency with Article XIX of GATT 1994 or the Safeguards Agreement.

[293] Korea Resp. Panel 1st Questions, para. 257.

[294] U.S. first written submission, paras. 411-17; U.S. Resp. Panel 1st Questions, paras. 111-15.