United States –
Safeguard Measure on Imports of Large Residential Washers
(DS546)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

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Argentina – Footwear (EC) (AB)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
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US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
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

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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
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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)
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TABLE OF ACRONYMS

Acronym	Full Name
COGS	Cost of Goods Sold
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FOB	Free on Board
GATT	General Agreement on Tariffs and Trade
HTS	Harmonized Tariff Schedule
LRW	Large Residential Washer
MFN	Most-Favored Nation
R&D	Research and Development
SGA	Agreement on Safeguards
TRQ	Tariff-Rate Quota
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

INTRODUCTION AND EXECUTIVE SUMMARY

1. The financial situation of the U.S. washers industry commenced a sustained decrease beginning in the 2013-2014 period, as confirmed by information gathered by the USITC in the global safeguard investigation Korea has challenged. The pervasive underselling by imported "LRWs" led to a doubling of imports that peaked in 2016. These increasing imports at low prices undersold, suppressed and depressed prices for domestically produced washers, leading to significant and worsening operating losses for the domestic industry producing like or directly competitive products. This precipitous decline occurred despite market conditions that were otherwise favorable to the domestic producers, including increasing domestic demand and the availability of domestic products that customers perceived as being as good as or better than competing imports.

2. The domestic industry first sought to resolve the difficulties posed by increasing imports by seeking antidumping and countervailing duty measures. Instead, each antidumping measure (on washers from Korea, Mexico, and China) and countervailing duty measure (on washers from Korea) prompted a shift in production to a country where washers for export to the United States were not subject to such remedies.

3. In 2017, the domestic industry filed a petition with the USITC requesting imposition of a safeguard measure on imports of LRWs and covered parts from all sources. ("Covered parts" is a limited category that includes only the three largest components of a washer, and not the myriad of parts incorporated in the finished product.) The Commission conducted an investigation and found that increased imports were causing serious injury to the domestic washers industry, and recommending the imposition of TRQs on LRWs and covered parts. The President imposed a safeguard measure, similar in most respects to the USITC's recommendation, that he determined "will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[1]

4. Korea claims that the washers safeguard measure and underlying investigation by the USITC were inconsistent with the GATT 1994 and the SGA. However, the arguments it advances in support of its claims are wrong. Korea relies on multiple misunderstandings of the relevant obligations, fails to take account of the totality of the evidence, and distorts the findings of the competent authorities.

5. Section II of this submission shows that Korea does not address the factual question of whether the increased imports were "as a result of unforeseen developments." It mistakenly assumes that all it needs do to establish an inconsistency with Article XIX:1(a) of GATT 1994 is to show that the competent authorities did not make an explicit finding on this point. Korea misunderstands the text and context for Article XIX:1(a) and SGA Articles 1 and 3.1, and by relying on erroneous Appellate Body statements, seeks to read into the text of Article XIX and the SGA an obligation that is not there. In fact, the evidence establishes that foreign producers developed an unforeseen ability to rapidly increase their production of LRWs for the U.S. market

[1] Proclamation 9694 of January 23, 2019, 83 Fed. Reg. 3553, 3554 (Jan. 25, 2018) (Exhibit KOR-3).

and then shift production rapidly among countries to avoid the effects of trade measures, and that the increase in imports was a result of this unforeseen development. Korea also errs in its arguments regarding the "obligations incurred." The USITC Report explicitly described the tariff concessions the United States took on with respect to the LRWs at issue in this investigation, which is sufficient to establish that the increased imports were "a result of . . . the obligations incurred by a contracting party under this Agreement, including tariff concessions."

6. Section III of this submission shows that the USITC's serious injury determination is WTO-consistent. The USITC properly defined the domestic like product and the domestic industry, and explained its conclusions. The USITC further examined conditions of competition, the injury factors, and alternate causes of injury put forward by the parties before it, and explained its conclusions at great length. The USITC found that the domestic industry was seriously injured. As the Commission explained, the domestic industry invested heavily in the development and production of competitive new LRWs during the period of investigation, and should have been well positioned to capitalize on the concurrent increase in apparent U.S. consumption. The Commission found that instead "the domestic industry's financial performance declined precipitously during the period of investigation, necessitating cuts to capital investment and R&D spending that imperil{ed} the industry's competitiveness."[2] The Commission found that these factors represented a "significant overall impairment in the position of" the domestic industry. In light of "strong demand growth, rising costs, and the competitiveness of the domestic industry's LRWs," the Commission found that "the only explanation for the domestic industry's declining prices and increasing COGS to net sales ratio is the significant increase in low-priced imports of LRWs during the period of investigation."

7. Section IV of this submission shows that the U.S. imposition of the washers safeguard measure is consistent with SGA Articles 5.1 and 7.1. The measure remedied the injury caused by imports – and only the injury caused by imports – with two elements. It addressed the *increase* in imports by imposing TRQ set at the average level of imports for the 2014-2016 period during which the serious injury occurred, with an out-of-quota tariff that would likely be preclusive. The measure addressed the *low prices* with an in-quota tariff set at a level to reduce or eliminate price suppression or depression. On covered parts, the United States imposed a TRQ at a level reflecting import volumes during the period of investigation, which parties agreed were used almost exclusively to repair previously sold models, with a substantial additional amount to facilitate foreign producers' efforts to ramp up production at new U.S. facilities. The measure imposed no in-quota duty, and an out-of-quota rate set so as to lessen any incentive for Samsung and LG to displace their expected U.S. production of machines or covered parts with imported covered parts for simple assembly. Korea's assertion that this combination of elements went beyond "the extent necessary to prevent or remedy serious injury and to facilitate adjustment" for purposes of SGA Article 5.1 is baseless. By tailoring the safeguard measure to address aspects of imports that the Commission identified as injurious, the United States stayed

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

within the limits laid out in Article 5.1. Korea offers no support for its claim under Article 7.1 that the United States applied the safeguard for a longer period of time than is necessary.

8. Section V of this submission shows there is no basis for Korea's claims under SGA Articles 8 and 12 regarding notification and consultation requirements. The United States notified the Committee on Safeguards at each relevant step of the process toward adoption of the washers safeguard measure, from its institution on June 12, 2017, through the announcement of the definitive safeguard measure on January 23, 2018. At each stage, the United States made its notification within one week of the triggering event – well within the periods that past panel and appellate reports have accepted as sufficient for purposes of SGA Article 12.1. Each of the notifications contained all of the relevant information available at the time, except as necessary to protect information submitted to the USITC on a confidential basis, in accordance with the obligation under SGA Article 3.2. The United States provided an opportunity for prior consultations beginning on December 11, 2017, and provided for consultations to continue through February 22, 2018. Through this process, the United States provided an opportunity for prior consultations with Members having a substantial interest as exporters of the product, as required under Article 12.3, and endeavored to maintain a substantially equivalent level of concessions and other obligations with those Members, as required under Article 8.1. Members representing the most voluminous exporters of covered washers during the investigation period consulted with the United States from December 11, 2017 - February 22, 2018. Despite Korea's assertions to the contrary, the United States' actions were consistent with SGA Articles 8.1, 12.1, 12.2, and 12.3.

9. Finally, in Section VI, the United States concludes that because none of Korea's claims under GATT XIX and SGA Articles 1, 2, 3, 4, 5, 7, 8, and 12 are substantiated, the United States, likewise, did not breach GATT Article II:1 or Article 11 of the SGA.

ARGUMENT

I. STANDARD OF REVIEW AND BURDEN OF PROOF

10. Article 3.2 of the DSU directs a WTO adjudicator to resolve claims relating to provisions of the covered agreements by interpreting those provisions "in accordance with customary rules of interpretation of public international law." Those customary rules of interpretation are reflected in Articles 31 to 33 of the Vienna Convention.[3]

11. Article 31 of the VCLT provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,"[4] and further defines what constitutes "context" and "object and purpose,"[5] as well as the relevance of certain instruments.[6] Article 32 of the VCLT provides for recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, including where application of article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.[7]

12. As Article 31 reflects, under customary rules of interpretation, it is the text of the treaty that is paramount.[8] The Appellate Body correctly elaborated in *India – Patents* that "principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or . . . concepts that were not intended. . . . Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement."[9]

13. The DSU does not assign precedential value to panel or Appellate Body reports adopted by the DSB, or to interpretations contained in those reports.[10] The DSU states that it exists to

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[3] *See US – Gasoline (AB)*, p.17; *Japan – Alcoholic Beverages II (AB)*, p.10.

[4] VCLT art. 31.1.

[5] VCLT art. 31.2.

[6] VCLT art. 31.3.

[7] VCLT art. 32.

[8] *See Japan – Alcoholic Beverages II (AB)*, p. 11 ("Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretative process: 'interpretation must be based above all upon the text of the treaty'").

[9] *India – Patents (AB)*, paras. 45-46.

[10] Instead, the DSU and the WTO Agreement reserve such weight to authoritative interpretations adopted by WTO Members in a different body, the Ministerial Conference or General Council, acting not by negative consensus but under different procedures. The DSU explicitly provides in Article 3.9 that the dispute settlement system operates without prejudice to this interpretative authority. In *Japan – Alcoholic Beverages II*, the Appellate Body explicitly found that adoption of reports under the WTO does not create "precedent" or assign a special status

resolve disputes arising under the covered agreements[11] – not disputes concerning panel or Appellate Body interpretations of those agreements. The DSU also provides that a panel or the Appellate Body is to apply customary rules of interpretation of public international law in assisting the DSB to determine whether a measure is inconsistent with a Member's commitments under the covered agreements.[12] Those customary rules of interpretation likewise do not assign a precedential value to interpretations given as part of dispute settlement for purposes of discerning the meaning of agreement text.

14. DSU Article 11 sets out the "function of panels" and reflects a standard of review of "objective assessment." It provides that:

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

15. Under these standards, panels are charged with the mandate to determine the facts of the case and to arrive at factual findings.[13] In challenging action to impose a safeguard measure, a complaining party brings forward evidence and argument relating to the investigation carried out, the findings by the competent authority, and the remedy imposed. Therefore, past reports have examined whether the authorities have provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those factual findings support the overall determination.[14] In reviewing agency action, the Panel must not conduct a *de novo* evidentiary review, but instead should bear in mind its role as *reviewer* of agency action.[15] Indeed, it would not reflect the function set out in Article 11 of the DSU for a panel to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.[16]

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for interpretations reached in reports, as that status has been reserved for authoritative interpretations reached by the Ministerial Conference. *See Japan – Alcoholic Beverages II (AB)*, pp. 12-14.

[11] DSU art. 1.

[12] DSU arts. 3.2, 7.1.

[13] *US – Wheat Gluten (AB)*, para. 150.

[14] *E.g.*, *US – Lamb (AB)*, para. 103.

[15] *See US – Lamb (AB)*, paras. 105-07; *Korea – Dairy (Panel)*, para. 7.30.

[16] *E.g.*, *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 188-190.

16. The *US – Lamb (AB)* report, summarized the role of a panel under Article 11 in a dispute involving a determination of serious injury made by the competent authorities:

> {A}s with any claim under the provisions of a covered agreement, panels are required to examine, in accordance with Article 11 of the DSU, whether the Member has complied with the obligations imposed by the particular provisions identified in the claim.
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> {A}lthough panels are not entitled to conduct a *de novo* review of the evidence, nor to substitute their own conclusions for those of the competent authorities, this does not mean that panels must simply accept the conclusions of the competent authorities …. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[17]

17. Finally, the burden of proof rests with the complaining party alleging a breach of an obligation or the party who is asserting a fact.[18] "The *evidence and arguments* underlying a prima facie case must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision."[19] Accordingly, Korea, as the complaining party, bears the burden of demonstrating that the safeguard measure within the Panel's terms of reference is inconsistent with one of the enumerated provisions of the Safeguards Agreement or GATT 1994.[20]

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[17] *US – Lamb (AB)*, paras. 105-06.

[18] *Japan – Apples (AB)*, para. 157; *Turkey Textiles (Panel)*, para. 9.57.

[19] *US – Gambling (AB)*, paras. 140-41 (emphasis added).

[20] *EC – Hormones (AB)*, para. 109 *(*citing *US – Wool Shirts and Blouses (AB)*, pp.14-16*); see also China – Broiler Products (Panel)*, para. 7.6.

II. KOREA FAILS TO ESTABLISH THAT IMPORTS DID NOT INCREASE AS A RESULT OF UNFORESEEN DEVELOPMENTS AND OF THE EFFECT OF OBLIGATIONS INCURRED. (KOREA'S CLAIM 1)

18. The increase in imports observed by the USITC is both the result of unforeseen developments and of the effect of the tariff concessions on large residential washers made by the United States during the Uruguay Round. Specifically, the negotiators of those tariff concessions did not foresee that a producer would be able to expand from producing zero or low volumes of an LRW model to producing large volumes in a very short time. This capability has enabled foreign producers both to penetrate the U.S. market at unexpected speeds, and to shift production among facilities in multiple countries at unexpected speeds. As a result, imports almost doubled over the five years of the investigation period.

19. The increase in imports is also the result of obligations incurred under GATT 1994, including the tariff concessions referenced in the USITC Report. The tariff bindings undertaken by the United States 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.

20. Korea dismisses, but does not address, the question of whether the increased imports were "as a result of unforeseen developments." Instead, it argues that, under Article XIX of GATT 1994 and SGA Articles 1 and 3.1, "it is therefore necessary for the published report to provide the required reasoned and adequate explanation of the existence of such unforeseen development."[21] However, these provisions impose no such obligation. A Member may take action pursuant to Article XIX:1 of GATT 1994 if, *inter alia*, an unforeseen developments exists. But this factual circumstance is not among the "conditions" set out in Article 2.1 for taking a safeguard measure. In fact, the phrase "unforeseen developments" does not appear anywhere in the Safeguards Agreement. Therefore, it is not one of the "pertinent issues of fact and law" that under Article 3.1 must be set forth in the report of the competent authorities, and the absence of a finding on that issue in the USITC Report does not signify an inconsistency with Article XIX of GATT 1994 or SGA Articles 1 and 3.1.

21. Korea cites statements by the Appellate Body in support of the view that a "reasoned and adequate finding" as to unforeseen developments must appear in the report of the competent authorities. It fails to recognize that these statements reflect an incorrect understanding of the relevant obligations, both because they did not address all of the potentially relevant arguments and because they disregard the ordinary meaning of the terms in their context and in light of the object and purpose of the relevant agreements. Therefore, the statements in question are erroneous and should not be regarded by the Panel as persuasive as it undertakes its evaluation of Korea's claims under Article XIX or Articles 1 and 3.1.

[21] Korea first written submission, para. 84.

22. Korea also errs in its arguments regarding the "obligations incurred." The USITC Report explicitly described the tariff concessions the United States took on with respect to the LRWs at issue in this investigation, which is sufficient to establish that the increased imports were "a result of . . . the obligations incurred by a contracting party under this Agreement, including tariff concessions."

A. Korea Fails to Establish That There Are No Unforeseen Developments.

23. Unforeseen developments are those that are unexpected or unanticipated at the time the Member took on obligations, including concessions, with respect to the product that is subject to a safeguard measure. Korea asserts that there were no such unforeseen developments relevant to LRWs because U.S. demand increased "in line with normal commercial considerations."[22] This argument errs as a legal matter in focusing on whether these developments were "foreseen" during the period of investigation, rather than at the time of the tariff concession. It also errs as a factual matter in ignoring Samsung and LG's unexpected success in rapidly shifting production of LRWs from one country to another.

24. Korea also errs in arguing that the United States acted inconsistently with Article XIX and Articles 1 and 3.1 on the basis that the USITC Report does not explicitly state that the increased imports were "as a result of" these unforeseen developments.[23] As noted above, the cited Articles do not support this position, and the Appellate Body statements cited by Korea cannot create an obligation that is otherwise absent from those provisions.

1. The framework.

25. The phrase "unforeseen developments" appears only once in the covered agreements, in Article XIX:1(a) of GATT 1994:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a {WTO Member} under this Agreement, including tariff concessions, any product is being imported into the territory of that {WTO Member} in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products…

26. The ordinary meaning of "unforeseen" is "not anticipated or predicted." The "as a result" phrase sets out a temporal and logical connection between the developments that were not anticipated or predicted and the "obligations incurred" by a Member. That is, had the developments been anticipated or predicted, the Member might well *not* have incurred the obligation, and Article XIX affords a right to take emergency action to a Member taking on the

[22] Korea first written submission, paras. 84-88.

[23] Korea first written submission, para. 85.

commitment. The working party in *Felt Hats* accordingly found that the proper focus was on the knowledge of a Contracting Party's negotiators at the time they undertook a particular obligation or tariff concession:

> {T}he term 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.[24]

27. As the Appellate Body also observed with regard to the ordinary meaning of "unforeseen":

> {T}he dictionary definition of "unforeseen," particularly as it related to the word "developments," is synonymous with "unexpected." "Unforeseeable," on the other hand, is defined in the dictionaries as meaning "unpredictable" or "incapable of being foreseen, foretold or anticipated." Thus it seems to us that the ordinary meaning of the phrase "unforeseen developments" requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected."[25]

28. There are important differences between the first and second clauses of Article XIX:1(a). While both contain clauses modifying the main verb "is being imported," the first clause is triggered "as a *result* of" unforeseen developments, while the sub-clause in the second clause is triggered by "as to *cause* serious injury." The Appellate Body has stated that "{a}lthough we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact . . . ."[26] Another significant point, which the Appellate Body did not note, is that the circumstances covered by the first clause occur *before* the main verb, while the situations covered by the second occur *after and concurrently with* the main verb.

29. SGA Article 1 provides that "{t}his Agreement establishes rules for the application of safeguard measures, which shall be understood to mean those measures provided for in Article

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[24] *Felt Hats*, para. 9.

[25] *Korea – Dairy (AB)*, para. 84. The *US - Lamb* panel, in a finding that the Appellate Body did not address, found that "the distinction drawn by the Appellate Body between *unforeseen* and *unforeseeable* {is} important. In our view, the former term implies a lesser threshold than the latter one. . . . {W}e must consider what was and was not actually 'foreseen', rather than what might or might not have been theoretically 'foreseeable.'" *US – Lamb (Panel)*, para. 7.22. *But see also India – Iron and Steel Products (Panel)*, para. 7.88 (citing *US – Steel (Panel)* in ascribing both "objective" and "subjective" elements to unforeseen developments).

[26] *Korea – Dairy, (AB)* para. 85.

XIX of GATT 1994." Article 11.1(a) states that a Member shall not take action under Article XIX "unless such action conforms with the provisions of that Article applied in accordance with this Agreement." Thus, Article XIX applies "in accordance with" the Safeguards Agreement, which provides "rules" for application of a measure.

30. Under the heading "Conditions," Article 2.1 provides that:

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

Thus, the *conditions* referenced in Article 2.1 consist exclusively of those contained in the second clause of Article XIX. It requires the Member to *determine* only that the product is imported in such quantities and under such conditions as to cause serious injury. The omission of any reference to "unforeseen developments" is glaring, and signifies that the determination as to serious injury need not include unforeseen developments. This conclusion finds confirmation from the requirement that the determination be made "pursuant to the provisions set out below."

31. Article 4.2(a) provides that "the competent authorities" make the "determination" envisaged in Article 2.1, following an "investigation" into whether "increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement." The Article calls on them to evaluate all relevant factors of an objective and quantifiable nature, and lists several such factors. Article 4.2(b) instructs the competent authorities to demonstrate the existence of a causal link between imports and serious injury or threat thereof, and not to attribute to imports the effects of other factors causing injury at the same time. There is no mention of the circumstances in the first clause of Article XIX:1(a), including unforeseen developments.

32. Article 3 sets forth what a competent authority must do in the "investigation" referenced in Article 4. These include the publication of a "report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Like Article 4, Article 3 makes no reference to unforeseen developments. Thus, like the "investigation" and the "determination," the "issues" in question are those "pertinent" to the question whether "increased imports have caused or are threatening to cause serious injury."

2. The increase in imports of LRWs was a result of the unforeseen speed with which foreign producers expanded production and transferred production from one country to another.

33. In the years immediately preceding the washers safeguard measure, there were three investigations that resulted in determinations of dumping, subsidies, and injury, followed by the

imposition of antidumping duties on washers from Korea and Mexico, countervailing duties on washers from Korea, and antidumping duties on washers from China.[27]

34. Each imposition of trade remedies was followed by shifts in manufacturing by Samsung or LG, who manufacture virtually all LRWs imported into the United States. Following the imposition of antidumping and countervailing duties on washers from Korea and Mexico in early 2013, these producers quickly shifted their production of washers for the U.S. market to China. In the run-up to, and after, the imposition of antidumping duties on Chinese LRWs in early 2017, both producers shifted production to Southeast Asia.[28] As a result, the volume of LRWs imported into the U.S. market continued its inexorable increase, and pricing continued to decrease because the shifting of production ensured that LG and Samsung would not have to absorb antidumping and countervailing duties.

35. It is clear that this development was unforeseen by the U.S. domestic industry. As the USITC Report itself found:

> Whirlpool and GE state that they did not foresee that LG and Samsung would move their production of LRWs for the U.S. market first from Korea and Mexico to China, and then from China to Thailand and Vietnam, and escape the disciplining effect of the resulting antidumping and countervailing duty orders, moves that in Whirlpool's view would have cost hundreds of millions of dollars.[29]

36. Given that highly knowledgeable industry participants did not foresee the rapidity with which Samsung and LG increased production and shifted production among countries, the U.S. negotiators who undertook the concession on the washers tariff 18 years earlier cannot have foreseen it, either. Korea provides no factual support or meaningful analysis for its assertion that the increased imports were not a result of unforeseen developments. It offers only the conclusory statement that there is not "any basis to suggest that any unforeseen developments occurred which would have resulted in the alleged increase in imports" because "{t}here was nothing "unexpected" about this increase in demand, which was simply in line with normal commercial considerations described in the USITC Report."[30]

37. The factual assertion fails because it addresses the expectations as to the increase in *U.S. demand*, and not the increase in *imports*. It fails further because that expectation existed only at

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[27] *See* USDOC, Large Residential Washers From Mexico and the Republic of Korea: Antidumping Duty Orders, 78 Fed. Reg. 11,148 (Feb. 15, 2013); USDOC, Large Residential Washers From the Republic of Korea: Countervailing Duty Order, 78 Fed. Reg. 11,154 (Feb. 15, 2013); USDOC, Large Residential Washers From the People's Republic of China: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order, 82 Fed. Reg. 9371 (Feb. 6, 2017); USITC Report pp.I-2, I-3, I-4, I-5, I-6 (Exhibit KOR-1).

[28] *See generally* USITC Report, pp.II-1, II-2 (Exhibit KOR-1).

[29] USITC Report, p. 36 (Exhibit KOR-1).

[30] Korea first written submission, para. 87.

or somewhat before the investigation period. Korea has not shown that the negotiators of the U.S. tariff concession on washers expected this development. And, finally, the statement fails because it ignores explicit evidence that the domestic industry did not expect Samsung and LG to be able to ramp up their production so quickly, and shift so readily among country sources.

38. As the foregoing demonstrates, the United States did not breach Article XIX of GATT 1994 in imposing a safeguard because the evidence shows that imports increased as a result of unforeseen developments.

3. None of the Appellate Body statements cited by Korea support its view that the competent authorities' report on their determination that increased imports caused serious injury must also include a finding on whether the "circumstance" of unforeseen developments existed.

39. Korea's arguments in support of its claim regarding unforeseen developments do not relate that claim to the obligations in the covered agreements, or to an analysis of the facts and evidence regarding LRWs. Instead, its legal argument is limited to three paragraphs (63-65) of its written submission, each quoting a statement from the *US – Lamb* or *US – Steel Safeguards* appellate reports,[31] apparently viewing them as a comprehensive and final disposition of all legal considerations. Korea is mistaken in this view. The three statements fail to take account of several important legal considerations, and in some instances reach conclusions at odds with the text of the obligations they seek to apply. As such, they do not support Korea's argument, and as they are erroneous, they should not be regarded by the Panel as persuasive.

40. Korea begins with the following passage from the appellate report in *US – Steel Safeguards*:

> Members of the WTO have agreed in the Agreement on Safeguards that Members may suspend their trade concessions temporarily by applying import restrictions as safeguard measures if certain prerequisites are met. These prerequisites are set forth in Article XIX of the GATT 1994, dealing with "Emergency Action on Imports of Particular Products", and in the Agreement on Safeguards, which, by its terms, clarifies and reinforces the disciplines of Article XIX. Together, Article XIX and the Agreement on Safeguards confirm the right of WTO Members to apply safeguard measures when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. However, as Article 2.1 of the Agreement on

[31] Korea quotes a fourth passage from *US – Steel Safeguards* in paragraph 66 of its submission, but this merely "confirms" a point made in the earlier quoted excerpts from *US – Lamb*.

> Safeguards makes clear, the right to apply such measures arises "*only*" if these prerequisites are shown to exist.[32]

41. This passage fails to take account of the fact, observable from the text and recognized elsewhere by the Appellate Body, that the requirements in the first clause of Article XIX:1(a) are not coequal "prerequisites" with the requirements of second clause. Rather, "as a result of unforeseen developments and of the effect of the obligations concurred" are "circumstances" that must be shown, whereas "any product is being imported . . . in such increased quantities and under such conditions as to cause or threat serious injury" are "conditions" that must be met.[33] Thus, from the outset, the passage contradicts the Appellate Body's recognition later in the same report of a difference between the two clauses.[34]

42. This false start leads to the final statement that "{a}s Article 2.1 of the Agreement on Safeguards makes clear, the right to apply such measures arises "*only*" if these prerequisites are shown to exist." As explained above in section A.1 (and as is clear from the text itself), Article 2.1 *does not refer to unforeseen developments*. Thus, the erroneous conflation of the "circumstances" in Article XIX:1(a)'s first clause with the "conditions" in its second clause leads to a facially incorrect characterization of the requirements of Article 2.1. This flawed analysis provides no support for Korea's argument, and provides no guidance on which the Panel can rely.

43. The next passage that Korea quotes is from the appellate report in *US – Lamb*, and states:

> In our view, the logical connection between the "conditions" identified in the second clause of Article XIX:1(a) and the "circumstances" outlined in the first clause of that provision dictates that the demonstration of the existence of these circumstances must also feature in the same report of the competent authorities. Any other approach would sever the "logical connection" between these two clauses, and would also leave vague and uncertain how compliance with the first clause of Article XIX:1(a) would be fulfilled.[35]

44. This passage presents a series of *non sequiturs* resulting in a conclusion untethered from any of the obligations it purports to apply. The initial observation that there is a "logical connection" between the first and second clauses is a truism – they are in the same sentence. But

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[32] Korea first written submission, para. 63, *quoting US – Steel Safeguards (AB)*, para. 264 (emphasis in original).

[33] *Korea – Dairy (AB)*, para. 85. *Accord Argentina – Footwear (EC) (AB)*, para. 92.

[34] *US – Steel Safeguards (AB)*, para. 277 ("the Panel in the current dispute correctly noted that 'the circumstances of unforeseen developments within the meaning of Article XIX:1(a) of GATT 1994 must be demonstrated as a matter of fact, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied.'").

[35] Korea first written submission, para. 64, *quoting US – Lamb (AB)*, para. 72.

the conclusion that the Appellate Body reaches does not follow from this fact. That there is a logical connection indicates nothing about the nature of the connection or the legal consequences of that connection – critical considerations for evaluating whether one side of the connection (unforeseen developments) must appear in a report that, under the terms of the Safeguards Agreement, contains a determination as to whether increased imports cause serious injury.

45. The second point in this passage is the assertion that to address unforeseen developments separately from the injury caused by increased imports would "sever the 'logical connection.'" It is unsupported, and another *non sequitur*. As a matter of logic one entity could evaluate whether imports caused serious injury – the question charged to the competent authorities – and another could evaluate whether those imports were "as a result of unforeseen developments." Those evaluations could occur in that order, in the reverse order, or simultaneously.

46. The passage ends with another assertion, equally unsupported and equally wrong, that evaluation of compliance with Article XIX:1(a)'s first sentence would be "vague and uncertain" without a demonstration of unforeseen developments in the report of the competent authorities. The Appellate Body does not explain why this would be the case, and it is difficult to see why. WTO panels routinely address complex questions of law and fact without the benefit of domestic competent authorities or their reports. As a substantive matter, there is simply nothing that would prevent a panel from evaluating whether an increase in imports were as a result of unforeseen developments based on argumentation and evidence presented exclusively in dispute settlement.[36]

47. As this passage relies at each step on flawed reasoning and an incorrect understanding of Article XIX:1(a) and Articles 3.1, it provides no support for Korea's argument and no valid guidance for this Panel.[37]

48. The final passage on which Korea relies, also from *US – Lamb*, states:

> As Article XIX:1(a) of the GATT 1994 requires that "unforeseen developments" must be demonstrated, as a matter of fact, for a safeguard measure to be applied, the existence of "unforeseen developments" is, in our view, a "pertinent issue … of fact and law," under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that

[36] By way of example, WTO panels in proceedings under the *Agreement on Subsidies and Countervailing Measures* Articles 5 and 6.3 routinely analyze whether subsidies conferred a benefit at the time of conferral based on evidence and argumentation submitted in WTO proceedings that occur long afterward.

[37] *See India – Patents (AB)*, paras. 45-46; *Japan – Alcoholic Beverages II (AB)*, p. 14.

> Article, must contain a "finding" or "reasoned conclusion" on "unforeseen developments."[38]

49. This passage, however, fails to address Article 3.1 in the context of Articles 2.1, 4.2(a), and 4.2(b). As explained above in section A.1, Article 2.1 does not mention unforeseen developments in its obligation that a Member apply a safeguard measure only after it has determined a product is being imported in such quantities and under such conditions as to cause or threaten to cause serious injury. Article 4.2(a) calls for the "competent authorities" to conduct an investigation to determine "whether increased imports have caused or are threatening to cause serious injury." Under the heading of "investigation," Article 3.1 provides that the competent authorities "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of law or fact."

50. In this context, the "findings" and "conclusions" can only be understood as relating to the investigation and determination, which cover only whether increased imports have caused or are threatening to cause serious injury." They cannot be read as covering other issues that may be "pertinent" to application of a safeguard measure. In fact, the Appellate Body recognized that this was the case in *Korea – Dairy*, when it found:

> {W}e do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. In particular, a Member is not obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with "the average of imports in the last three representative years for which statistics are available".[39]

In *US – Line Pipe*, the Appellate Body reiterated this finding, and differentiated the "demonstration" as to whether a safeguard measure was "necessary to prevent or remedy serious injury and to facilitate adjustment" for purposes of Article 5.1 from the report under Articles 3.1 and 4.2(c) which "should provide a benchmark against which the permissible extent of the measure should be determined."[40] By any standard, compliance with Article 5.1 is a "pertinent" issue within the context of the Safeguards Agreement as a whole. The fact that a Member's conclusions on that issue need not appear in the competent authorities' report on their determination of serious injury signifies that the obligation does not apply to "pertinent issues" outside of those mentioned in Articles 2, 3, and 4.

51. These three passages constitute the entirety of the legal support Korea advances for its argument that a Member must demonstrate that increased imports are "as a result of unforeseen

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[38] Korea first written submission, para. 65, *quoting US – Lamb (AB)*, para. 76.

[39] *Korea – Dairy (AB)*, para. 99.

[40] *US – Line Pipe (AB)*, para. 236.

developments" through a finding in the report of the competent authorities. They fail to take account of all of the terms and relevant context for Article XIX:1(a) and Articles 1 and 3.1, and in fact reach conclusions directly contrary to those provisions. The Appellate Body statements cited by Korea are erroneous and should not be regarded by the Panel as persuasive as it undertakes its evaluation of Korea's claims.

B. Korea Fails to Establish That the USITC's Report is Deficient on Grounds That It Did Not Explain the Obligations Incurred.

52. The second circumstance of Article XIX:1 of GATT 1994, first clause, is that the condition of the increase in imports in the second clause of Article XIX:1 of GATT 1994 be a result of the "effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions." GATT 1994 uses the term "obligations" to refer to the substantive commitments that a Member undertakes with respect to the products of another Member under the provisions of the agreement. "Tariff concessions" refers to the Schedule of Concessions granted by a Member under Article II of GATT 1994, and in particular to commitments not to impose ordinary customs duties in excess of the amount set out in the schedule. "Effect" means "{s}omething accomplished, caused or produced; a result, a consequence."[41] Thus, the "effect of the obligations incurred" refers to the consequences of a Member's substantive commitments, including tariff bindings, namely that the Member cannot take certain trade-restrictive measures.

53. The Appellate Body report in *Korea – Dairy* understood the phrase to mean:

> With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions," we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that 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. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994.[42]

54. Korea bases its argument on the assertion that the USITC's report contains no mention of the "obligations incurred." As Korea itself notes, however, the USITC report does contain a description of the tariff lines at issue, including the bound (MFN) rates.[43] 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. Thus the ITC report explicitly demonstrates that the United

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[41] New Shorter Oxford English Dictionary, p. 786.

[42] *Korea – Dairy (AB)*, para. 84.

[43] Korea first written submission, para. 81.

States incurred obligations – tariff concessions – with respect to the washers at issue in this proceeding.

55. Accordingly, the USITC report demonstrates that the United States undertook obligations with respect to the products at issue in in this investigation. It was as a result of this fact that imports increased. Therefore, Korea fails to establish an inconsistency with Article XIX:1(a) relating to the "obligations incurred" element of this provision.

III. THE USITC'S SERIOUS INJURY DETERMINATION IS CONSISTENT WITH ARTICLE XIX OF GATT 1994 AND SGA ARTICLES 2, 3, AND 4. (KOREA'S CLAIMS 2, 3, 4, AND 5)

A. Overview of the Serious Injury Determination

56. To provide a complete understanding of the reasoning underlying the Commission's affirmative serious injury determination, we set out below a summary of the Commission's step-by-step analysis.

57. ***Background.*** The Commission instituted the safeguard investigation underlying this dispute in June 2017, following receipt of an amended petition filed by Whirlpool Corporation ("Whirlpool"), a domestic producer of LRWs and covered parts.[44] The scope of the petition covered certain LRWs but excluded stacked washer-dryers; commercial washers; top loading washers with a permanent split capacitor motor, belt drive, and flat wrap spring clutch ("PSC/belt drive TL washers"); front loading washers with a controlled induction motor and belt drive ("CIM belt drive FL washers") (collectively, "belt driven washers"), and front load washers with a cabinet width of more than 28.5 inches ("extra-wide FL washers").[45] The scope of the petition also covered certain parts used in LRWs, including cabinets, tubs, baskets, and any combination of the three parts (collectively, "covered parts").[46]

58. In addition to Whirlpool, several other interested parties participated actively in the investigation. Another non-petitioning domestic producer of LRWs and covered parts, Haier U.S. Appliance Solutions, Inc. d/b/a/ GE Appliances ("GE"), supported the petition.[47] The Respondents in the investigation included importer LG Electronics USA, Inc. and foreign producers LG Electronics, Inc.; LG Electronics Vietnam Haiphong Co., Ltd.; LG Electronics Thailand Co., Ltd.; and Nanjing LG-Panda Appliance Co. (collectively "LG"); and importer Samsung Electronics America, Inc. and foreign producers Samsung Electronics Co., Ltd.; Samsung Digital Appliances Mexico; Samsung Electronics HCMC Complex; Suzhou Samsung Electronics Co., Ltd.; and Suzhou Samsung Electronics Co., Ltd. (collectively, "Samsung").[48] These domestic and respondent interested parties participated in the investigation by filing prehearing briefs, posthearing briefs, and final comments, and by participating in a public

[44] *Residential Washers; Institution and Scheduling of Safeguard Investigations and Determinations That the Investigation is Extraordinarily Complicated*, 82 Fed. Reg. 27075 (June 13, 2017) ("Institution Notice") (Exhibit US-1); USITC Report pp. 3-4 (Exhibit KOR-1).

[45] USITC Report, pp. 7-8 (Exhibit KOR-1).

[46] USITC Report, p.7 (Exhibit KOR-1).

[47] USITC Report, p. 4 (Exhibit KOR-1).

[48] USITC Report, p. 4 (Exhibit KOR-1).

hearing held by the Commission, where they presented argument and witness testimony, and answered questions posed by individual Commissioners.[49]

59. The Commission defined the period of investigation ("POI") as the five most recent full years, from 2012-2016 plus the first quarter of 2017 ("interim 2017").[50] To collect the information necessary for its analysis, the Commission issued detailed questionnaires, developed with input from petitioners and respondents, to known industry participants. The Commission received questionnaire responses from: four domestic producers, accounting for all known domestic production of LRWs; five importers, accounting for virtually all subject imports; 21 purchasers; and 16 foreign producers/exporters of LRWs, believed to account for all U.S. imports of LRWs.[51]

60. On October 5, 2017, the Commission reached a unanimous affirmative determination that LRWs were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry.[52] The investigation then proceeded to the remedy phase, so the Commission could provide remedy recommendations in its report to the President.

61. ***Like or Directly Competitive Domestic Product.*** The Commission began its analysis by defining the like or directly competitive domestic product as all domestically produced LRWs and covered parts as well as PSC/belt drive LT washers and CIM/belt drive FL washers.[53] At the outset, the Commission explained its methodology for defining the like or directly competitive domestic product and the domestic industry, based upon U.S. legal requirements and past Commission approaches.[54] The Commission also provided a complete description of the imported article within the scope of the investigation, as defined in the petition and published in the Commission's notice instituting and scheduling the safeguard investigation.[55] The scope included LRWs and covered parts but excluded stacked washer-dryers, commercial washers, PSC/belt drive TL washers, and CIM/belt drive FL washers.[56]

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[49] *See* USITC Report, pp. 4 (Exhibit KOR-1), I-1; Hearing Tr., pp. 4-7 (Exhibit US-2). These same parties also participated at the Commission's remedy hearing, which the Commission held after it made an affirmative serious injury determination.

[50] USITC Report, pp. 5 n.10, 20 n.98 (Exhibit KOR-1).

[51] USITC Report, pp. 5, I-32 (Exhibit KOR-1).

[52] USITC Report, pp. 3 & n.2 (Exhibit KOR-1).

[53] USITC Report, p. 10 (Exhibit KOR-1).

[54] USITC Report, pp. 5-7 (Exhibit KOR-1).

[55] USITC Report, pp. 7-9 (Exhibit KOR-1).

[56] USITC Report, pp. 7-8, I-7-9 (Exhibit KOR-1).

62. The Commission rejected respondents' request to amend the scope of the investigation to exclude two types of in-scope washers and covered parts, which in respondents' view did not compete with domestically produced washers and parts.[57] As the Commission explained, in past investigations, it had considered whether certain imports should be subject to the Commission's serious injury analysis not by amending the scope of the investigations but by considering whether the imports were in the scope and, if so, whether there was a domestic article like or directly competitive with the imports.[58] Accordingly, the Commission considered respondents' argument to boil down to a claim that there is no domestic article like or directly competitive with imports of the washers and covered parts, and thus no domestic industry producing them.[59]

63. The Commission also rejected respondents' request to amend the scope of the investigation to include PSC/belt drive TL washers, CIM/belt drive FL washers, and extra-wide washers.[60] As the Commission explained, it did not need an amendment to the scope of the investigation to consider these out-of-scope washer imports as an alternative cause of injury or to define the domestic like product to include PSC/belt drive TL washers and CIM/belt drive washers produced domestically, and thus factor such washers into its analysis of the domestic industry's market share.[61] Accordingly, the Commission considered respondents' argument to be that imports of such out-of-scope washers compete directly with domestically produced washers.[62]

64. The Commission found that domestically produced LRWs were like the imported LRWs based on an analysis of the factors the Commission traditionally considers, including (1) the physical properties of the article, (2) customs treatment, (3) manufacturing process, (4) uses, and (5) marketing channels.[63] As the Commission explained, all LRWs, domestic and imported, were similar in terms of their functionality (washing clothes) and physical characteristics, consisting of the same components (basket, tub, motor, pump, user interface) and produced in either top load or front load configurations.[64] All finished LRWs were classifiable under the same subheading of the Harmonized Tariff Schedule of the United States, used to remove soil

[57] USITC Report, pp. 10-11 (Exhibit KOR-1).

[58] USITC Report, pp. 11 & n.44 (Exhibit KOR-1).

[59] USITC Report, p. 11 (Exhibit KOR-1). The other two in-scope LRW products that respondents argued should be excluded from the scope of the investigation, FlexWash and Sidekick LRWs, are not subject to this dispute. *Id.*

[60] USITC Report, p. 10 (Exhibit KOR-1).

[61] USITC Report, pp. 11-12 (Exhibit KOR-1).

[62] USITC Report, p. 11 (Exhibit KOR-1).

[63] USITC Report, pp. 6, 12-13 (Exhibit KOR-1).

[64] USITC Report, p. 12 (Exhibit KOR-1).

from fabric, and primarily sold to retailers.[65] Noting that respondents had not argued that there were significant differences between imported and domestic LRWs in terms of manufacturing processes, the Commission reasoned that because imported and domestic LRWs consisted of the same types of components, their general manufacturing processes would be the same.[66] Based on the preponderance of similarities between domestic and imported LRWs, the Commission found that domestically produced LRWs were like imported LRWs.[67]

65. The Commission found that PSC/belt drive TL washers and CIM/belt drive washers produced domestically by Alliance Laundry Systems ("Alliance") were like imported LRWs, notwithstanding that imports of such belt driven washers were outside the scope of the investigation.[68] The only physical difference between such washers and other LRWs, the Commission explained, was the inclusion of particular types of motors (PSC or CIM) coupled to a belt drive system, as opposed to the direct drive systems found on imported LRWs.[69] While recognizing that belt drive systems do not permit the high spin speeds or vibration reduction technology of drive systems, the Commission noted that CIM/belt drive FL could be Energy Star certified, like many LRWs.[70] The belt driven washers were also similar to LRWs in terms of manufacturing processes, customs treatment, and uses.[71] Based on the preponderance of similarities, the Commission found that domestically produced PSC/belt drive TL washers and CIM/belt drive FL washers were like imported LRWs.[72]

66. The Commission also found that domestic covered parts were like imported covered parts. As an initial matter, the Commission recognized that imports of covered parts did not compete with domestically produced covered parts because imported parts were used to repair specific imported LRWs and domestic parts were used to repair and assemble specific domestic LRWs.[73] Nevertheless, as the Commission explained, imported parts were like domestic parts because they were "substantially identical in inherent or intrinsic characteristics" to domestic

[65] USITC Report, pp. 12-13 (Exhibit KOR-1).

[66] USITC Report, p. 13 (Exhibit KOR-1).

[67] USITC Report, p. 13 (Exhibit KOR-1). The Commission also found that domestically produced LRWs were like imported FlexWash and Sidekick LRWs, based on the preponderance of similarities between domestic LRWs and imported FlexWash and Sidekick LRWs with respect to the Commission's five traditional factors. *Ibid.* at 13-15. Korea does not challenge this analysis.

[68] USITC Report , p. 15 (Exhibit KOR-1).

[69] USITC Report, p. 15 (Exhibit KOR-1).

[70] USITC Report, p. 15 (Exhibit KOR-1).

[71] USITC Report, pp. 15-16 (Exhibit KOR-1).

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

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

parts based on an analysis of the Commission's traditional factors.[74] Specifically, the Commission found that domestic and imported covered parts shared the same physical properties because all cabinets comprised the metal shell of a washer, all tubs comprised a plastic tub and seal, and all baskets comprised a side wrapper, base, and drive hub.[75] All covered parts were classified under the same two HTSUS subheadings.[76] Domestic and imported covered parts also shared the same uses when installed in LRWs, with cabinets enclosing LRWs, tubs holding water, and drums holding laundry, and the same marketing channels, in being sold to authorized service centers and distributors for the repair of LRWs.[77] Noting that respondents had not argued that there were significant differences between imported and domestic covered parts in terms of manufacturing processes, the Commission reasoned 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.[78] Based on the preponderance of similarities between domestic and imported covered parts, the Commission found that domestic covered parts were like imported covered parts.[79]

67. Having found that domestically produced LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts were like the imported LRWs and covered parts within the scope of the petition, the Commission defined the like domestic product as all domestically produced LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts.[80]

68. ***Domestic Industry.*** Consistent with its definition of the like product, the Commission defined the domestic industry as all domestic producers of LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts, including Whirlpool, GE, Alliance, and Staber.[81] The Commission explained that it was including domestic producers of covered parts in the domestic industry not only because domestic covered parts were like imported covered parts but also because domestic production of covered parts and LRWs was vertically integrated.[82] In this regard, the record showed that virtually all domestically produced LRWs were assembled from covered parts produced domestically in the same facilities as the LRWs.[83] Given this, and consistent with the Commission's practice of including within the domestic industry "all

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

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

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

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

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

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

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

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

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

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

domestic facilities and workers producing a product like or directly competitive with the imported article," the Commission included all domestic producers of covered parts in its definition of the domestic industry.[84]

69. ***Increased Imports.*** Having defined the domestic industry, the Commission found that imports increased during the period of investigation, both in absolute terms and relative to domestic production.[85] Subject import volume had "increased steadily" in each year during 2012-16.[86] As the Commission explained, imports of LRWs had nearly doubled between 2012 and 2016.[87] The Commission also found that the absolute volume of subject imports remained "substantial" in interim 2017, though lower than the comparable period in 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 posing "a risk of personal injury or property damage."[88]

70. ***Conditions of Competition and the Business Cycle.*** The Commission next turned to the question of whether LRWs were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry. The Commission began by discussing several conditions of competition that informed its analysis.

71. ***Demand***. The Commission found that two-thirds of demand for LRWs was driven by the replacement of failing washers while the balance was driven by home sales, renovations, and new construction.[89] Most responding domestic producers, importers, and purchasers had reported that LRW demand increased due to improved U.S. economic performance, increased housing activity, and pent-up replacement demand from the last recession.[90] Apparent U.S. consumption of LRWs increased in every year of the 2012-16 period and was higher in interim 2017 than in interim 2016.[91] The Commission explained that it would focus its analysis on competition and pricing on sales by domestic producers and importers to retailer/distributors, as the first sales to arms-length customers, while recognizing that consumer preferences influenced retailers' purchasing decisions.[92]

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

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

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

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

[88] USITC Report, pp. 30, 38 (Exhibit KOR-1).

[89] USITC Report, p. 23 (Exhibit KOR-1).

[90] USITC Report, p. 23 (Exhibit KOR-1).

[91] USITC Report, pp. 24, 26 (Exhibit KOR-1).

[92] USITC Report, p. 24 (Exhibit KOR-1).

72. ***Supply.*** The Commission found that in 2016, the U.S. market was served by four domestic producers, in-scope imports, and out-of-scope imports.[93] Domestic producers, consisting of Whirlpool, GE, Alliance, and Staber, had made "substantial" capital investments and research and development expenditures during 2012-16 to design and produce LRWs.[94] In particular, Whirlpool and GE had invested in the commencement of domestic production of LRWs that had previously been imported, completing the "repatriation" process by 2012-13. These two firms likewise had invested in the development and production of new and improved FL and TL LRWs, as well as in the development and introduction of innovative new features.[95]

73. The Commission found that LG and Samsung, which accounted for virtually all subject imports during the period of investigation, had changed the country sources of their U.S. imports of LRWs several times during the period, with the changes coinciding with the imposition of successive trade remedies.[96] In 2012, they imported LRWs from Korea and (in Samsung's case) Mexico.[97] After imposition of antidumping and countervailing duty orders on LRWs from Korea and Mexico in February 2013, LG and Samsung replaced most imports from Korea and Mexico with imports from China, having commenced LRW production in China.[98] After imposition of an antidumping duty order on imports from China in February 2017, LG and Samsung replaced most imports from China with imports from Thailand and Vietnam, making corresponding changes to their LRW production operations in Thailand and Vietnam.[99] In February 2017, LG announced plans to open a U.S. LRW production facility in 2019, followed in June 2017 by Samsung's announcement of plans to open a U.S. LRW production facility in early 2018.[100]

74. ***Market Dynamics.*** The Commission found that typical negotiations between LRW suppliers and retailers revolved around price.[101] Suppliers would offer a minimum advertised price ("MAP"), above which they will support retailers with advertising funds, and then negotiate a margin for each model, which is the difference between the MAP and the retailer's acquisition cost net of all discounts and rebates.[102] During special promotional periods such as Black Friday (the day after the U.S. Thanksgiving holiday), suppliers reduce the MAP on certain models and then maintain the retailer's margin on the models through lower wholesale prices and

[93] USITC Report, p. 24 (Exhibit KOR-1).

[94] *See* USITC Report, pp. 24-25, 33 (Exhibit KOR-1).

[95] *See* USITC Report, pp. 24-25 (Exhibit KOR-1).

[96] USITC Report, p. 25 (Exhibit KOR-1).

[97] USITC Report, p. 25 (Exhibit KOR-1).

[98] USITC Report, p. 25 (Exhibit KOR-1).

[99] USITC Report , p. 25 (Exhibit KOR-1).

[100] USITC Report, p. 26 (Exhibit KOR-1).

[101] USITC Report, p. 26 (Exhibit KOR-1).

[102] USITC Report, p. 26 (Exhibit KOR-1).

additional discounts and rebates.[103] The Commission also found that retailer decisions about which LRW models to display on the floor of their retail establishments drove sales of LRWs, with most responding purchasers allocating floor space based on their need to showcase a variety of price points and the profitability of individual units. [104]

75. ***Substitutability.*** The Commission found a moderate to high degree of substitutability between imports and domestically produced LRWs.[105] Most responding domestic producers and purchasers reported that domestic and imported LRWs were always interchangeable, while most responding importers reported that they were sometimes interchangeable.[106] The Commission also found that price, quality, and features were among the most important factors influencing purchasing decisions.[107] More responding purchasers ranked price/pricing/cost as among the top three factors influencing their purchasing decisions, and as the number one factor influencing their purchasing decisions, than any other factor.[108] Most responding domestic producers and purchasers reported that differences other than price were only sometimes significant to purchasers choosing between domestic and imported LRWs, although most responding importers reported that such differences were always significant.[109] As further evidence of the importance of price in the LRW market, the Commission cited the prevalence of discounting, retailers' negotiations with LRW suppliers over MAPs and profit margins, and retailers' allocation of floor space to LRW models based on relative profit margins.[110]

76. The Commission found that domestically produced LRWs and imported LRWs were comparable in terms of non-price factors, contrary to respondents' argument that consumers and retailers increasingly favored imported LRWs for non-price reasons.[111] Relying on consumer survey data, respondents argued that consumer consideration of LG and Samsung branded LRWs had increased at the expense of U.S. branded LRWs due to the declining reliability of Maytag branded LRWs, the domestic industry's focus on allegedly unpopular agitator-based TL LRWs, and mold issues afflicting Whirlpool's FL LRWs.[112] Contrary to this argument, the Commission explained, all responding purchasers reported that domestic and imported LRWs were either

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[103] USITC Report, p. 26 (Exhibit KOR-1).

[104] USITC Report, pp. 26-27 (Exhibit KOR-1).

[105] USITC Report, p. 27 (Exhibit KOR-1).

[106] USITC Report, p. 27 (Exhibit KOR-1).

[107] USITC Report, p. 27 (Exhibit KOR-1).

[108] USITC Report, p. 27 (Exhibit KOR-1).

[109] USITC Report, pp. 27-28 (Exhibit KOR-1).

[110] USITC Report, p. 28 (Exhibit KOR-1).

[111] USITC Report, p. 29 (Exhibit KOR-1).

[112] USITC Report, p. 28 (Exhibit KOR-1). Maytag is a brand name of Whirlpool. USITC Report, p. I-28 (Exhibit KOR-1).

always or usually interchangeable, and most responding purchasers reported that domestic LRWs were either comparable to or superior to imported LRWs in terms of 23 factors that influenced purchasing decisions.[113] The Commission also observed that Whirlpool, GE, LG, and Samsung each reported introducing numerous innovative features on their LRWs during the period of investigation, while both domestic and imported LRWs were rated highly in publications and surveys during the period.[114] Respondents' own consumer survey data showed that a higher percentage of consumers identified Maytag and Whirlpool as "good brand names" for washers than LG and Samsung in 2016.[115] The Commission concluded that no LRW supplier possessed a clear advantage over other suppliers in terms of non-price factors.[116]

77. The Commission also found that the record did not support respondents' arguments that significant non-price differences between domestic and imported LRWs favored imported LRWs.[117] Consumer Reports data showed that repair rates had increased not just for Maytag FL and TL LRWs but also for LG and Samsung FL LRWs.[118] The record also showed that repair rates had not prevented Consumer Reports from ranking four domestic LRWs among the top ten FL LRWs and six domestic LRWs among the top ten TL LRWs in 2016, and that Consumer Reports had suspended its recommendations for Samsung's TL LRWs after Samsung recalled 2.8 million units posing "a risk of personal injury or property damage" that year.[119] All responding purchasers had rated domestic LRWs as comparable or superior to imported LRWs in terms of frequency of returns/product reliability and quality exceeds industry standards.[120]

78. The Commission found respondents' contention that mold issues were unique to domestic FL LRWs belied by evidence that LG and Samsung FL LRWs were also subject to class action lawsuits related to mold, including a lawsuit settled by LG in June 2016.[121]

79. The Commission also found that the record did not support respondents' argument that U.S. brands suffered in the eyes of consumers due to Whirlpool's alleged failure to differentiate Whirlpool and Maytag branded LRWs and domestic producers' sales of agitator-based LRWs.[122] All responding purchasers reported that domestic LRWs were comparable or superior to

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[113] USITC Report, p. 29 (Exhibit KOR-1).

[114] USITC Report, pp. 29-30 (Exhibit KOR-1).

[115] USITC Report, p. 30 (Exhibit KOR-1).

[116] USITC Report, p. 30 (Exhibit KOR-1).

[117] USITC Report, p. 30 (Exhibit KOR-1).

[118] USITC Report, p. 30 (Exhibit KOR-1).

[119] USITC Report, p. 30 (Exhibit KOR-1).

[120] USITC Report, p. 30 (Exhibit KOR-1).

[121] USITC Report, p. 31 (Exhibit KOR-1).

[122] USITC Report, p. 31. Whirlpool produced Maytag branded LRWs. *Ibid.*, p. I-28.

imported LRWs in terms of consumer preferences for particular brands resulting in high store turnover (*i.e.*, more sales).[123] Further, studies submitted by petitioners and respondents showed that consumers generally preferred the Maytag washer brand to the LG and Samsung washer brands.[124] The record also showed that the domestic industry had invested most of its R&D and capital expenditures in a competitive range of FL and impeller-based TL LRWs, and that sales of agitator-based TL LRWs had rebounded after 2015.[125]

80. The Commission addressed respondents' reliance on a consumer data survey that they submitted to the record ("Traqline" survey). The Commission found that, contrary to respondents' contention, the Traqline data did not establish that non-price factors accounted for the apparent increase in consumer consideration of import LRW brands and the apparent decline in consumer consideration of domestic LRW brands.[126] Because Traqline collected these data post-purchase, the Commission explained, the brands that consumers reported purchasing would have been influenced by retail prices and the flooring decisions of retailers, which in turn would have been influenced by price competition at the wholesale level.[127]

81. Finally, the Commission found that imported LRWs competed with domestic LRWs in all segments of the U.S. market, even though FL LRWs accounted for a higher percentage of imports and agitator-based TL LRWs accounted for half of domestic industry shipments but few imports.[128] As the Commission explained, half of domestic industry shipments consisted of FL and impeller-based TL LRWs, which competed directly with imported LRWs; and domestic TL LRWs competed with imported FL LRWs insofar as consumers frequently cross-shopped TL and FL LRWs.[129] The Commission also noted that imported LRWs were sold at nearly all price points in the U.S. market, including the lower price points covering most agitator-based TL LRWs.[130]

82. ***Serious Injury to the Domestic Industry.*** Having discussed the conditions of competition relevant to its analysis, the Commission found that the domestic industry was seriously injured.[131] As the Commission explained, the domestic industry had invested heavily in the development and production of competitive new LRWs during the period of investigation,

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[123] USITC Report, p. 31 (Exhibit KOR-1).

[124] USITC Report, p. 31 (Exhibit KOR-1).

[125] USITC Report, p. 31 (Exhibit KOR-1).

[126] USITC Report, p. 31 (Exhibit KOR-1).

[127] USITC Report, pp. 31-32 (Exhibit KOR-1).

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

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

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

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

and should have been well positioned to capitalize on the increase in apparent U.S. consumption during the period.[132] Instead, the Commission found, "the domestic industry's financial performance declined precipitously during the period of investigation, necessitating cuts to capital investment and R&D spending that imperil{ed} the industry's competitiveness."[133] Consequently, the Commission found that there was a "significant overall impairment in the position of" the domestic industry.[134]

83. The Commission found that the domestic industry's operating losses had worsened each year during 2012-16 period. The Commission also took note of the magnitude of the industry's aggregate operating loss during that period, and observed that both Whirlpool and GE suffered worsening operating losses during the period with the exception of an operating profit by Whirlpool in 2012.[135] As a ratio to net sales, the industry's operating loss also worsened in each year of the 2012-14 period, narrowed in 2015, and then widened in 2016 to the largest operating loss of the period.[136] The Commission also found that the industry suffered operating losses in interim 2016 and 2017.[137] The industry's net losses showed a similarly adverse trend.[138]

84. The Commission rejected respondents' argument that Whirlpool's growing operating losses on sales of LRWs were somehow inconsistent with the increase in Whirlpool's profit margin for its overall North American operations.[139] Noting that the focus of its serious injury analysis was the domestic industry producing the like or directly competitive article, the Commission explained that Whirlpool's financial results for its North American segment were not informative because they were based primarily on products other than LRWs.[140] Further, in *LRWs from China*, which had a period of investigation overlapping with that of this safeguard investigation, Commission staff had thoroughly verified the accuracy of the methodologies Whirlpool used to report its financial results Whirlpool used the same verified methodologies in responding to its domestic producers' questionnaire response in both investigations. During the antidumping investigation verification, Commission staff also confirmed that all primary

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

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

[134] USITC Report, p. 33 (Exhibit KOR-1), citing 19 U.S.C. § 2252(c)(6)(C). *See also* Safeguards Agreement Article 4.1(a).

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

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

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

[138] USITC Report, p. 33 n.207 (Exhibit KOR-1).

[139] USITC Report, p. 34 n.210 (Exhibit KOR-1).

[140] USITC Report, p. 34 n.210 (Exhibit KOR-1).

information reported by Whirlpool, including its financial data, was reasonable and complied with applicable guidelines.[141]

85. The Commission also rejected respondents' argument that the Commission should consider the domestic industry's profitability in the laundry segment as a whole, including sales of dryers, because domestic producers allegedly offered matching washers and dryers to retailers at the same net wholesale price and used higher profits on dryers to compensate for lower profits on LRWs.[142] As the Commission explained, the focus of its analysis was domestic producers of the like or directly competitive product, and no party had argued that dryers were like or directly competitive with imported LRWs and covered parts.[143] Nor did the record support respondents' claim that domestic producers offset losses on washers with profits on matching dryers. To the contrary, Whirlpool's Chairman and CEO emphatically testified that Whirlpool did not engage in such a practice, but rather evaluated its washer business by itself.[144] And GE explained that it does not manufacture dryers domestically, but imports them under a contract manufacturing agreement that precludes outsized profits on dryers; therefore it does not and cannot use profits on sales of dryers to compensate for losses on sales of LRWs.[145] Whirlpool and GE also maintained that matching washers and dryers were seldom sold together or at the same net wholesale price, although respondents provided some conflicting evidence.[146] In any event, the Commission found that even if respondents' theory were correct, and the domestic industry's sales of dryers were more profitable than its sales of LRWs, the theory could explain higher profit margins on dryers relative to LRWs but not the industry's worsening operating and net losses on sales of LRWs.[147]

86. The Commission next found that the domestic industry's inability to earn an adequate return on its investments in new LRW models had caused the industry to curtail capital investment and R&D expenditures in 2016.[148] As the Commission explained, the domestic industry had increased its capital and R&D spending 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

[141] USITC Report, p. 34 n.210 (Exhibit KOR-1).

[142] USITC Report, p. 34 (Exhibit KOR-1).

[143] USITC Report, p. 34 (Exhibit KOR-1).

[144] USITC Report, pp. 34-35 (Exhibit KOR-1).

[145] USITC Report, pp. 34-35 (Exhibit KOR-1).

[146] USITC Report, p. 35 & n.216 (Exhibit KOR-1).

[147] USITC Report, pp. 35-36 & n.217 (Exhibit KOR-1).

[148] USITC Report, p. 36 (Exhibit KOR-1).

LRW production to avoid the antidumping and countervailing duty orders.[149] As a result of its growing financial losses, the domestic industry reduced capital investment and R&D spending in 2016 relative to 2015, and also relative to 2012, delaying and cancelling numerous new LRW products.[150] Noting the importance of innovation and features to LRW sales, the Commission found these reductions provide further evidence that the domestic industry was seriously injured.[151]

87. The Commission recognized that the domestic industry had not suffered any significant idling of productive facilities.[152] The domestic industry's substantial capital expenditures were reflected in an increase in capacity between 2012 and 2016, and the industry's rate of capacity utilization also increased irregularly from 2012 to 2016.[153] Although Whirlpool and GE scaled back certain product lines, no plants were closed and LG and Samsung announced plans to open new LRW production facilities in the United States in 2018 and 2019.[154]

88. The Commission also recognized that there had been no significant unemployment or underemployment within the domestic industry, with the number of production-related workers increasing between 2012 and 2016.[155] The industry's hours worked, wages paid, and productivity also increased irregularly during the period.

89. Upon its evaluation of all relevant information concerning the condition of the domestic industry, the Commission found that the domestic industry was seriously injured.[156] In particular, the dramatically worsening financial losses, including both the magnitude of the industry's operating and net losses and the resulting cuts in capital and R&D spending in 2016, led the Commission to conclude that "there has been a significant overall impairment in the position of the domestic industry."[157]

90. ***Increased Imports were a Substantial Cause of Serious Injury to the Domestic Industry.*** The Commission found that imports were a substantial cause of serious injury to the

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[149] 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. *Ibid.* at 36 n.219.

[150] USITC Report, p. 36 (Exhibit KOR-1).

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

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

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

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

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

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

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

domestic industry.[158] As the Commission explained, the domestic industry's increasing operating and net losses resulted directly from the declining prices on sales of domestically produced LRWs during a time of increasing costs, which placed the industry in a cost-price squeeze.[159] The Commission found that the significant increase in low-priced imports of LRWs was the only explanation for the industry's declining prices, given strong demand growth, increasing costs, and the competitiveness of domestic LRWs.[160]

91. The Commission found that the significant increase in subject import volume during the period of investigation was accompanied by a significant increase in their penetration of the U.S. market during the 2012-16 period and also in interim 2017 relative to interim 2016.[161]

92. While recognizing that the domestic industry's market share fluctuated within a narrow band, the Commission observed that fluctuations in the industry's market share coincided with the imposition of provisional measures and antidumping and countervailing duty orders on imports during the period.[162] The domestic industry's market share increased during 2012-14, after imposition of trade measures on imports of LRWs from Korea and Mexico, but declined in 2015 after LG and Samsung shifted production of LRWs to China.[163] The industry's market share increased during 2015-16 after imposition of trade measures on LRWs from China, but was lower in interim 2017 than in interim 2016 after LG and Samsung shifted production of LRWs to Thailand and Vietnam.[164] The Commission found that import levels appeared to have been restrained by serial trade measures.[165]

93. The Commission also found that the domestic industry defended its market share, in part, by reducing its prices to compete with increasing volumes of low-priced imports, noting the moderate to high degree of substitutability and the importance of price to purchasers.[166] For its pricing analysis, the Commission collected quarterly net U.S. FOB selling price data for six strictly-defined LRW products, known as "pricing products," from two domestic producers and

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

[159] USITC Report, p. 38 (Exhibit KOR-1). The domestic industry's ratio of cost of goods sold ("COGS") to net sales increased from 2012 to 2016. *Ibid.*

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

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

[162] USITC Report, p. 39 (Exhibit KOR-1). The Commission found that the domestic industry's market share in 2016 was about the same as in 2012. *Ibid*.

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

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

[165] USITC Report, pp. 39-40 (Exhibit KOR-1).

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

two importers.[167] All participating interested parties in this investigation had the opportunity to provide input into the selection of pricing products. Ultimately, the Commission used six pricing products that had also been used in the antidumping duty investigation of *LRWs from China*. Four of these six pricing products (products 1-4) were specifically endorsed by LG and Samsung in their comments in this investigation, and one (product 5) had been proposed by respondents in *LRWs from China*.[168] Noting that pricing product data covered an "appreciable percentage" of the U.S. shipments of domestic producers and importers,[169] the Commission found that the data provided a reliable basis for apples-to-apples price comparisons.[170]

94. The Commission rejected respondents' arguments that the pricing data were unreliable. In response to the argument that the pricing product definitions were overbroad, the Commission explained that the definitions were broad enough to yield reasonable coverage of domestic producer and importer shipments without reducing the similarity of the compared LRWs to an unacceptable level, as evidenced by respondents' own recommendation of five of the six pricing product definitions as being representative of competition in the U.S. market.[171] The Commission also rejected respondents' argument that the pricing product definitions were unrepresentative because they had not been "updated" since the investigation of LRWs from China, explaining that respondents had proposed no additional pricing product definitions for new models in their comments and that the pricing data covered an appreciable share of U.S. shipments.[172] Finally, the Commission rejected respondents' argument that the more extensive distribution networks employed by Whirlpool and GE somehow distorted the pricing data, noting that the Commission had verified Whirlpool's and GE's respective methodologies for deducting freight expenses from delivered prices to arrive at FOB plant prices comparable to the FOB port prices reported by importers.[173]

95. Based on the pricing product data, the Commission found that 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 margin of 14.2 percent.[174] The Commission also found that the volume of subject import shipments in quarters with underselling, 3,860,937

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

[168] USITC Report, pp. 40-41 (Exhibit KOR-1). LG recommended the inclusion of products 1-4, but with the addition of "or infusor" to the definitions of products 3 and 4, and Samsung endorsed LG's recommended pricing products. *Ibid*., p. 41 n.255.

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

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

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

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

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

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

units, far exceeded the volume of subject import shipments in quarters with overselling, at 613,567 units.[175] Belying respondents' argument that subject import sales were driven by features and innovation, which should have commanded a price premium, the Commission found that subject imports were generally priced lower than comparable domestic LRWs and that prices declined on subject imported models that respondents identified as particularly innovative.[176]

96. The Commission found that the large and increasing volume of subject imports at prices that undercut domestic like product prices to a significant degree depressed and suppressed domestic prices during the period of investigation.[177] Given the moderate to high degree of substitutability and the importance of price to purchasers, the Commission explained, the pervasively lower prices on subject imports would have forced domestic producers to either lower their own prices or else lose retailer floor spots and sales.[178] 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.[179]

97. As further support of its findings of adverse price effects, the Commission found that Whirlpool was forced to lower its prices to a particular retailer in 2014 and to retract announced price increases in 2012 and 2014 after retailers cited low-priced subject imports in negotiations with Whirlpool.[180]

98. The Commission concluded that imports were a substantial cause of serious injury to the domestic industry.[181] Even as demand increased and the domestic producers offered competitive products, the domestic industry suffered increasing operating and net losses during the period of investigation as increasing quantities of low-priced subject imports depressed and suppressed domestic prices.[182]

99. ***Imports Were an Important Cause Not Less Than Any Other Cause.*** Finally, the Commission undertook to assure it was not attributing to increased imports injury caused by other factors. Specifically, the Commission considered respondents' argument that two

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

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

[177] USITC Report, pp. 42-43 (Exhibit KOR-1).

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

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

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

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

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

alternative causes of injury to the domestic industry were more important than imports. The Commission found, however, that not only had it not attributed injury from these factors to increased imports, but that neither was even an important cause of injury to the industry.[183]

100. First, the Commission rejected respondents' claim that the domestic industry's "joint pricing" of LRWs and matching dryers was a more important cause of injury than imports. Relying on a report prepared by their economist, respondents argued that domestic producers are obligated by their retail customers to sell LRWs and matching dryers for the same or similar wholesale prices, resulting in lower profits on LRWs that are compensated for by higher profits on matching dryers (due to their lower cost of production).[184] Referencing its earlier discussion of the issue, the Commission found that the record did not support respondents' claim that Whirlpool and GE purposefully compensated for losses on sales of LRWs with profits on sales of matching dryers. Instead, Whirlpool and GE adamantly denied that they engage in such a practice or even sell LRWs and matching dryers for the same net wholesale price.[185] The Commission also found 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 industry's worsening operating and net losses on sales of LRWs.[186] Under respondents' theory, Whirlpool should have been able to maintain the modest level of profitability on sales of LRWs achieved in 2012, given strong demand growth and competitive products, but instead suffered dramatically worsening operating losses.[187] Respondents did not explain how Whirlpool could have compensated for its growing losses on LRWs with increasing profits on matching dryers when dryer prices would have declined with LRW prices under their theory.[188] The Commission concluded that the domestic industry's "joint pricing" of LRWs and matching dryers was not an important cause of injury to the industry.[189]

101. Second, the Commission rejected respondents' claim that the "deterioration" of U.S. brands in the eyes of consumers was a cause, let alone a more important cause of injury than imports.[190] Relying again on the same flawed report prepared by their economist, respondents argued that the domestic industry's declining market share resulted not from import competition but from the 6.9 percentage point decline in the share of consumers who considered purchasing

[183] USITC Report, p. 45 (Exhibit KOR-1).

[184] USITC Report, p. 45 (Exhibit KOR-1).

[185] USITC Report, pp. 45-46 (Exhibit KOR-1).

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

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

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

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

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

U.S. brands during the period, according to the Traqline consumer survey data.[191] Respondents attributed the decline to Whirlpool's failure to differentiate Maytag-branded LRWs, the popularity of LG and Samsung LRWs with younger consumers, the domestic industry's focus on agitator-based TL LRWs, the declining quality of Maytag LRWs, and mold issues with certain Whirlpool FL LRWs.[192]

102. As an initial matter, the Commission found the premise of respondents' argument – that the domestic industry lost market share, to be incorrect, as the domestic industry's serious injury resulted from declining prices and not from any loss of market share.[193] As respondents' "brand deterioration" theory only purported to explain a decline in the domestic industry's market share that did not occur, the theory could not explain the industry's declining prices.[194]

103. The Commission also found that the record did not support respondents' argument that consumers, and by extension retailers, increasingly favored subject imports for non-price reasons. Referencing its previous discussion of the issue, the Commission reiterated its finding that subject imports were comparable to domestically produced LRWs in terms of non-price factors, based on a wide range of evidence. Specifically, all responding purchasers reported that domestic and imported LRWs were either always or usually interchangeable, and most responding purchasers reported that domestic LRWs were either comparable to or superior to imported LRWs in terms of 23 factors that influenced purchasing decisions.[195] Whirlpool, GE, LG, and Samsung each reported introducing numerous innovative features on their LRWs during the period of investigation, while both domestic and imported LRWs were rated highly in publications and surveys during the period.[196] Further, respondents' own consumer survey data showed that a higher percentage of consumers identified Maytag and Whirlpool as "good brand names" for washers than LG and Samsung in 2016.[197]

104. The Commission also rejected respondents' other assertions that certain non-price factors caused consumers to favor subject imports over domestically produced LRWs, referencing its previous discussion of the factors. As the Commission explained, Consumer Reports data showed that repair rates had increased not just for Maytag FL and TL LRWs but also for LG and Samsung FL LRWs. [198] The record also showed that repair rates had not prevented Consumer

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

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

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

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

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

[196] USITC Report, pp. 48-49 (Exhibit KOR-1).

[197] USITC Report, p. 49 (Exhibit KOR-1).

[198] USITC Report, p. 49 (Exhibit KOR-1).

Reports from ranking four domestic LRWs among the top ten FL LRWs and six domestic LRWs among the top ten TL LRWs in 2016, and that Consumer Reports had suspended its recommendations for Samsung's TL LRWs after Samsung recalled 2.8 million units posing "a risk of personal injury or property damage" that year.[199] All responding purchasers had rated domestic LRWs as comparable or superior to imported LRWs in terms of frequency of returns/product reliability and quality exceeds industry standards.[200]

105. The Commission found respondents' contention that mold issues were unique to domestic FL LRWs belied by evidence that LG and Samsung FL LRWs were also subject to class action lawsuits related to mold, including a lawsuit settled by LG in June 2016.[201]

106. The Commission also found that the record did not support respondents' argument that U.S. brands suffered in the eyes of consumers due to Whirlpool's alleged failure to differentiate Whirlpool and Maytag branded LRWs and domestic producers' sales of agitator-based LRWs.[202] All responding purchasers reported that domestic LRWs were comparable or superior to imported LRWs in terms of consumer preferences for particular brands resulting in high store turnover, and studies submitted by petitioners and respondents showed that consumers generally preferred the Maytag washer brand to the LG and Samsung washer brands.[203] The record also showed that the domestic industry had invested most of its R&D and capital expenditures in a competitive range of FL and impeller-based TL LRWs, and that sales of agitator-based TL LRWs had rebounded after 2015.[204]

107. Finally, the Commission found that respondent's analysis of the Traqline data did not establish that non-price factors accounted for the apparent increase in consumer consideration of import LRW brands and the apparent decline in consumer consideration of domestic LRW brands.[205] Because Traqline collected these data post-purchase, the Commission explained, the brands that consumers reported purchasing would have been influenced by retail prices and the flooring decisions of retailers, which were both in turn influenced by price competition at the wholesale level.[206]

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[199] USITC Report, p. 49 (Exhibit KOR-1).

[200] USITC Report, p. 49-50 (Exhibit KOR-1).

[201] USITC Report, p. 50 (Exhibit KOR-1).

[202] USITC Report, p. 50 (Exhibit KOR-1). Whirlpool produced Maytag branded LRWs. *Ibid*. at I-28.

[203] USITC Report, p. 50 (Exhibit KOR-1).

[204] USITC Report, p. 50 (Exhibit KOR-1).

[205] USITC Report, pp. 50-51 (Exhibit KOR-1).

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

108. Based on the preceding analysis, the Commission rejected respondents' claim that the deterioration of U.S. brands in the eyes of consumers for non-price reasons was a more important cause of injury than imports.[207] Furthermore, the Commission explained that respondents' "brand deterioration" argument only purported to explain a decline in the domestic industry's market share that did not occur, and could not explain the industry's declining sales prices during the period of investigation or any of the resulting injury.[208] Thus, as with its finding on respondents' first alleged alternative cause ("joint pricing of LWRs and dryers), the Commission found that respondents' second alleged alternative cause (brand deterioration) was unsupported by the record and not a factor that contributed to the domestic industry's serious injury, much less an important factor.

109. Having found respondents' allegations about alternative causes of injury to be unsupported by the record evidence, the Commission concluded that imports were an important cause of serious injury not less than any other cause, thus assuring that it had not attributed any injury from these alleged factors to increased imports.[209]

B. Standard of Review for Panel's Examination of the Commission's Serious Injury Determination

1. Articles 3.1 and 4.2(c) call for the competent authorities to publish a report setting forth their findings based on their investigation, and do not call on them to address evidence or argumentation outside of their record.

110. Article 3.1, third sentence, and Article 4.2(c) describe the obligation of the competent authorities to publish a report on the investigation. Together, they require that the competent authorities provide "their findings and reasoned conclusions reached on all pertinent issues of fact and law," along with "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined."

111. These obligations focus on the competent authorities and their investigation. The competent authorities must publish *their* findings and reasoned conclusions – not those that the Panel or one of the Complainants might have made. The competent authorities must demonstrate the relevance of the factors they examined – not those that the Panel or the Complainants would have examined. And this analysis must appear in the report. If the report, as in the case of the USITC report, contains narrative views and separate data tables, both must be considered in evaluating whether the report has satisfied the obligations.

112. Articles 3.1 and 4.2(c) do not impose a burden of investigative or explanatory perfection that no competent authority could meet. For example, if an error or omission does not cast doubt

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

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

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

on a particular conclusion, that conclusion is still "reasoned" and, thus, consistent with Article 3.1. Similarly, if the competent authorities are silent on a particular issue of fact or law that is not pertinent, they have still complied with Article 3.1.

113. In conducting a safeguard investigation pursuant to Article 3.1, competent authorities "should carry out a 'systematic inquiry' or a 'careful study' into the matter before them" and must also "actively seek out pertinent information."[210] Article 3.1 also requires competent authorities to take certain steps to facilitate the participation of interested parties in safeguard investigations. Specifically, Article 3.1 requires competent authorities to provide notice of the investigation to interested parties, an opportunity for interested parties to submit evidence and their views to the competent authorities, and an opportunity for interested parties to respond to the presentations of other parties.[211] Although competent authorities may not "remain passive in the face of possible short-comings in the evidence submitted" by interested parties, they do not have "an open-ended and unlimited duty to investigate all available facts that might possibly be relevant."[212]

114. Pursuant to Article 3.1, the competent authorities "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." In publishing such reports, competent authorities are required "to 'give an account of' a 'judgement or statement which is reached in a connected or logical manner or expressed in a logical form', 'distinctly, or in detail.'"[213] On all "pertinent issues of fact and law," competent authorities must "provide a conclusion that is supported by facts and reasoning."[214]

115. We note in this regard past Appellate Body reports finding that Article 3.1 calls for a "reasoned and *adequate* explanation."[215] For example, the *US – Lamb* report recalled the description of a proper causation analysis in *US – Wheat Gluten* and stated:

> {T}hese three steps simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). These steps are not legal "tests" mandated by the text of the *Agreement on Safeguards*, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities.[216]

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[210] *US – Wheat Gluten (AB)*, paras. 53.

[211] *US – Wheat Gluten (AB)*, para. 54.

[212] *US – Wheat Gluten (AB)*, paras. 55-56.

[213] *US – Steel Safeguards (AB)*, para. 287.

[214] *US – Steel Safeguards (AB)*, para. 329.

[215] *US – Line Pipe (AB)*, para. 216 (emphasis added).

[216] *US – Lamb (AB)*, para. 178.

116. Korea states that the USITC did not address alternative explanations of the facts,[217] pointing to the Appellate Body's statement that "{a} panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[218] However, Korea has disregarded that this consideration applies only if there is an alternative explanation that is "plausible" *and* the competent authorities' explanation is inadequate in light of that alternative view. As the party asserting the affirmative of a claim, Korea bears the burden of proof to demonstrate that their particular alternative explanations are both "plausible" and demonstrate that the USITC explanation is inadequate.[219] As we show below, its submission fails to satisfy this requirement.

117. Article 4.2(c) states: "The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." This article does not impose any additional publication requirements, but rather is merely "an elaboration of the requirement set out in Article 3.1, last sentence, to provide a 'reasoned conclusion' in a published report."[220] Panels will look to the explanation given by the competent authorities in their published report to determine whether those authorities have acted consistently with the obligations imposed by Article 4.2 of the Agreement on Safeguards.

118. As the *US – Steel Safeguards* Appellate Body report observed:

> It is by "setting forth findings and reasoned conclusions on all pertinent issues of fact and law", under Article 3.1, and by providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined", under Article 4.2(c), that competent authorities provide panels with the basis to "make an objective assessment."[221]

2. A panel reviewing the determination of the competent authorities should make an objective assessment of the matter, and not conduct a de novo review.

119. In *US – Steel Safeguards*, the Appellate Body stated:

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[217] Korea first written submission, paras. 151-52, 335, 403, 454, 465.

[218] *US – Lamb (AB)*, para. 106.

[219] *US – Lamb (AB)*, para. 106; US – Wool Shirts, AB Report, p. 17.

[220] *US – Steel Safeguards (AB)*, para. 289.

[221] *US – Steel Safeguards (AB)*, para. 299.

> It follows that the precise nature of the examination to be conducted by a panel, in reviewing a claim under Article 4.2 of the Agreement on Safeguards, stems … in part from the panel's obligation to make an 'objective assessment of the matter' under Article 11 of the DSU and, in part, from the obligations imposed by Article 4.2, to the extent that those obligations are part of the claim. Thus, as with any claim under the provisions of a covered agreement, panels are required to examine, in accordance with Article 11 of the DSU, whether the Member has complied with the obligations imposed by the particular provisions identified in the claim.[222]

120. A Panel may not conduct a *de novo* review of the evidence or substitute its judgment for that of the competent authorities. The reasoned conclusions, detailed analysis, and demonstration of the relevance of the factors examined that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations the SGA or Article XIX of GATT 1994.[223] A panel should examine whether the conclusions reached by the authority are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations.[224]

> {I}t is in the nature of such investigations that an authority will gather a variety of information and data from different sources, and that these may suggest different trends and outcomes. The investigating authority will inevitably be called upon to reconcile this divergent information and data. However, the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report. When those inferences and conclusions are challenged, it is the task of a panel to assess whether the explanations provided by the authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its

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[222] *US – Steel Safeguards (AB)*, paras. 298-99.

[223] *US – Steel Safeguards (AB)*, para. 299.

[224] *US – Tyres (AB)*, para. 123; *Argentina – Footwear (AB)*, paras. 119-121; *US – Cotton Yarn (AB)*, paras. 74-78; *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 183, 186-188; *US – Hot-Rolled Steel (AB)*, para. 55; *US – Lamb (AB)*, paras. 101, 105-108; *US – Steel Safeguards (AB)*, para. 299; *US – Wheat Gluten (AB)*, paras. 160-161.

> findings without favouring the interests of any interested party, or group of interested parties, in the investigation.[225]

121. Thus, a panel's examination of the competent authorities' conclusions should be critical and must be based on the information contained in their record and the explanations given by the authority in its published report.[226] Conversely, a panel may not base its review on information that was *not* on the competent authorities' record or arguments regarding that evidence that the parties did not make. Evidence or argumentation presented for the first time in a WTO panel proceeding cannot establish an inconsistency with the obligations for the competent authorities to publish a report "setting forth *their* findings and reasoned conclusions" (Article 3.1) and containing "a detailed analysis of *the case under investigation* as well as a demonstration of the relevance of *the factors examined*." (Article 4.2(c)).

122. Some of the evidence cited by Korea in its first written submission seeks to draw the Panel's review of the USITC determination beyond these bounds. Specifically, Exhibits KOR-8, KOR-20, KOR-21, KOR-22, and KOR-23 contain documents that were not submitted to the USITC or otherwise part of its record. That is also the case with the decision of the Arbitrator in *US – Washing Machines (Article 22.6)*, which Korea cites in paragraph 41 of first written submission. As such, these documents are not relevant to an evaluation whether the USITC Report was consistent with Article 3.1 or 4.2(c). The Panel should accordingly disregard them in its review of claims with respect to the USITC's determination regarding serious injury, and consider any argument as unsupported to the extent that it relies on those exhibits.[227]

C. The Commission Complied With Articles 2.1, 3.1, 4.1(c) and 4.2 of the Agreement on Safeguards in Defining the Domestic Industry

1. The relevant obligations for defining the domestic industry

123. Article 2.1 provides:

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[225] *US – Lumber VI (21.5) (AB)*, para. 97; *US – Hot-Rolled Steel (AB)*, para. 193.

[226] *US – Tyres (AB)*, para. 123 (citing *US – Lamb (AB)*, para. 106). *See also US – Tyres (AB)*, para. 329; *US – Wheat Gluten*, para. 162; *Korea – Dairy (Panel)*, para. 7.30.

[227] We note that paragraph 21 of Korea's first written submission cites Exhibit KOR-16 with respect to an argument that the Unites States applied the washer safeguard measure beyond the extent necessary, contrary to SGA Article 5.1. As explained in Section IV.A of this submission, the justification for a safeguard measure need not appear in the report of the competent authorities. Therefore, the Panel may appropriately consider Exhibit KOR-16 in its review of Korea's claim under Article 5.1.

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

The Appellate Body has explained that, under this formulation, "the legal basis for imposing a safeguard measure exists only when imports of a specific product have prejudicial effects on domestic producers of products that are 'like or directly competitive' with that imported product."[228] SGA Article 4.1(c) clarifies the meaning of "domestic industry" but does not expand on the term "like or directly competitive products," stating that:

> in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of ***the like or directly competitive products*** operating within the territory of a Member, or those whose collective output of ***the like or directly competitive products*** constitutes a major proportion of the total domestic production of those products (emphasis added).

124. Thus, by the "clear and express wording of the text of Article 4.1(c), the term 'domestic industry' extends solely to the 'producers . . . of the like or directly competitive products'."[229] Accordingly, "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."[230]

125. The Safeguards Agreement is silent on how competent authorities are to identify "the like or directly competitive products" for purposes of defining the domestic industry. In defining the domestic industry at issue in this dispute, the Commission included domestic producers of products "like" the imported products within the scope of the investigation, and did not rely on any "directly competitive" products produced domestically.[231] Consequently, the term "directly competitive" products is not at issue in this dispute.

126. 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)."[232] 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

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[228] *US – Lamb (AB)*, para. 86.

[229] *US – Lamb (AB)*, para. 84.

[230] *US – Lamb (AB)*, para. 87.

[231] *See* USITC Report, pp. 12-17 (Exhibit KOR-1).

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

domestically produced merchandise that is the same or nearly the same as the imported merchandise described by the scope of the investigation.

127. The relevant meaning of "producers" as used in Article 4.1(c) is those who "manufacture an article" or "those who bring a thing into existence."[233] Thus, to define the domestic industry as "producers as a whole of the like . . . products," the competent authorities must include all domestic firms that manufacture or bring into existence the like products. As explained by the panel in *Dominican Republic – Polypropylene Bags*, "{t}here is nothing in the text of {Article 4.1(c)} that allows the domestic industry to be defined on the basis of a limited portion of {like} products."[234] Indeed, by defining "domestic industry" as producers as a whole of "like . . . products" plural, Article 4.1(c) makes clear that a single domestic industry may produce different types of merchandise like the imported merchandise subject to investigation.

128. Importantly, the likeness required under Articles 2.1 and 4.1(c) is between domestically produced merchandise and the imported merchandise alleged to have been imported in "increased quantities." This is clear from the text of Article 2.1, which provides that a Member may impose a safeguard measure on a "product" only if "such product is being imported into its territory" so as "to cause or threaten to cause serious injury to the domestic industry that produces like . . . products." The "like products" produced by the domestic industry must be "like" the "product imported into {the Member's} territory" that causes or threatens to cause serious injury and the "product" to which a safeguard measure is applied.

129. Nothing in the Safeguards Agreement creates any obligation for an investigating authority to ensure that all imported articles within the scope of an investigation are "like" one another, as recognized by the panel in *Dominican Republic – Safeguard Measures*. In that dispute, the complainants argued that the competent authority's consideration of the "product under investigation" to include both polypropylene bags and the tubular fabric from which bags are made was WTO-inconsistent because "the product under investigation can only include products that are 'like' and . . . the facts of the investigation show that tubular fabric and polypropylene bags are not the same product."[235] The panel rejected this argument because "complainants have not identified any provision in the Agreement that restricts the inclusion of imported products within the scope of an investigation solely to those products that are like or directly competitive with each other."[236] In parallel with this definition of the "product under investigation," the competent authorities defined the domestic like product "as 'polypropylene bags made from tubular woven fabric . . . and tubular woven fabric . . . ,'" and complainants did

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[233] *US – Lamb (AB)*, para. 289.

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

[235] *Dominican Republic – Safeguard Measures (Panel)*, paras. 7.181, 7.184 ("{T}he Commission's Preliminary Resolution refers to the like domestic product, as 'polypropylene bags made from tubular woven fabric . . . and tubular woven fabric . . . .").

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

not contest this definition.[237] If products within the scope of investigation need not be like one another, and products within the domestic like product must be like the products within the scope, it follows that products within the domestic like product need not be like one another.

130. Instructively, panels have also found that investigating authorities may define a single domestic like product encompassing different product types under Article 2.6 of the Antidumping Agreement, which defines the term "like product" for purposes of antidumping duty investigations in a manner analogous to the first alternative ("like") of the term "like product" as used in the Safeguards Agreement.[238] Specifically, ADA Article 2.6 defines the term "like product" as "a product which is identical . . . to the product under consideration, or in the absence of such a product . . . has characteristics closely resembling those of the product under consideration." Similar to SGA Article 4.1(c), ADA Article 4.1 defines the domestic industry as "domestic producers as a whole of the like products." Thus, in both safeguard and antidumping investigations, authorities may define the domestic like product as the domestically produced merchandise that is "like" the imported merchandise under consideration, and then define the domestic industry as producers as a whole of the like product.

131. Panels have rejected the view that the Antidumping Agreement somehow obligates investigating authorities to ensure that all product types encompassed by a domestic like product definition are "like" one another. In *Korea – Certain Paper*, the panel rejected Indonesia's argument that the Korean investigating authority ("KTC") acted inconsistently with ADA Article 2.6 by defining a single domestic like product encompassing the two types of paper subject to investigation – plain paper copier ("PPC") and wood-free printing paper ("WF") – even though PPC was allegedly unlike WF in terms of physical characteristics, end uses, substitutability, and manufacturing processes, among other factors.[239] As the panel explained, "once the product under consideration is defined, the IA has to make sure that the product it is using in its injury determination {the domestic like product} is like the product under consideration,"[240] Having "determined 'the product under consideration' to be PPC and WF," the panel reasoned, the KTC appropriately defined the domestic like product as "domestically produced PPC and WF . . . identical to the definition of the PPC and WF imported from Indonesia."[241] Rejecting Indonesia's argument that "the KTC had to determine that PPC and WF were like products"

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[237] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.184 ("{T}he Commission's Preliminary Resolution refers to the like domestic product, as 'polypropylene bags made from tubular woven fabric . . . and tubular woven fabric . . . .").

[238] *See Korea – Certain Paper (Panel)*, para. 7.220; *U.S. – Softwood Lumber V (Panel)*, paras. 7.156-57.

[239] *Korea – Certain Paper (Panel)*, para. 7.216.

[240] *Korea – Certain Paper (Panel)*, para. 7.219.

[241] *Korea – Certain Paper (Panel)*, para. 7.220; *see also ibid.* para. 7.216 ("Indonesia agrees with the KTC's determination that PPC and WF originating in Indonesia are identical to PPC and WF produced in Korea.").

before including them in the same domestic like product, the panel found that "the KTC's like product definition was consistent with the provisions of Article 2.6."[242]

132. Similarly, in *United States – Softwood Lumber*, Canada argued that the U.S. Department of Commerce violated ADA Article 2.6 by defining a single domestic like product despite evidence that the "product under consideration" encompassed multiple product types (including bed frame components, finger-jointed flangestock, Eastern White Pine, and Western Red Cedar) that did not possess "characteristics closely resembling" one another.[243] Rejecting complainant's position that "there must be likeness within both the product under consideration and within the like product," the Panel found "no basis to imply such a condition into the AD Agreement."[244] "Having defined the 'product under consideration'" and "used an identical definition for the 'like product,'" the panel reasoned, ". . . DOC has defined the 'like product' in this investigation in a manner consistent with the definition found in Article 2.6."[245]

133. The same considerations apply to the competent authorities' definition of the domestic product "like or directly competitive with" imported articles subject to safeguard investigations. Just as ADA Article 2.6 requires investigating authorities to define the domestic like product to include all domestically produced articles "like" the product under consideration, Articles 2.1 and 4.1(c) of the Safeguards Agreement require competent authorities to define the domestic like product to include all domestically produced merchandise "like or directly competitive with" the imported articles subject to investigation. There is no requirement that different product types within a domestic like product definition be "like or directly competitive with" one another, just as nothing "restricts the inclusion of imported products within the scope of an investigation solely to those products that are like or directly competitive with each other."[246] Accordingly, competent authorities may include different product types within a single domestic like product as long as each domestically produced product type is "like or directly competitive with" imported merchandise subject to investigation.

2. The Commission defined the domestic industry as producers as a whole of the like product, consistent with SGA Articles 2.1, 3.1, 4.1(c), and 4.2.

134. The Commission defined the domestic industry in two steps. First, it defined the domestic like product to include all domestically produced merchandise that was like the

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[242] *Korea – Certain Paper (Panel)*, para. 7.220-21.

[243] *US – Softwood Lumber V (Panel)*, para. 7.140. Article 2.6 of the Antidumping Agreement supplies the sole definition of "like product" that is to be used throughout that Agreement, both for purposes of the dumping investigation and the injury investigation.

[244] *US – Softwood Lumber V (Panel)*, para. 7.157.

[245] *US – Softwood Lumber V (Panel)*, para. 7.156.

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

imported merchandise within the scope of the investigation. As the scope of the investigation encompassed imports of LRWs and covered parts, the Commission defined the domestic like product as all domestically produced washers like the imported LRWs, including domestically produced LRWs, PSC/belt drive TL washers, and CIM/belt drive FL washers, and all domestically produced parts like the imported covered parts. Second, the Commission defined the domestic industry as producers as a whole of the domestic like product, including Whirlpool, GE, Alliance, and Staber. Both steps complied fully with Articles 2.1, 3.1, 4.1(c), and 4.2 of the Safeguards Agreement.

a. The Commission defined the scope of the "product(s) being imported" consistent with the Safeguards Agreement.

135. In determining what constituted the like product, the Commission started with the imported product (or products) identified in the petition that initiated the investigation, and then examined the evidence to define the domestic products like the imported products ("subject imports").[247] Thus, the Commission properly began its identification of the domestic like product by looking at the imported products alleged to have "increased." In the first instance, the petitioner, Whirlpool, defined these in its petition. The Commission then described the subject imports in its Federal Register notice of institution and scheduling of the safeguard investigation.[248] The so-defined imported article subject to investigation encompassed two related types of merchandise.

136. First, the subject imports included "all LRWs" meaning "all automatic clothes washing machines, regardless of the orientation of the rotational axis, with a cabinet width (measured from its widest point) of at least 24.5 inches (62.23 cm) and no more than 32.0 inches (81.28 cm), except as noted below."[249] Three categories of products were expressly excluded from the scope of the investigation: (1) "stacked washer-dryers," (2) "commercial washers," (3) PSC/belt drive TL washers and CIM/belt drive FL washers ("belt driven washers").[250]

137. Second, the scope covered "certain parts used in large residential washers."[251] Specifically, the "covered parts" included "(1) All cabinets, or portions thereof, designed for us in large residential washers; (2) all assembled tubs designed for use in large residential washers which incorporate, at a minimum: (a) A tub; and (b) a seal; (3) all assembled baskets designed

[247] *See* USITC Report, pp. 7-8 (Exhibit KOR-1).

[248] USITC Report, pp. 7-8 (Exhibit KOR-1); Petition, pp. 5-9 (Exhibit US-3); *Large Residential Washers; Institution and Scheduling of Safeguard Investigations and Determinations That the Investigation is Extraordinarily Complicated*, 82 Fed. Reg. 27075 (June 13, 2017) ("Institution Notice") (Exhibit US-3).

[249] USITC Report, p. 7 (Exhibit KOR-1).

[250] USITC Report, pp. 7-8 (Exhibit KOR-1).

[251] USITC Report, p. 7 (Exhibit KOR-1).

for use in large residential washers which incorporate, at a minimum: (a) A side wrapper; (b) a base; and (c) a drive hub; and (4) any combination of the foregoing parts or subassemblies."[252]

138. Respondents requested that the Commission amend the scope of the investigation to exclude covered parts because, in their view, imported covered parts did not compete with domestic covered parts and "a clear dividing line" separated covered parts from LRWs.[253] Rejecting respondents' request, the Commission explained that, as in past investigations, it would consider whether certain imports should be subject to the Commission's serious injury analysis not by amending the scope of the investigations but by considering whether the imports were in the scope and, if so, whether there was a domestic article like or directly competitive with the imports.[254] Accordingly, the Commission treated respondents' argument that the Commission should amend the scope of the petition to exclude covered parts to be an argument that there was no domestic article like or directly competitive with imports of the covered parts, and thus no domestic industry producing them.[255]

139. The Commission also rejected respondents' request that the Commission amend the scope of the investigation to include imports of PSC/belt drive TL washers and CIM/belt drive FL washers.[256] The Commission understood these arguments as reflecting respondents' views that the Commission consider imports of such belt-driven washers as an alternative cause of injury and factor them into its analysis of apparent consumption, and consequently the domestic industry's share of the relevant market.[257] The Commission explained that no amendment to the scope of the investigation was necessary to address this argument.[258]

140. The Commission's definition of the imported articles subject to investigation was consistent with the Safeguards Agreement. As noted above and recognized by the panel in *Dominican Republic – Safeguard Measures*, "the Agreement on Safeguards does not impose specific obligations with respect to the definition or the scope of the product under

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[252] USITC Report, p. 7 (Exhibit KOR-1). LRWs cabinets, assembled tubs, and assembled baskets are among the major components assembled into LRWs. *Ibid.* at I-21-22.

[253] USITC Report, pp. 10-11 (Exhibit KOR-1).

[254] USITC Report, p. 11 & n.44 (Exhibit KOR-1).

[255] USITC Report, p. 11 (Exhibit KOR-1). In this dispute, Korea has not challenged the Commission's inclusion of the other two in-scope LRW products that respondents argued should be excluded from the scope of the investigation, FlexWash and Sidekick LRWs. *Ibid.*

[256] USITC Report, p. 10 (Exhibit KOR-1).

[257] USITC Report, pp. 11-12 (Exhibit KOR-1).

[258] USITC Report, p. 11 (Exhibit KOR-1).

investigation."[259] Thus, the Safeguards Agreement leaves the definition of the imported articles subject to investigation to the discretion of competent authorities.

141. In this case, the petition for imposition of a safeguard measure defined the imported articles subject to investigation.[260] The Commission included the same definition of the imported articles in its notice initiating and scheduling the investigation, published in the Federal Register on June 13, 2017.[261] Thus, the Commission's determination reasonably defined the scope of the investigation as encompassing LRWs and covered parts but not belt driven washers, consistent with the petition and the scheduling notice.[262]

142. Nothing in the Safeguards Agreement required the Commission to amend the scope of the investigation at the request of respondents. Just as the Safeguards Agreement imposes no obligations on a competent authority's definition of the imported articles subject to investigation, the Agreement imposes no obligations on the authority's disposition of interested party requests to amend the scope of an investigation. Denying respondents' requests was therefore within the Commission's discretion.

143. Nor did respondents' arguments compel the Commission to amend the scope of the investigation so as to exclude covered parts from the increase-in-import calculations. As the Commission noted, any safeguard measure taken to remedy the serious injury and allow an affirmative adjustment to import competition would need to include these parts, which were integral to the finished washers.[263] During the investigation, Whirlpool explained that it included covered parts in the scope of its petition to prevent foreign manufacturers, and particularly LG and Samsung, from circumventing any safeguard measure by importing the major components of a washer for simple assembly in domestic "kitting" operations.[264] Faced with this compelling rationale, nothing in the Safeguards Agreement precluded the Commission from investigating the entirety of the products alleged to have been imported in increased quantities, rather than the different, narrower products favored by the respondents.

144. Likewise, the Safeguards Agreement does not obligate the Commission to broaden the scope to include belt-driven washers at respondents' request. Whirlpool explained that it excluded belt driven washers from the scope of the petition because it did not consider imports of

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

[260] Petition at 5-9 (Exhibit US-3); *see also* USITC Report, pp. 3-4 (Exhibit KOR-1).

[261] Initiation Notice (Exhibit US-3); *see also* USITC Report, pp. 7-8 (Exhibit KOR-1).

[262] USITC Report, pp. 7-8 (Exhibit KOR-1).

[263] *See* Petition pp. 5-9, 40-41 (Exhibit US-3).

[264] USITC Report, p. 71 & n.47 (Exhibit KOR-1).

such washers to be injurious.[265] As the Commission explained, its consistent approach has been to address the specific type of concerns raised by the respondents not by amending the scope of the investigation, but as part of its identification of whether there were domestically produced products that were like or directly competitive with the subject imports.[266] Accordingly, in response to both of respondents' scope arguments, the Commission stated that it would consider whether there was a domestic article like or directly competitive with imports of covered parts and whether the domestic like product should include PSC/belt drive TL washers and CIM/belt drive FL washers.[267] As discussed in the following section, the Commission provided a reasoned and adequate explanation for its definition of the domestic industry to include producers of covered parts and belt driven washers.

b. The Commission defined the domestic like product in accordance with Articles 2.1 and 4.1(c) of the Safeguard Agreement

145. Next, the Commission sought to identify the domestically produced merchandise that was like the imported products subject to investigation. In defining the like or directly competitive domestic product, the Commission has traditionally considered such factors as the article's physical properties, uses, customs treatment, manufacturing process, and the marketing channels through which the product is sold.[268] In this investigation, the Commission considered the record evidence pertaining to the factors in light of the arguments advanced by the petitioner and each of the respondents. The Commission also considered its findings from the 2016 antidumping duty investigation of *LRWs from China*, which possessed the same scope as the safeguard investigation of LRWs.[269]

146. The Commission found that domestically produced LRWs were like the imported LRWs described by the scope. As the Commission explained, all LRWs, domestic and imported, possessed the same physical properties. All were automatic clothes washing machines capable of cleaning fabric using water and detergent in conjunction with multiple cycles programmed into the unit.[270] All featured a metal drum or basket into which laundry is loaded, a plastic tub

[265] At the Commission's hearing, a Whirlpool official stated that Whirlpool excluded belt driven washers from the scope of its petition because they were "old technology," "nothing I lose sleep over," and "a small portion" of the U.S. market. Hearing Tr.at 85-86 (Tubman) (Exhibit US-3). Counsel to Whirlpool stated that "imports of these low-tech front loaders are plummeting . . . not taking away from domestic producers, to the contrary." *Ibid.* at 86-87 (Levy).

[266] USITC Report, p. 11 (Exhibit KOR-1).

[267] USITC Report, pp. 11-12 (Exhibit KOR-1).

[268] USITC Report, p. 6 (Exhibit KOR-1).

[269] USITC Report, p. I-9 (Exhibit KOR-1).

[270] USITC Report, p. 12 (Exhibit KOR-1).

that holds water, a motor, a pump, and a user interface.[271] All were produced in one of two configurations: top loading LRWs with a door on top of the unit for loading clothes, a drum that spins on a vertical axis, and either an agitator, agi-peller,[272] or impeller to create the washing action; and front loading LRWs with a door for loading clothes on the front of the unit and a drum that spins on a horizontal axis.[273] All came in an array of models possessing different combinations of features, such as energy efficiency, capacity, appearance, and innovations, with most features offered on both domestic and imported LRWs.[274] And all responding purchasers reported that domestic and imported LRWs were always or usually interchangeable and virtually all reported that domestic and imported LRWs were comparable in terms of 22 factors influencing purchasing decisions.[275]

147. The Commission also found that domestic and imported LRWs shared the same customs treatment, manufacturing process, uses, and marketing channels. As the Commission explained, all finished LRWs were classifiable under subheading 8450.20.00 of the HTS.[276] Noting that respondents had not argued that there were significant differences between domestic and imported LRWs in terms of manufacturing processes, the Commission reasoned that because imported and domestic LRWs consisted of the same types of components, their general manufacturing processes would be the same.[277] The Commission further found that domestic and imported LRWs shared the same use of removing soil from fabric, as well as the same marketing channels, with LRWs from both sources primarily sold to retailers.[278] Based on the preponderance of similarities between domestic and imported LRWs, the Commission found that domestically produced LRWs were like imported LRWs.[279]

148. Noting that no party had argued otherwise, the Commission also found that belt-driven washers produced domestically by Alliance (specifically PSC/belt drive TL washers and CIM/belt drive FL washers) were like imported LRWs, notwithstanding that the subject imports

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[271] USITC Report, p. 12 (Exhibit KOR-1).

[272] Agi-pellers combine aspects of agitators and impellers to enhance the energy efficiency of the top load LRWs utilizing them. USITC Report, p. I-14 (Exhibit KOR-1).

[273] USITC Report, p. 12 (Exhibit KOR-1).

[274] USITC Report, p. 12 (Exhibit KOR-1).

[275] USITC Report, p. 12 (Exhibit KOR-1).

[276] USITC Report, pp. 12-13 (Exhibit KOR-1).

[277] USITC Report, p. 13 (Exhibit KOR-1).

[278] USITC Report, p. 13 (Exhibit KOR-1).

[279] USITC Report, p. 13 (Exhibit KOR-1). The Commission also specifically found that domestically produced LRWs were like imported Samsung FlexWash and LG Sidekick LRWs, based on the preponderance of similarities between domestic LRWs and imported FlexWash and Sidekick LRWs with respect to the Commission's five traditional factors. *Ibid.*, pp. 13-15. Korea does not challenge this analysis.

did not include PSC/belt drive TL washers and CIM/belt drive FL washers.[280] Relying on the Commission's like product analysis in *LRWs from China*, the Commission found that the only physical difference between domestic CIM/belt drive FL washers and imported LRWs was the use of a controlled induction motor and a belt drive system, and that the only physical difference between domestic PSC/belt drive TL washers and imported LRWs was the use of a permanent split capacitor motor and a belt drive system.[281] While recognizing that belt drive systems do not permit the high spin speeds or vibration reduction technology of the direct drive systems used on imported LRWs, the Commission observed that CIM/belt drive FL washers could be Energy Star certified, like many LRWs produced domestically with direct drive systems.[282] Moreover, as the Commission explained, domestic PSC/belt drive TL washers and CIM/belt drive FL washers shared the same uses as imported LRWs, washing clothes,[283] and were classified under the same HTS subheading as imported LRWs, HTS subheading 8450.20.00.[284] Given that PSC/belt drive TL washers and CIM/belt drive FL washers consisted of the same types of components as other LRWs, the Commission reasoned that they would be produced using the same general manufacturing processes as imported LRWs. [285] Finally, the Commission considered the marketing channels of domestic PSC/belt drive TL washers and CIM/belt drive FL washers, relying on business confidential information.[286] Based on the preponderance of similarities between domestic PSC/belt drive TL washers and CIM/belt drive FL washers and other LRWs, the Commission found that domestically produced PSC/belt drive TL washers and CIM/belt drive FL washers were like imported LRWs.[287]

149. Next, the Commission found that domestic covered parts were like imported covered parts. As an initial matter, the Commission recognized that imports of covered did not compete with domestically produced covered parts because imported covered parts were used to repair specific imported LRWs and domestic parts were used to repair and assemble specific domestic

[280] USITC Report, p. 15 (Exhibit KOR-1).

[281] USITC Report, p. 15 (Exhibit KOR-1); *LRWs from China*, USITC Pub. 4591, p. 9 (Exhibit US-4). We note that the Commission mistakenly cited publication number 4666, which was the Commission's final determination for *LRWs from China*, when it intended to cite publication number 4591, which was the Commission's preliminary determination for *LRWs from China*. In its final determination for *LRWs from China*, the Commission again defined the domestic like product to include belt driven washers with no further analysis of the issue, noting that Whirlpool and respondents agreed with the Commission's definition of the domestic like product from the preliminary determination. *LRWs from China*, USITC Pub. 4666, pp. 7-9 (Exhibit US-5).

[282] USITC Report, p. 15 (Exhibit KOR-1).

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

[284] USITC Report, pp. 15-16 (Exhibit KOR-1).

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

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

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

LRWs.[288] Nevertheless, as the Commission explained, 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.[289] Specifically, the Commission found that domestic and imported covered parts shared the same physical properties because all cabinets comprised the metal shell of a washer, all tubs comprised a plastic tub and seal, and all baskets comprised a side wrapper, base, and drive hub.[290] All covered parts were classified under the same two HTS subheadings: HTS subheading 8450.90.20 for tubs and tub assemblies and HTS subheading 8450.90.60 for other parts.[291] Domestic and imported covered parts also shared the same uses when installed in LRWs, with cabinets enclosing LRWs, tubs holding water, and drums holding laundry, and the same marketing channels, in being sold to authorized service centers and distributors for the repair of LRWs.[292] The Commission reasoned 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.[293] Based on the preponderance of similarities between domestic and imported covered parts, the Commission found that domestic covered parts were like imported covered parts.[294]

150. Having found that domestically produced LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts were like the imported LRWs and covered parts within the scope of the petition, the Commission defined the like domestic product as all domestically produced LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts.[295] The Commission thus based its analysis on what products were "like" those under investigation; it did not rely on the "directly competitive" prong.

151. As detailed above, the Commission's definition of the domestic like product complied with SGA Articles 2.1, 3.1, 4.1(c), and 4.2. Consistent with Articles 2.1 and 4.1(c), the Commission began its consideration of "the scope of the domestic industry" with "the identification of the products which are 'like or directly competitive' with the imported product."[296] While the Safeguards Agreement is silent on how competent authorities are to identify "the like or directly competitive products," the factors applied by the Commission in this

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

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

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

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

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

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

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

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

[296] *US – Lamb (AB)*, para. 87.

investigation 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. Moreover, it was eminently reasonable for the Commission to consider factors – physical properties, customs treatment, manufacturing processes, uses, and marketing channels – that are clearly relevant to identifying the domestically produced articles that are like the imported articles under investigation. For example, three of the factors considered by the Commission are factors the Appellate Body has recognized as relevant to "analyzing 'likeness,'" including "the physical properties of the products," "the extent to which the products are capable of serving the same or similar end-uses," and "the international classification of the products for tariff purposes."[297] Indeed, Korea itself acknowledges 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."[298] Thus, the Commission reasonably relied on these factors in defining the domestic like product.

152. With respect to all or nearly all of the factors considered, the Commission found that domestically produced residential washers, including LRWs and domestically produced belt driven washers, were like imported LRWs and domestically produced covered parts were like imported covered parts. As the Commission explained, the record showed that domestically produced LRWs were like imported LRWs and that domestically produced covered parts were like imported covered parts with respect to *all* factors.[299] Although respondents argued that domestic covered parted were not "directly competitive" with imported covered parts, as the Commission recognized, respondents never denied, and cannot reasonably deny, that domestic covered parts are "like" imported covered parts.[300]

153. The Commission also found that domestically produced belt driven washers were like imported LRWs with respect to all factors, with the possible exception of marketing channels.[301] Indeed, the Commission noted that the only physical difference between domestically produced belt drive washers and imported LRWs was the inclusion of particular types of motors coupled to belt drive systems, which limited spin speeds and vibration control relative to the direct drive systems utilized by imported LRWs.[302] Respondents themselves recognized that belt driven washers were like LRWs, as further discussed below.[303]

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[297] *EC – Asbestos (AB)*, para. 101.

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

[299] USITC Report, pp. 12-13, 16-17 (Exhibit KOR-1).

[300] USITC Report, p. 10 (Exhibit KOR-1).

[301] USITC Report, pp. 15-16 (Exhibit KOR-1).

[302] USITC Report, p. 15 (Exhibit KOR-1).

[303] USITC Report, p. 10 (Exhibit KOR-1).

154. Based on this analysis, the Commission reasonably defined the domestic like product to include all domestically produced articles that were "like" *i.e.*, the same or nearly the same, as the imported articles described by the scope of the investigation: residential washers, including LRWs and belt driven washers, and covered parts. The Commission predicated its definition of the domestic like product on an analysis of factors highly relevant to identifying domestically produced articles that were like the imported articles within the scope. The Commission also supported its conclusions that domestic residential washers, including LRWs and belt driven washers, were like imported LRWs and that domestic covered parts were like imported covered parts, with ample facts and thorough reasoning, spanning six pages of text and 39 footnotes.[304] Thus, the Commission provided a reasoned and adequate explanation for its definition of the domestic like product, consistent with SGA Articles 2.1, 3.1, 4.1(c), and 4.2(c).

c. The Commission defined the domestic industry in accordance with SGA Articles 2.1, 3.1, 4.1(c), and 4.2(c)

155. Finally, consistent with its definition of the domestic like product, the Commission defined the domestic industry as all domestic producers of LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts, including Whirlpool, GE, Alliance, and Staber.[305] The Commission explained that it was including domestic producers of covered parts in the domestic industry not only because domestic covered parts were like imported covered parts but also because domestic production of covered parts and LRWs was vertically integrated.[306] In this regard, the record showed that virtually all domestically produced LRWs were assembled from covered parts produced domestically in the same facilities as the LRWs.[307] Due to the vertically integrated nature of LRW production facilities, the Commission explained, the production facilities producing assembled LRWs and the production facilities for producing covered parts were necessarily part of the same domestic industry.[308] Given this, and in order to include within the domestic industry "all domestic facilities and workers producing a product like or directly competitive with the imported article," the Commission included all domestic producers of covered parts in its definition of the domestic industry.[309] By defining the domestic

[304] *See* USITC Report, pp. 12-17 & nn.46-85 (Exhibit KOR-1).

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

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

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

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

[309] USITC Report, p. 19 (Exhibit KOR-1); *see US – Lamb (AB)*, para. 84 ("According to the clear and express wording of the text of Article 4.1(c), the term "domestic industry" extends solely to the "producers … *of the like or directly competitive* products". (emphasis added) The definition, therefore, focuses exclusively on the producers of a very specific group of products."); *Dominican Republic – Safeguards Measures (Panel)*, para. 7.191 ("There is nothing in the text of {Article 4.1(c)} that allows the domestic industry to be defined on the basis of a limited portion of {like} products.").

industry to include all known domestic producers of the like products, the Commission defined the industry as "producers as a whole of the like . . . products" in accordance with Articles 2.1 and 4.1(c).

156. Furthermore, the Commission thoroughly explained the "facts and reasoning" behind its definition of the domestic industry, consistent with Article 3.1 and 4.2(c) of the Agreement on Safeguards.[310] First, the Commission described its methodology for defining the domestic industry in safeguard investigations, discussing the applicable legal standards and the five factors it has traditionally considered in defining domestic like products.[311] Second, the Commission set forth a complete description of the imported article subject to the investigation, excerpted from the petition and the Commission's institution notice.[312] Third, the Commission summarized the arguments of the parties, including those of Whirlpool and the respondents, and explained its denial of respondents' requests to amend the scope of the investigations.[313] Fourth, the Commission methodically explained why, under the five applicable factors, domestic residential washers, including LRWs and belt drive washers, were like imported LRWs, and domestic covered parts were like imported covered parts.[314] Finally, the Commission explained that it was defining the domestic industry to include the four known domestic producers of the like products.[315] Thus, the Commission provided a reasoned and adequate explanation of its definition of the domestic industry in accordance with SGA Articles 3.1 and 4.2(c).

3. The Panel should reject Korea's challenges to the Commission's domestic like product and industry definitions.

157. None of Korea's specific challenges to the Commission's definition of the domestic industry withstands scrutiny. The Commission appropriately defined the industry to include producers of belt driven washers based on its determination that domestically produced belt driven washers were like imported LRWs, notwithstanding that belt driven washers were excluded from the scope of the investigated imports.[316] Contrary to Korea's argument, there is no requirement under the Safeguards Agreement that the scope of the products produced by a domestic industry match the scope of a safeguard investigation.[317] The Commission also appropriately defined the domestic industry to include producers of covered parts, based on its

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[310] USITC Report, pp. 5-19 (Exhibit KOR-1).

[311] USITC Report, pp. 5-7, 17-18 (Exhibit KOR-1).

[312] USITC Report, pp. 7-9 (Exhibit KOR-1).

[313] USITC Report, pp. 9-12 (Exhibit KOR-1).

[314] USITC Report, pp. 12-17 (Exhibit KOR-1).

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

[316] USITC Report, pp. 15-16 (Exhibit KOR-1).

[317] Korea first written submission, para. 191.

determination that domestically produced covered parts were like imported covered parts and its finding that the domestic industry was vertically integrated with respect to covered parts.[318] Nothing in the Safeguards Agreement requires competent authorities to ensure that all products included within a domestic like product definition compete with each other and with all imported products under investigation, as Korea mistakenly claims.[319] We elaborate upon each of these points below.

a. The Commission's definition of the domestic industry to include producers of belt driven washers was consistent with the Safeguards Agreement.

158. Korea argues that the Commission's definition of the domestic industry to include domestic producers of belt driven washers, consistent with its definition of the domestic like product, somehow created a "mismatch" between the scope of the investigation, which excluded imports of belt driven washers, and the scope of the domestic industry.[320] In Korea's view, the Commission did not provide a reasonable and adequate explanation for why it excluded belt driven washers from the scope of the investigation but included such washers in its definition of the domestic industry.[321]

159. To the extent Korea's claim amounts to a disagreement as to the scope of the investigation, the Commission acted well within its discretion in accepting the scope of the "product(s) being imported" as defined by the petitioner. As explained by the panel in *Dominican Republic – Safeguard Measures*, "the Agreement on Safeguards does not impose specific obligations with respect to the definition or the scope of the product under investigation."[322] Indeed, neither Article 2.1 nor Article 4.1(c) impose such obligations. Korea itself concedes that "{t}here are no specific disciplines in respect of the definition of the product scope."[323] Given the Safeguard Agreement's silence on defining the product under investigation, the Commission was under no obligation to define the product under investigation here in any particular way,[324] as Korea mistakenly argues. Rather, the Commission reasonably adopted the product under investigation defined in the petition, which included the imported articles that were in the petitioner's view seriously injuring the domestic industry. Further, the Commission

[318] USITC Report, pp. 16-17, 19 (Exhibit KOR-1).

[319] Korea first written submission, para. 191.

[320] Korea first written submission, para. 197.

[321] Korea first written submission, para. 197.

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

[323] Korea first written submission, para. 198.

[324] *US – Lamb (AB)*, para. 76.

explicitly published a notice describing the scope in detail, which did not change starting from initiation of the investigation.[325]

160. Nor does Korea's challenge to the other side of the equation – the definition of the domestic product "like" that being imported – withstand scrutiny. Contrary to Korea's argument, the Commission thoroughly explained that it included belt driven washers in its definition of the domestic like product, and thus its definition of the domestic industry, because domestic belt driven washers were like imported LRWs.

161. Specifically, the Commission defined the domestic like product to include belt driven washers based on an analysis of its traditional factors showing that domestic belt driven washers were like imported LRWs in terms of at least four of the five factors. The Commission found that domestic belt driven washers were like imported LRWs in terms of all physical characteristics other than the drive system, with imported LRWs utilizing direct drive systems.[326] While recognizing that belt drive systems did not permit the higher spin speeds and vibration reduction technology of direct drive systems, the Commission noted that belt driven washers could still qualify for Energy Star certification, like many direct drive LRWs.[327] The Commission also found that domestic belt driven washers were like imported LRWs in terms of customs treatment, manufacturing processes, and uses.[328] 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.

162. Notably, Korea's challenge to the Commission's finding that domestic belt driven washer were like imported LRWs runs in direct contradiction to respondents' emphatic position during the investigation that belt driven washers were virtually indistinguishable from LRWs.[329] Specifically, in their joint prehearing brief, LG and Samsung argued that imports of PSC/belt drive TL washers and CIM/belt drive FL washers "clearly compete with the domestic industry and with in-scope imports," *i.e.*, LRWs, highlighting the Commission's finding in *LRWs from China* that "there is no clear dividing line between {front-load residential washers with CIM/belt} and LRWs within the scope."[330] At the Commission's hearing, counsel to Samsung

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[325] *See* Institution Notice (Exhibit US-1).

[326] USITC Report, p. 15 (Exhibit KOR-1).

[327] USITC Report, p. 15 (Exhibit KOR-1).

[328] USITC Report, pp. 15-16 (Exhibit KOR-1).

[329] *See* Korea first written submission, paras. 194, 200.

[330] LG and Samsung's Prehearing Injury Brief at 28-29 (quoting *LRWs from China*, USITC Pub. 4666 at 7 n.24) (Exhibit KOR-11). Likewise, in *LRWs from China*, which had a scope identical to that of the safeguard investigation of LRWs, LG and Samsung argued that the Commission should define the domestic like product to include "low tech" washers, including PSC/belt drive TL washers and CIM/belt drive FL washers, because there was no meaningful distinction between such washers and in-scope LRWs in terms of the Commission's like product

stated that "excluded washers," including belt driven washers, "compete directly with in-scope washers," meaning LRWs, "and no clear dividing line distinguishes them."[331] To emphasize this point, counsel to Samsung presented two physical exhibits to the Commission, a Whirlpool FL LRW with direct drive and a GE FL washer with a CIM/belt drive, and stated that the two machines were practically identical:

> For both the list price at Home Depot is 899. They have exactly the same capacity, the same design and look, and very similar features. A consumer wanting to know which washer is excluded product three because it has a drive train with a controlled induction motor and belt drive would have difficulty finding that information. The drive train is not mentioned in the product's specs, the installation manual, or the user guide.[332]

As the Commission reasonably observed, the implication of LG's and Samsung's argument that belt driven washers were like LRWs was that the Commission should define the domestic like product to include belt driven washers.[333]

163. Once the Commission defined the domestic like product to include belt driven washers, the Commission 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."[334] 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

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factors. *See LRWs from China*, USITC Pub. 4591 p. 8 (Exhibit US-4). The Commission placed key documents from *LRWs from China* onto the record of the safeguard investigation of LRWs, including the hearing transcript, the verification report for Whirlpool, the staff report, and the Commission's views.

[331] Hearing Transcript, p. 227 (Smith) (Exhibit US-2).

[332] Hearing Transcript, p. 228 (Smith) (Exhibit US-2). Samsung argued that "the 'only physical difference' between in-scope and excluded front loaders is 'the combination of a controlled induction motor and a belt drive system,'" quoting the Commission's finding from *LRWs from China*; that belt driven washers "are aggressively promoted by retailers alongside competing in-scope LRWs"; and that belt driven washers "qualify as LRWs and compete in the U.S. market." Samsung's Posthearing Injury Brief, 5-7 (quoting *LRWs from China*, USITC Pub. 4591 at 9) (Exhibit KOR-10).

[333] USITC Report, pp. 11-12 (Exhibit KOR-1).). The Commission also noted that it need not amend the scope to consider out-of-scope belt driven washers as an alternative cause of injury. *Ibid.* Respondents did not, however, claim that imports of out-of-scope belt driven washers were an alternative cause, and as noted above, Whirlpool's officials explained that such imports were in no way injurious.

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

washers, CIM/belt drive FL washers, and covered parts, including Whirlpool, GE, Alliance, and Staber."[335]

164. Nothing in the Safeguards Agreement obligated the Commission to define the articles produced by the domestic industry to perfectly match the scope of the investigated imports. Korea cites nothing in the text of the Agreement suggesting any such obligation.[336] The dispute settlement reports that it cites are unavailing.

165. Contrary to Korea's argument, the panel in *Dominican Republic – Safeguard Measures* did not find that "competent authorities may not create a mismatch between the determinations of the 'product under consideration' and 'the domestic industry.'"[337] Rather, the panel found 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."[338] That is precisely what the Commission did in this case: having found domestic belt driven washers to be like imported LRWs, the Commission defined the domestic industry to include producers of belt driven washers.

166. Korea also errs in seeking to rely on the Appellate Body's finding in *EC – Fasteners* that an "authority bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry."[339] Korea mistakenly contends that the Appellate Body was concerned with "{a} domestic industry defined through a process that involves active exclusion of certain products from the scope of the investigation while including domestic producers of the exact same out-of-scope product."[340] The issue that gave rise to the finding in *EC – Fasteners* was the manner in which the EU had selected domestic *producers* for inclusion in its sample of the domestic industry, which had nothing to do with the exclusion of products from the scope of investigation. As the appellate report explained, "by defining the domestic industry on the basis of willingness to be included in the sample, the {EU's} approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion," in breach of the objectivity obligation under Article 3.1 of the Antidumping Agreement.[341] In this case, by

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

[336] Korea first written submission, para. 198.

[337] Korea first written submission, para. 198 (citing *Dominican Republic – Safeguard Measures (Panel)*, para. 7.191).

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

[339] *EC – Fasteners (China) (AB)*, para. 416.

[340] Korea first written submission, para. 198.

[341] *EC – Fasteners (China) (AB)*, para. 427.

contrast, the Commission included *all* known domestic producers of the like product in its definition of the domestic industry, and Korea does not claim otherwise.

167. Korea also attempts to support its argument by misapplying the so-called "parallelism principle," which has nothing to do with a competent authority's definition of the domestic industry under Articles 2.1 and 4.1(c). In *US – Wheat Gluten*, the Appellate Body stated that "the imports included in the determination made under Article 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2."[342] The Appellate Body added in *US – Steel Safeguards* that this confluence of obligations means that competent authorities must establish that "imports from sources covered by the measures . . . satisfy, alone, and in and of themselves, the conditions for the application of a safeguard measure."[343] Thus, "parallelism" calls for the products covered by any safeguard measure to "correspond" to the imports covered by a finding of serious injury. That is the case with the washers safeguard measure, which does not exclude any imported product covered the Commission's finding of serious injury, except as required by SGA Article 9.1.[344]

168. The Commission's compliance with Article 4.1(c) created no "risk of distortion," as Korea mistakenly argues.[345] To the contrary, because belt-driven washers were found to be "like" imported washers, excluding their producers from the domestic industry would have been inconsistent with SGA Article 4.1(c). It would have also omitted from the Commission's analysis of serious injury and causation a portion of the domestic industry that, by Korea's own admission, was clearly impacted by imports of LRWs.[346]

169. In this case, the Commission found that domestic belt driven washers were like the imported LRWs subject to investigation with respect to nearly all of the factors it has traditionally analyzed in making such determinations. Korea agrees that belt driven washers are like LRWs, as LG and Samsung argued before the Commission. Because the record showed that domestic belt driven washers were like imported LRWs, the Commission's inclusion of domestic producers of belt driven washers in the domestic industry was fully consistent with SGA Articles 2.1 and 4.1(c).

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[342] *U.S. – Wheat Gluten (AB)*, para. 96; *see also US – Line Pipe (AB)*, para. 181.

[343] *U.S. – Steel Safeguards (AB)*, para. 444.

[344] The United States does not understand Korea's "parallelism" arguments as a challenge to the exclusion of certain developing country Members.

[345] Korea first written submission, paras. 202-205.

[346] *See* Korea first written submission, paras. 194, 200.

b. In defining the domestic industry, the Commission was under no obligation to examine the competitive relationship between either domestic covered parts and imported LRWs or domestic covered parts and imported covered parts

170. Korea argues that SGA Articles 2.1 and 4.1(c) somehow obligated the Commission to establish that domestically produced covered parts were like or directly competitive with imported LRWs before defining the domestic like product to include both covered parts and LRWs.[347] Korea also argues that the Commission erred in finding that domestic covered parts were like imported covered parts.[348] Neither argument withstands scrutiny.

171. First, nothing in Articles 2.1 and 4.1(c) requires competent authorities to ensure that all domestic articles within the domestic like product and all imported articles within the product under investigation are like or directly competitive with one another, as Korea mistakenly argues.[349] Indeed, "the Agreement on Safeguards does not impose specific obligations with respect to the definition or the scope of the product under investigation."[350] Thus, as the panel found in *Dominican Republic – Safeguard Measures*, there is no "provision in the Agreement that restricts the inclusion of imported products within the scope of an investigation solely to those products that are like or directly competitive with each other."[351]

172. Given this, nothing in the Agreement precludes competent authorities from defining a single domestic like product encompassing multiple domestic articles that are not like or directly competitive with each other as long as each domestic article is like an imported article subject to investigation. Articles 2.1 and 4.1(c) require competent authorities to define the domestic industry as producers as a whole of products "like or directly competitive" with the product under investigation. Specifically, Article 2.1 provides in relevant part that "{a} Member may apply a safeguard measure to a product only if that Member has determined that such product is being imported into its territory in such increased quantities . . . as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products." Article 4.1(c) defines "domestic industry" in relevant part as "the producers as a whole of the like or directly competitive products operating within the territory of a Member . . . ." Under the text of these provisions, the "like or directly competitive" relationship that competent authorities must establish is between the "products" produced by the "domestic industry," on the one hand, and the "product being imported into {the Member's} territory," on the other. Neither article says anything about competent authorities having to establish a "like or directly competitive" relationship between each and every article included within a domestic like product. On the

[347] *See* Korea first written submission, paras. 209-215.

[348] *See* Korea first written submission, paras. 216-230.

[349] Korea first written submission, para. 212.

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

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

contrary, Articles 2.1 and 4.1(c) recognize that a single domestic industry may produce multiple products "like or directly competitive" with the imported article subject to investigation by defining the "domestic industry" with reference to "like or directly competitive products" in the plural.

173. Thus, in *Dominican Republic – Safeguard Measures*, the panel rejected complainants' argument that the competent authority acted inconsistently with Article 4.1(c) by including within the imported product both polypropylene bags and the tubular fabric from which those bags were made.[352] Similarly, the Commission here defined the domestic like product to include both LRWs and the major parts from which LRWs are assembled, coextensive with the scope of the investigation.[353] The Panel should likewise find the Commission's domestic like product definition consistent with SGA Articles 2.1 and 4.1(c).

174. Panels have also rejected claims similar to Korea's in the context of ADA Article 2.6, which defines the term "like product" for purposes of antidumping duty investigations, finding that investigating authorities are under no obligation to ensure that all products within a domestic like product are like one another. In *Korea – Certain Paper*, the panel found that KTC's definition of a single domestic like product encompassing PPC and WF was consistent with ADA Article 2.6, notwithstanding the complainant's argument that PPC was unlike WF, because "the KTC appropriately defined the domestic like product as "domestically produced PPC and WF . . . identical to the definition of the PPC and WF imported from Indonesia."[354] Similarly, the panel in *United States – Softwood Lumber* rejected Canada's argument that "there must be likeness within both the product under consideration and within the like product," and upheld Commerce's definition of a single domestic like product "identical" to the product under consideration, which encompassed multiple product types allegedly unlike one another.[355]

175. In light of the similarities between the "like product" definitions under the Safeguards Agreement and the Anti-Dumping Agreement, the Panel here should likewise find that there is no basis under Articles 2.1 and 4.1(c) for Korea's argument that there must be likeness between all products within the scope and the domestic like product. Under the Safeguards Agreement, as under the Anti-Dumping Agreement, competent authorities must define the domestic like product such that each type of domestic article included within the definition is like an imported article within the scope of investigation. That is precisely what the Commission did in this case. It defined the domestic like product to include all domestically produced residential washers, including LRWs and belt driven washers, because all were like the imported LRWs. The

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

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

[354] *Korea – Certain Paper (Panel)*, para. 7.220; *see also ibid*. at 7.216 ("Indonesia agrees with the KTC's determination that PPC and WF originating in Indonesia are identical to PPC and WF produced in Korea.").

[355] *U.S. – Softwood Lumber V (Panel)*, para. 7.156.

Commission also defined the domestic like product to include covered parts because domestic covered parts were like imported covered parts. Because each type of domestic article included in the Commission's domestic like product definition was like an imported article within the scope, the Commission's definition of the domestic like product, and by extension its definition of the domestic industry, are consistent with SGA Articles 2.1 or 4.1(c).

176. Equally misplaced is Korea's argument that the Commission's inclusion of covered parts in the domestic like product was permissible only if there were a finding that domestic covered parts were both like *and* directly competitive with imported covered parts.[356] Claiming that "{l}ikeness is a subset of the broader concept of directly competitive products," Korea argues that competent authorities may only find that a domestically produced article is "like" an imported article within the scope of investigation if the domestic article is also "in competition with the other product."[357]

177. Contrary to Korea's argument, the text of 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 'like' the other product," the converse is also true.[358] Not every domestically produced product that is "like" an imported product subject to investigation will be "directly competitive" with the imported product.

178. In this case, the Commission explicitly recognized that domestic covered parts were not "directly competitive" with imported covered parts but nevertheless found that domestic covered parts were "like" imported covered parts with respect to all five of its traditional factors.[359] Based on the preponderance of similarities between domestic and imported covered parts, the Commission reasonably found that domestic covered parts were like imported covered parts.[360]

179. Korea is also mistaken that the Commission "failed to address properly important factors such as consumer preference and end-uses."[361] "Consumer preference" was irrelevant to a comparison of domestic and imported covered parts because, as the Commission found, such

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[356] *See* Korea first written submission, paras. 224-27.

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

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

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

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

[361] Korea first written submission, para. 228.

parts were sold not to end consumers but to authorized service centers and distributors for the repair of LRWs.[362] Expressly considering "uses," the Commission found that "{d}omestically produced and imported covered parts share the same general functionality when installed in LRWs" in that "{c}abinets are the metal shell used to cover LRWs, plastic tubs hold water, and metal drums hold laundry."[363] Although Korea emphasizes that domestic and imported covered parts were designed for installation in "very different and very specific LRWs of the same brand only,"[364] the Commission recognized 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 of repairing them."[365] That domestic covered parts were not identical to imported covered parts did not preclude the Commission relying on the additional factors it considered to reach the ultimate finding that the domestic parts were nonetheless "like" imported covered parts.

180. Thus, Korea has failed to establish that the Commission erred in finding that domestic covered parts were like imported covered parts.[366]

c. The Commission's "product line" approach was consistent with the Safeguards Agreement.

181. The Panel need not reach Korea's arguments concerning the Commission's alternative "product line" approach, which the Commission cited only as an additional basis for defining the domestic industry to include covered parts production. In any event, however, the Commission's application of this approach to include within the industry definition "all domestic facilities and workers producing a product like or directly competitive with the imported article,"[367] was fully consistent with the Safeguards Agreement.[368] Competent authorities have the discretion to apply reasonable methodologies in conducting their serious injury analyses.[369]

182. As the Commission explained, domestic production of covered parts was inseparable from domestic production of LRWs. Since "virtually all domestically produced LRWs are assembled from covered parts produced domestically in the same facilities as the LRWs, . . . the

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

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

[364] Korea first written submission, para. 228.

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

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

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

[368] *See* Korea first written submission, paras. 213-15.

[369] *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.").

production facilities producing assembled LRWs necessarily include the facilities for producing covered parts."[370] In other words, there was no separate domestic industry producing covered parts, as Korea suggests, but rather a single domestic industry producing covered parts primarily for use in the assembly of LRWs in vertically integrated production facilities. Due to the vertically integrated nature of the domestic industry, the serious injury caused by imports of LRWs would have affected not only the industry's operations producing LRWs but also the industry's associated operations producing covered parts for assembly into LRWs. Thus, the Commission's reference to a product line approach as support for its definition of the domestic industry to include parts production was consistent with Article 4.1(c).

183. Korea is mistaken that this rationale was similar to the Commission's "continuous line of production" analysis in *US – Lamb*, which the Appellate Body rejected.[371] In *US – Lamb*, the Appellate Body found that the Commission's definition of the domestic industry to include "growers and feeders of live lambs" was inconsistent with Article 4.1(c) because "the 'like product' is 'lamb meat'" and "under Article 4.1(c), input products can only be included in defining the 'domestic industry' if they are 'like or directly competitive' with the end-products."[372] Unlike in *Lamb*, where the imported product included lamb meat but not live lambs,[373] the product under investigation in this case included both LRWs and covered parts.[374] Consequently, the Commission defined the domestic like product to include covered parts and included parts producers in its definition of the domestic industry both as producers of "like or directly competitive" products and as producers whose parts production was vertically integrated with LRW production. The Commission did not rely on any finding of a "continuous line of production" or a "substantial coincidence of economic interests" between out-of-scope input products and in-scope end products, as it had in *Lamb*.[375]

184. For all the foregoing reasons, Korea has failed to establish that the Commission failed to provide a reasoned and adequate explanation for its definition of the domestic industry to include producers of residential washers, including LRWs and belt driven washers, and covered parts, consistent with SGA Articles 2.1, 3.1, and 4.1(c). There is accordingly no support for Korea's challenge to the Commission's domestic industry definition, or for Korea's derivative claims that the Commission's allegedly improper domestic industry definition prevented it from establishing significant overall impairment under Article 4.2(a) and causation under Article 4.2(b).[376]

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

[371] Korea first written submission, para. 214.

[372] *US – Lamb (AB)*, paras. 87-90.

[373] *US – Lamb (AB)*, para. 88.

[374] USITC Report, pp. 7-8 (Exhibit KOR-1).

[375] *US – Lamb (AB)*, para. 89.

[376] *See* Korea first written submission, paras. 231-33.

D. The Commission Complied with SGA Articles 2.1 and 3.1 in Finding Increased Imports

1. The Relevant Obligation Under SGA Article 2.1

185. For analytical purposes, the Commission divided its analysis of the "Conditions" laid out in Article 2.1 for taking a safeguard measure into multiple steps, one of them being an inquiry into whether imports were increasing. Korea does not dispute that this approach was consistent with the Safeguards Agreement. However, it makes several erroneous assertions regarding the legal requirements applicable to this analysis.

186. First, Korea overlooks that an increased imports finding is only the first step in the overall analysis covered by the obligations of Article 2.1. Second, Korea fails to recognize that the temporal nature of the inquiry encompasses the entire period of investigation, although the most recent data deserves more weight. Third, there is no basis in the Safeguards Agreement for Korea's assertion that competent authorities are obligated to subdivide the products investigated in performing their analysis.

187. Korea does note correctly that the Safeguards Agreement calls for a focus on the present. Article 2.1 provides that a Member may impose a safeguard measure on a product that "*is* being imported . . . in *such* increased quantities . . . *and* under such conditions *as to cause or threaten to cause serious injury*" (emphasis added). The phrase "in such increased quantities" establishes the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time.

188. The Appellate Body has further found, based on the context of Article 2.1, that the increase in imports must be recent enough to cause or threaten to cause serious injury to a domestic industry at the time of the competent authority's determination.[377] It explained:

> {T}he determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be "*such* increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure. . . . {T}he increase in imports must have been recent enough,

[377] *US – Steel Safeguards (Panel)*, para. 10.162 ("as indicated by the present continuous 'are being', there is an implication that imports, in the present, remain at higher (i.e. increased) levels.").

> sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury."[378]

189. SGA Article 2.1, which the Appellate Body was interpreting when it spoke of "recent enough, sudden enough, sharp enough, and significant enough," encompasses the entirety of the analysis the competent authorities undertake in a safeguard investigation. Accordingly, whether an increase in imports has been recent, sudden, sharp, and significant enough to cause or threaten serious injury to a domestic industry is not strictly a question of the timing and magnitude of the increase in import volume.[379] Rather, to assess the impact of a particular increase in imports on a domestic industry, a competent authority must consider whether the increase occurred "under such conditions" as to cause or threaten serious injury to a domestic industry, which necessarily includes a consideration of the present condition of the industry and the causal relationship between the increase in imports and any serious injury or threat of serious injury sustained by the industry. As the Appellate Body explained in *US – Steel Safeguards*, "{t}he question whether 'such increased quantities' of imports will suffice as 'increased imports' to justify the application of a safeguard measure is a question that can be answered only in the light of 'such conditions' under which those imports occur" and "the relevant importance of these elements varies from case to case."[380]

190. Therefore, Korea errs in suggesting in its discussion of the "legal standard" that the preliminary step of quantitatively addressing the increased imports must include an evaluation of whether the quantities "justify an emergency measure," or of the impact of imports on the market, or of the degree of competition between domestic and imported products.[381] The competent authorities' findings as to increased imports may focus on the numerical increase, and address the other conditions enumerated in Article 2.1 in other parts of its analysis. As discussed in section D.3.d below, the Commission thoroughly explained how imports increased significantly "under such conditions" as to cause serious injury to the domestic industry, including a reasoned and adequate explanation of the relevant conditions of competition.

191. While the increased imports must be in the present, the entire increase in import volume need not be confined to the most recent period examined by the competent authorities. In *US – Line Pipe* the Appellate Body described "the reality of how injury occurs" as "a continuous

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[378] *Argentina – Footwear (EC) (AB)*, para. 131.

[379] *See US – Steel Safeguards (Panel)*, para. 10.168 ("{T}here are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1 of the Agreement on Safeguards." (emphasis original)).

[380] *US – Steel Safeguards (AB)*, para. 350. The Appellate Body also agreed with the panel that the assessment of whether an increase is "recent enough, sudden enough, and significant enough to cause or threaten serious injury" is to be made *on a case-by-case basis* by the competent domestic authority—and is *not*, therefore, a determination that is made in the *abstract"*.

[381] Korea first written submission, paras. 115-17.

progression of injurious effects eventually rising and culminating in what can be determined to be 'serious injury.'"[382] As the Appellate Body recognized, "{s}erious injury does not generally occur suddenly."[383] Noting that "imports need not be increasing at the time of the determination" as long as "imports have increased," the panel in *United States – Steel Safeguards* explained that "the most recent data must be the focus, but should not be considered in isolation from the data pertaining to the less recent portion of the period of investigation."[384] Furthermore, as panels have recognized, there is no requirement that "the rate of the increase in imports must accelerate (or be positive) at every moment of the period of investigation."[385] Rather, "an absolute increase . . . is sufficient" for purposes of satisfying the increased imports requirement under SGA Article 2.1.[386]

192. Finally, the "product" that is the focus of an competent authority's analysis of increased imports under Article 2.1 must be the product under investigation, to which any safeguard measure would be applied. Once a competent authority has defined the product under investigation, the authority is under no obligation to subdivide the product into separate categories of products and to consider whether imports in each category increased. In *Dominican Republic – Safeguard Measures*, the panel explained that "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."[387] Noting "the undisputed definition of tubular fabric and polypropylene bags as the product under investigation," the panel rejected complainant's argument that "the increase in imports should have been demonstrated separately with respect to each of these products."[388]

2. The Commission's analysis of increased imports was consistent with SGA Articles 2.1 and 3.1 in examining trends over an extended period, with a focus on the present.

193. The Commission provided a reasoned and adequate explanation of how the facts supported its finding that the imports subject to investigation, LRWs and covered parts, increased in absolute terms and relative to domestic production during the period of

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[382] *US – Line Pipe (AB)*, para. 168.

[383] *US – Line Pipe (AB)*, para. 168.

[384] *US – Steel Safeguards (Panel)*, para. 10.162.

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

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

[387] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.236.

[388] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.236.

investigation, consistent with SGA Articles 2.1 and 3.1.[389] The Commission examined import trends in each year of the period of investigation, 2012 through 2016, and in both interim periods, January-March of 2016 and 2017, both in absolute terms and relative to domestic production. Based on these data, the Commission found that subject import volume "increased steadily" during every year of the 2012-16 period in absolute terms,[390] nearly doubling during the period of investigation.[391] The Commission also found that the absolute volume of subject imports remained "substantial" in interim 2017, though down from 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.[392] The Commission also found that "imports increased steadily relative to the domestic industry's production" in each year of the 2012-16 period and also considered imports relative to domestic production in interim 2017, which were down from interim 2016.[393] The Commission therefore concluded that "imports increased during the period of investigation, both in absolute terms and relative to domestic production."[394]

194. 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."[395] Indeed, imports of LRWs had peaked at nearly double the level of 2012 in 2016, only three months before the end of the period of investigation. Furthermore, as panels have recognized, there is no requirement that "the rate of the increase in imports must accelerate (or be positive) at every moment of the period of investigation."[396] Rather, "an absolute increase . . . is sufficient" for purposes of satisfying the increased imports requirement under SGA Article 2.1.[397] The Commission's finding that imports of LRWs increased in every year of the 2012-16 period to a level in 2016 nearly twice that of

[389] *See* USITC Report, pp. 20, 38-39 (finding that "{i}mports of LRWs increased significantly during the period of investigation, in terms of both volume and market share.") (Exhibit KOR-1).

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

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

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

[393] USITC Report, pp. 20, II-1 (Exhibit KOR-1).

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

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

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

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

2012, a mere three months before the end of the period of investigation, was sufficient to satisfy the increased imports requirement under Article 2.1.

195. For all of these reasons, the Commission showed that the increase in imports of LRWs was of such a magnitude (absolute or relative) and under such conditions to satisfy the increased imports requirement under Article 2.1. Moreover, the Commission thoroughly explained its findings that imports of LRWs increased in absolute terms and relative to domestic production, thereby satisfying its obligation under SGA Article 3.1to provide a reasoned and adequate explanation of its increased imports finding.

3. Korea has not presented a valid basis to find the Commission's increased imports finding inconsistent with the Safeguards Agreement.

196. None of Korea's challenges to the Commission's analysis of increased imports is persuasive. The Commission appropriately based its increased imports finding on imports of all products under investigation, contrary to Korea's claim that the Commission should have analyzed increased imports separately for imports of LRWs and imports of covered parts.[398] The Commission also provided a reasoned and adequate explanation for how the increase in imports was of such a magnitude (absolute or relative) and under such conditions, both quantitatively and qualitatively, to cause serious injury to the domestic industry, notwithstanding Korea's argument to the contrary.[399] Finally, the Commission's analysis of increased imports included an examination of the trends in import volumes over the period of investigation, including over the interim periods, contrary to Korea's mistaken argument that the Commission overlooked these trends.[400] We elaborate upon each of these points below.

a. The Commission analyzed increased imports with respect to the product under investigation, consistent with Article 2.1.

197. Contrary to Korea's argument, the Commission's analysis of increased imports appropriately focused on imports of the product under investigation, encompassing LRWs and covered parts, as required under SGA Article 2.1. Article 2.1 provides, in relevant part, that "{a} Member may apply a safeguard measure to ***a product*** only if that Member has determined . . . that ***such product*** is being imported . . . in such increased quantities . . . and under such conditions as to cause . . . serious injury to the domestic industry . . . ." (emphasis added.) Thus,

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[398] Korea first written submission, paras. 130-133. We note that the Commission did not "cumulate{} imports of LRWs and LRW parts" in its examination of increased imports, as Korea argues. Unlike under the Anti-dumping and SCM Agreements, cumulation is not an issue in global safeguard investigations covering imports from all sources. We understand Korea's argument that the Commission "cumulated imports of LRWs and LRW parts" to be an argument about the Commission's consideration of imports of LRWs and covered parts in the aggregate.

[399] Korea first written submission, paras. 130, 134-141.

[400] Korea first written submission, paras. 130, 142-58.

the imported product that is the subject of a competent authority's serious injury analysis pursuant to Article 2.1, the product under investigation, is the "product" to which a safeguard measure may be applied upon the authority's determination that increased imports of the "product" caused serious injury to the domestic industry. As recognized by the Panel in *Dominican Republic – Safeguard Measures*, "the Agreement on Safeguards does not impose specific obligations with respect to the definition or the scope of the product under investigation."[401]

198. In this case, the petition provided a detailed description of the imported merchandise that was allegedly causing serious injury to the domestic industry: LRWs and covered parts.[402] As discussed in section I.B.2.a above, on accepting the petition, the Commission published the scope of the investigation contained in the petition in its initiation and scheduling notice in the Federal Register.[403] Having accepted Whirlpool's petition and notified interested parties of the imported articles subject to investigation, namely LRWs and covered parts, the Commission reasonably defined the product under investigation as encompassing those articles.[404]

199. Because the product under investigation included both LRWs and covered parts, the Commission appropriately conducted its serious injury analysis, including its consideration of increased imports, with respect to LRWs and covered parts in the aggregate.[405] 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."[406] For this reason, the panel found that a competent authority need not demonstrate that imports increased with respect to each separately identifiable product within a product under investigation, but only with respect to the overall product under investigation.[407] Thus, nothing under the Safeguards Agreement obligated the Commission to make separate determinations on increased imports with respect to LRWs on the one hand and covered parts on the other, as Korea mistakenly suggests.[408]

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

[402] Petition, pp. 5-9 (Exhibit US-3).

[403] Institution Notice, (Exhibit US-3).

[404] USITC Report, pp. 7-8 (Exhibit KOR-1).

[405] *See* USITC Report, pp. 20, II-1-2, and Tables II-1, C-2 (Exhibit KOR-1). For its analysis of increased imports, the Commission relied on the data presented in tables II-1 and C-2, which included both LRWs and covered parts. *Ibid.*

[406] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.236.

[407] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.236.

[408] *See* Korea first written submission, para. 132.

b. The Commission established that the increase in imports was of such a magnitude (absolute or relative) and under such conditions as to cause serious injury to the domestic industry

200. In the analysis of serious injury and causation, the Commission thoroughly explained how the increase in subject import volume was of such a magnitude (absolute or relative) and under such conditions (that is, sufficiently recent, sudden, sharp, and significant), both quantitatively and qualitatively, as to cause serious injury to the domestic industry, contrary to Korea's argument.[409] 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.[410] The Commission also found that the significant and growing volume of subject imports was priced lower than domestic LRWs. Given their moderate to high degree of substitutability with domestic LRWs and the importance of price to purchasers, the Commission found that imports had significantly depressed and suppressed domestic like product prices, resulting in the domestic industry's increasing financial losses and reduced capital and R&D expenditures.[411] 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.[412]

201. Korea is also mistaken that the Commission somehow failed to "critically examine and explain" its finding of increased imports in light of "the decrease in imports in the most recent part of the POI."[413] The Commission did so. Having found that the absolute volume of subject imports nearly doubled during the 2012-16 period,[414] the Commission also found that, although down from interim 2016, the absolute volume of subject imports remained "substantial" in interim 2017.[415] As the Commission explained, subject import volume was lower in this comparison due to "supply disruptions related to LG and Samsung's transfer of production from

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

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

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

[412] *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.").

[413] Korea first written submission, para. 138.

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

[415] USITC Report, pp. 30, 38 (Exhibit KOR-1).

China to Thailand and Vietnam and Samsung's recall" of 2.8 million units.[416] Thus, the Commission explicitly addressed the decline in subject import volume in interim 2017 relative to interim 2016, and explained why the temporary decline did not detract from overall increase in subject import volume during the 2012-16 period.

202. Nor did the decline in subject import volume in interim 2017 relative to interim 2016 "contradict the overall conclusion of an increase in imports," as Korea argues.[417] As the panel explained in *US – Line Pipe*, "there is no need for a determination that imports are presently still increasing" because "imports could have 'increased' in the recent past, but not necessarily . . . up to the end of the period of investigation."[418] Certainly, the steady and significant increase in imports of LRWs over the 2012-16 period was more significant than the slight decrease 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."[419] Indeed, imports of LRWs had peaked at nearly double the level of 2012 in 2016, just three months prior to the end of the period of investigation. As panels have recognized, there is no requirement that "the rate of the increase in imports must accelerate (or be positive) at every moment of the period of investigation."[420] Rather, "an absolute increase . . . is sufficient" for purposes of satisfying the increased imports requirement under SGA Article 2.1,[421] and that is what the Commission found here.

203. Furthermore, 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 plastic bags in *Dominican Republic – Safeguard Measures*, in which the panels upheld increased import findings. In *US – Steel Safeguards*, the Commission found that imports of welded pipe had not only declined in interim 2001 compared to interim 2000, but also between 1998 and 1999.[422] In *Dominican Republic – Safeguard Measures*, the competent authority found that imports of bags and tubular fabric had declined between 2008 and 2009, the last year of the period of investigation, by 14.68 percent.[423] By contrast, in this investigation, the Commission found that imports of LRWs increased in every full year of the

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[416] USITC Report, pp. 30, 38 (Exhibit KOR-1).

[417] Korea first written submission, para. 138.

[418] *US – Line Pipe (Panel)*, para. 7.207.

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

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

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

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

[423] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.231.

period of investigation, nearly doubling from 2012 through 2016.[424] The Commission also found that imports of LRWs remained "substantial" in interim 2017, though down from interim 2016, and explained that the lower level of imports in interim 2017 resulted from temporary factors rather than a secular reversal of the upward trend in import volume during the 2012-16 period. The peak subject import volume found by the Commission in this case, three months prior to the end of the period of investigation, was more recent than the peak import volume found in *Dominican Republic – Safeguard Measures*, 12 months before the end of the period of investigation, or in *US – Steel Safeguards*, six months before the end of the period of investigation.[425]

204. The Commission also thoroughly examined "the increase in imports relative to consumption," notwithstanding Korea's assertion that "the USITC did not evaluate it at all."[426] As an initial matter, the United States observes that the only increase referenced in Article 2.1 is an increase in import volume "absolute or relative to domestic production." There is no requirement that competent authorities also find an increase in subject import market share.

205. Nevertheless, the Commission examined U.S. commercial shipments of subject imports as a share of apparent U.S. consumption in each year of the period of investigation and over the interim period and found a significant increase.[427] Specifically, the Commission found that subject import market share increased in each year between 2012 and 2015 before declining in 2016 to a level that remained several percentage points higher than in 2012.[428] The Commission also found that subject import market share resumed its ascent in interim 2017, increasing to a level higher than in interim 2016.[429] Based on these trends, the Commission found that "as imports of LRWs nearly doubled during the period of investigation, they increased their penetration of the U.S. market to a significant degree."[430]

206. The Commission's analysis of subject import market share was therefore fully consistent with its finding that imports of LRWs increased significantly in absolute terms and relative to domestic production during the period of investigation, Indeed, the Commission's finding that subject import market share increased in interim 2017 relative to interim 2016 lent further support to the Commission's finding that subject import volume remained "substantial" in interim 2017, though down from interim 2016. The Commission's record-based findings

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

[425] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.231; *U.S. – Steel Safeguards (Panel)*, para. 10.233-234.

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

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

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

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

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

describing the actual subject import market share belie Korea's claims that the Commission failed to address the real trends; moreover, the actual facts contradict Korea's erroneous assertions that "the market share of imports remained the same throughout the POI" and that "imports actually decreased . . . in terms of market share" in the "most important, recent period of the POI."[431]

c. The Commission provided a reasoned and adequate explanation of the development of import trends over time

207. Contrary to Korea's argument, the Commission thoroughly examined the "rate and amount" of the absolute increase in subject import volume.[432] Specifically, the Commission considered the absolute volume of subject imports in each year of the 2012-16 period and found that imports of LRWs had "increased steadily" during the period.[433] The Commission also considered the overall percentage increase in subject import volume between 2012 and 2016,[434] which showed that subject import volume had "nearly doubled during the period of investigation."[435] Thus, the Commission considered the rate of increase in subject import volume, characterizing it as "steady," and the amount of the increase, including the increase in each year of the period of investigation and the overall increase.

208. Korea errs in arguing that the Commission overlooked "the speed, or the significance" of the increase in absolute import volume.[436] Rather than cite the actual Commission analysis of increased imports as set out in its views, Korea faults the discussion of import trends on page II-1 of the staff report. Specifically, Korea appears to takes issue with the adequacy of the staff report's discussion of the shifting country sources of imports of LRWs during the period of investigation, as though that were the extent of the Commission's consideration of import increases. While the Commission considered all data contained in the staff report, and specifically discussed how LG and Samsung repeatedly altered the sourcing of their imports of LRWs to evade successive antidumping and countervailing duty measures, the Commission's analysis of increased imports clearly addresses the rate and amount of the absolute increase in subject import volume.

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[431] Korea first written submission, paras. 138, 141.

[432] *See Argentina –Footwear (AB)*, para. 129.

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

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

[435] USITC Report, p. 39 (Exhibit KOR-1). The rate of increase in imports of LRWs was clear from the evolution of the absolute volume of imports of LRWs during the period of investigation, which the Commission expressly discussed. *Ibid.* The percent changes in imports of LRWs from 2012 to 2013, from 2013 to 2014, from 2013 to 2014, from 2014 to 2015, and from 2015 to 2016 were provided in Table C-2 of the staff report, and thus considered by the Commission. *Ibid.*, Table C-2.

[436] Korea first written submission, para. 144.

209. Similarly misplaced is Korea's argument, based on "LRW import data" allegedly gleaned from the Commission's Dataweb that "the data confirms a deceleration, rather than an acceleration, in the rate of increase of LRWs imports in the more recent period of the POI."[437] As an initial matter, Korea's argument is predicated on extra-record import data that was not before the Commission. As we demonstrated in Section III.B, consistent with the appropriate standard of review, the Panel may not consider this extra-record evidence.[438] The Commission relied on U.S. import data reported by five U.S. importers estimated to have accounted for virtually all U.S. imports of LRWs in 2016.[439] These data showed that imports of LRWs nearly doubled between 2012 and 2016, unlike the 33.7 percent increase shown by Korea's extra-record data. Given the very different trends exhibited by Korea's extra-record import data, the Panel cannot rely on those data to assess the Commission's analysis of increased imports, even if it were appropriate for the Panel to consider this extra-record data.

210. Furthermore, there is no requirement under the Safeguards Agreement that "imports . . . have a positive rate of increase – that is, an acceleration," as Korea claims.[440] As the panel explained in *Dominican Republic – Safeguard Measures*, "{t}here is nothing in the text of Article XIX:1(a) 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."[441] Rather, "an absolute increase . . . is sufficient" for purposes of satisfying the increased imports requirement under SGA Article 2.1,[442] which is what the Commission found here.

211. Indeed, panels have upheld increased import findings predicated on similar facts in previous disputes. The panel in *US – Steel Safeguards* found that a similarly "steady" increase in the absolute volume of subject imports of welded pipe, with a total increase of 67.5 percent between 1996 and 2000, satisfied the increased imports requirement under Article 2.1, even though imports had declined from 1998 to 1999 and from interim 2000 compared to interim 2001.[443] As the panel explained, "{e}ach of these increases was more significant than the two mentioned decreases, so that the overall evaluation is that of a clearly discernable increase"

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[437] Korea first written submission, para. 148.

[438] *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.").

[439] USITC Report, p. 5 (Exhibit KOR-1).

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

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

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

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

including "in the most recent past."[444] Rejecting Switzerland's contention that a "steady" and "gradual" increase in import volume could not satisfy the requirements of Article 2.1, the panel explained that the question of whether such an increase in import volume is sufficient to cause serious injury "is a question to be addressed within the context of whether there is serious injury and whether it has been caused by increased imports."[445] "{F}or the purposes of the first condition of Article 2.1 of the Agreement on Safeguards," the panel found, "an absolute increase . . . is sufficient."[446]

212. In *Dominican Republic – Safeguard Measures*, the panel found that the 50.06 percent increase in imports of bags and tubular fabric between 2006 and 2009 satisfied the increased imports requirement under Article 2.1, even though most of the increase in import volume occurred between 2006 and 2007 and import volume declined between 2008 and 2009.[447] As the panel explained, the competent authority's "evaluation took into account the import data corresponding to each of the years of the period of investigation, as well as the trend in imports over that period," and "found a global increase in imports of . . . 50.06 percent . . . over the period investigated," with "imports increase{ing} continuously in two out of three annual comparisons, including a significant increase between the years 2006 and 2007."[448] The panel rejected the complaining party's assertion that the "sharply" decreasing rate of increase in import volume from 60.76 percent in 2007 to 9.4 percent in 2008, and -14.68 percent in 2009 precluded the competent authority from finding a "recent, sudden, and sharp increase in imports," explaining that:

> There is nothing in the text of Article XIX:1(a) 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. As the Appellate Body has pointed out, the determination of whether the product "is being imported in such increased quantities" is not a "mathematical or technical" determination, but rather an evaluation that must be made case by case. The Panel therefore considers that the complainants have not demonstrated that the competent authority did not examine the rate of the increase

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

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

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

[447] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.231.

[448] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.231.

> in imports nor that the increase in imports it found could not have been considered recent, sudden and sharp.[449]

For these and other reasons, the panel rejected complainants' claim that the competent authority's increased imports finding was inconsistent with SGA Articles 2.1 and 3.1.[450]

213. The absolute increase in imports of LRWs found by the Commission in this case was of a greater magnitude and steadier than the increase in imports upheld with respect to welded pipe in *US – Steel Safeguards* and plastic bags in *Dominican Republic – Safeguard Measures*. In this case, the Commission found that the absolute volume of imports of LRWs increased in every year of the 2012-16 period,[451] in contrast to the increase in only four of five years found for imports of welded pipe and in three of four years found for imports of bags and tubular fabric.[452] The Commission also found that the absolute volume of imports of LRWs had nearly doubled over the period of investigation, [453] compared to the 67.5 percent increase found for imports of welded pipe and the 50.06 percent increase found for imports of bags and tubular fabric.[454] The Panel should therefore find the Commission's analysis of increased imports consistent with SGA Article 2.1.

d. The Commission provided a reasoned and adequate explanation of its increased imports finding, including the relevant conditions of competition.

214. The Commission's detailed analysis of increased imports, serious injury, and causation thoroughly explained how imports increased significantly "under such conditions" as to cause serious injury to the domestic industry, including a reasoned and adequate explanation of the relevant conditions of competition. That is all that Safeguards Agreement Articles 2.1 and 3.1 require. Nevertheless, Korea asserts that the Commission failed to provide a "reasoned and adequate explanation" of its increased imports finding. Its arguments are terse and conclusory, and rely on the faulty premise that only the text under the heading "increased imports" is relevant to the Panel's analysis.[455] But this is not the case. Article 2.1 sets out the overall conditions for

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

[450] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.240.

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

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

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

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

[455] *E.g.*, Korea first written submission, para. 157 ("although the USITC included in its published report a section on the 'conditions of competition and the business cycle', it entirely failed to incorporate the description . . . into its increase imports analysis.").

application of a safeguard measure, and does not require the competent authorities to preview in the analysis of increased imports conclusions presented later (or earlier) regarding the other conditions. Thus, Korea's "reasoned and adequate explanation" arguments fail at the outset. Nevertheless, for the sake of completeness, the remainder of this section indicates where in its Report the ITC provided the analysis that Korea contends is absent.

215. Korea opens its argument by contending that that the USITC did not "examine the relevance for purposes of its increased imports finding" of the steady rate of increase, the decline in import volume in interim 2019, or subject import market share.[456] These assertions are essentially derivative, repurposing its challenge to the substance of the Commission's increased imports findings as an argument that the findings were not reasoned and adequate. These arguments fail for the same reasons that the substantive assertions fail. As shown above in section 3.b, the Commission's causation analysis explained why the "steady rate" of increase in imports was recent, sudden, and sharp enough to cause serious injury. It also explained why a slight decrease in imports in the final three months of the investigation period did not detract from the conclusion that there was an absolute increase in imports. Section 3.c also demonstrates that the Commission addressed the increase in imports in terms of market share, and explained how those data supported its conclusion that imports increased in absolute terms. Thus, Korea errs in arguing that the Commission failed to provide a reasoned and adequate explanation of how these considerations affected its conclusion that imports increased "in such quantities" as to cause serious injury.

216. Despite acknowledging that the USITC Report contained a section devoted to "conditions of competition and the business cycle," Korea also asserts that the Commission failed to incorporate those conditions of competition in its increased imports analysis.[457] To begin with, Korea's acknowledgement is an understatement, given that the Commission provided an extensive discussion of the conditions of competition relating to demand, supply, market dynamics, and substitutability.

217. The Commission predicated its evaluation of the effects of increased imports on this extensive analysis of all relevant price and non-price factors. In particular, contrary to Korea's assertions,[458] the Commission carefully considered respondents' allegations that non-price factors, such as innovation and brand awareness, attenuated competition between imported and domestic washers. As the Commission explained, most responding domestic producers and purchasers reported that domestic and imported LRWs were always interchangeable, while even responding importers reported that they were sometimes interchangeable.[459] Moreover, the

[456] Korea first written submission, para. 150.

[457] Korea first written submission, para. 157.

[458] Korea first written submission, para. 157.

[459] USITC Report, p. 27 (Exhibit KOR-1).

Commission noted, most responding purchasers reported that domestic LRWs were either comparable to or superior to imported LRWs in terms of 23 factors that influenced purchasing decisions.[460] The Commission also observed that Whirlpool, GE, LG, and Samsung each reported introducing numerous innovative features on their LRWs during the period of investigation. And both domestic and imported LRWs were rated highly in publications and surveys during the period.[461] Based on this and other evidence, the Commission reasonably concluded that domestic and imported LRWs were comparable in terms of non-price factors, with a moderate to high degree of substitutability.[462] The Commission also cited a wealth of information establishing that price was an important factor in purchasing decisions for LRWs, while recognizing that non-price factors were also important.[463]

218. The Commission factored these conditions of competition into its finding that imports increased "under such conditions" as to cause serious injury to the domestic industry. Noting the domestic industry's development and production of competitive new LRWs during the period of investigation, the Commission found that the domestic industry should have been well positioned to capitalize on the increase in apparent U.S. consumption during the period of investigation.[464] Instead, the domestic industry suffered increasing operating and net losses that peaked in 2016 as domestic producers reduced their prices to defend their market share and retailer floor spots from increasing volumes of low-priced imports of LRWs.[465] The record showed that imported LRWs were priced lower than comparable domestic LRWs in 76.1 percent of quarterly comparisons, accounting for 86.3 percent of reported import sales volume for the pricing products.[466] Given the moderate to high degree of substitutability between imported and domestic LRWs, and the importance of price to purchasers, the Commission found that the pervasively lower prices on imported LRWs would have forced domestic producers to either reduce their own prices or lose retailer floor spots and sales.[467]

219. In fact, the record showed that the former scenario did actually occur. Indeed, the domestic industry's prices on sales of all six pricing products declined during the period of investigation, despite strong demand and increasing costs, even as the industry's market share

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[460] USITC Report, p. 29 (Exhibit KOR-1).

[461] USITC Report, pp. 29-30 (Exhibit KOR-1). As the Commission found, in 2016, 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 recommended impeller-based TL LRW models. *Ibid.*, pp. 29-30. Reviewed.com ranked domestic LRWs among six of the top ten TL LRW models and among four of the top ten FL LRW models. *Ibid.*, p. 30.

[462] USITC Report, p. 30 (Exhibit KOR-1).

[463] USITC Report, pp. 27-28 (Exhibit KOR-1).

[464] USITC Report, pp. 23-25, 33, 38 (Exhibit KOR-1).

[465] *See* USITC Report, pp. 40-43 (Exhibit KOR-1).

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

[467] *See* USITC Report, pp. 27-32, 42-43 (Exhibit KOR-1).

fluctuated within a narrow band.[468] In turn, these forced price reductions resulted in dire financial returns for the industry. Thus, having expressly tied its findings to the relevant conditions of competition, the Commission concluded that the increasing quantities of low-priced imports caused the domestic industry's increasing operating and net losses during the period of investigation by depressing and suppressing prices for the domestic like product.[469]

220. Thus, the Commission explained thoroughly how the conditions of competition supported its conclusions regarding increased imports. The fact that the explanation appeared in a section labeled "conditions of competition and the business cycle" does not obscure its clear relationship to the analysis of "increased imports." Thus, taken as a whole, the ITC report provided a reasoned and adequate explanation for its finding that imports increased "under such conditions" as to cause serious injury to the domestic industry, consistent with SGA Articles 2.1 and 3.1.

221. For all the foregoing reasons, the Commission provided a reasoned and adequate explanation for its finding that imports of LRWs increased in absolute terms and relative to domestic production, consistent with SGA Articles 2.1 and 3.1. Korea has accordingly failed to provide a valid basis for its challenge to the finding.

E. Korea Fails to Establish Any Inconsistency with Articles 2.1, 3.1, 4.1(a), and 4.2(a) and (c) of the Safeguard Agreement in the Commission's Finding that the Domestic Industry Was Seriously Injured.

222. The Commission conducted a detailed analysis of all of the relevant factors having a bearing on the situation of the industry, including but not limited to those enumerated in Article 4.2(a). It related the factors to each other and to the conditions of competition in the washers industry, explaining why significant negative developments in the industry outweighed positive trends highlighted by the respondents. It carefully examined data on domestic producers' profitability, explaining why the respondents' arguments that the profitability of petitioners' dryer operations did not cast doubt on the conclusion that increased imports had resulted in worsening financial losses on washer sales. And it explained why alleged quality and feature differences between imported and domestic washers did not undermine its conclusions.

223. Korea nevertheless alleges that the Commission's serious injury determination failed to comply with the Safeguards Agreement on essentially five grounds. None of its arguments withstands scrutiny.

1. The relevant obligations under Articles 2.1, 4.1(a), and 4.2(a)

224. Before a Member adopts a safeguard measure under Article 2.1, its competent authorities must find that the domestic industry sustained "serious injury" within the meaning of Article

[468] USITC Report, pp. 39, 43 (Exhibit KOR-1).

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

4.1(a) by taking into account "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry" pursuant to Article 4.2(a). Article 4.1(a) defines "serious injury" as "a significant overall impairment in the position of a domestic industry. Article 4.2(a) provides that the competent authorities "shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry." It then goes on to list several such factors "in particular": the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, and changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

225. Panel and appellate reports have recognized that this framing of the obligation means that competent authorities must consider all factors listed in Article 4.2(a) in making a serious injury determination. As the Appellate Body explained in *Argentina – Footwear*, "Article 4.2(a) . . . requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned."[470] Even so, the Appellate Body has recognized "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."[471] Thus, competent authorities may find some factors more important than others in their evaluation of whether a domestic industry is seriously injured.[472]

226. The extensive analysis of the evidence and argumentation in the Commission's determination of serious injury satisfied these obligations.

2. Korea errs in asserting that the Commission did not examine all relevant factors.

227. The Commission predicated its serious injury finding on an evaluation of all relevant factors, including each of the factors listed in Article 4.2(a). The Commission's findings and conclusions with respect to each of the listed factors was supported by the evidence before it.[473] And in each instance, the Commission provided a reasoned and adequate explanation for its findings.

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[470] *Argentina – Footwear (EC) (AB)*, para. 136.

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

[472] *See US – Wheat Gluten (Panel)*, para. 8.39 ("Of course, an examination of any one of those factors in a given case may lead the investigating authority to conclude that a particular factor is not probative of the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination.").

[473] USITC Report, pp. 30, 38 (Exhibit KOR-1).

228. Korea nonetheless argues that the Commission's analysis of serious injury was inconsistent with Article 4.2(a) because it "did not expressly examine" two of the enumerated factors: the rate and amount of the increase in imports and the share of the market taken by increased imports.[474] This is plainly incorrect.

229. The Commission's increased imports and causation analyses thoroughly examined the "rate and amount" of the absolute increase in subject import volume.[475] Specifically, the Commission considered the evolution of the absolute volume of subject imports in each year of the 2012-16 period and found that imports of LRWs had "increased steadily" during the period.[476] The Commission also considered the overall percentage increase in subject import volume between 2012 and 2016,[477] which showed that subject import volume had "nearly doubled during the period of investigation."[478] Thus, the Commission evaluated the rate of increase in subject import volume, characterizing it as "steady," and the amount of the increase, including the increase in each year of the period of investigation and the overall increase.

230. The Commission also examined the share of the market taken by increased imports during the period of investigation, and found that subject imports significantly increased their penetration of the U.S. market.[479] Specifically, the Commission found that subject import market share increased in each year between 2012 and 2015 before declining in 2016 to a level that remained several percentage points higher than in 2012.[480] The Commission also found that subject import market share resumed its ascent in interim 2017, increasing to a level higher than in interim 2016.[481] Based on these objective data, the Commission found that "as imports of LRWs nearly doubled during the period of investigation, they increased their penetration of the U.S. market to a significant degree."[482]

231. Contrary to Korea's argument, the Commission's thorough evaluation of these two factors was nothing like the evaluation of capacity utilization and productivity found to be insufficient in *Argentina – Footwear*. In that dispute, the panel found that the competent

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[474] Korea first written submission, para. 260.

[475] *See Argentina –Footwear (AB)*, para. 129.

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

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

[478] USITC Report, p. 39 (Exhibit KOR-1). As noted above, the Commission also considered the percentage increase in import volume between 2012 and 2013, 2013 and 2014, 2014 and 2015, and 2015 and 2016. *Ibid.*, Table C-2.

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

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

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

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

authorities had not evaluated the factors of capacity utilization and productivity within the meaning of Article 4.2(a) because their report contained no "discussion or explanation" of either factor.[483] Specifically, the panel found that the only reference to capacity utilization was "to a representation by petitioners" with "no indication . . . that this representation was either confirmed or relied upon . . . ."[484] Similarly, the panel found that "there is no analysis of changes in productivity . . . in the text of Act 338 or the Technical Report."[485] In this case, by contrast, the Commission cited objective data and other evidence in explaining its conclusions regarding changes in the absolute volume, relative volume, and market share of subject imports.

232. Korea's erroneous argument that "these factors were not examined at all as part of the serious injury analysis" appears premised on the view that the competent authorities' evaluation of all the factors listed under Article 4.2(a) must appear together in a section of the authority's published report devoted to "serious injury."[486] There is no such obligation under the Safeguards Agreement.

233. Neither Article 3.1 nor Article 4.2(c) dictate the organization of the reports that competent authorities are required to publish under those articles. Article 3.1 provides that "{t}he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Article 4.2(c) provides that "{t}he competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." The obligation is only that the competent authorities' published report contain the "findings and reasoned conclusions reached on all pertinent issues of fact and law" and "a demonstration of the relevance of the factors examined." These articles do not specify a particular structure or order of analysis for the report, leaving the issue to the competent authorities' discretion.[487]

234. Thus, the Commission was free to satisfy Article 4.2(a) by incorporating its evaluation of the rate and amount of the increase in imports and the share of the market taken by increased imports in the sections of its report titled "Increased Imports" and "Increased Imports are a

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[483] *Argentina – Footwear (EC) (Panel)*, paras. 8,209, 8,277.

[484] *Argentina – Footwear (EC) (Panel)*, para. 8.209.

[485] *Argentina – Footwear (EC) (Panel)*, para. 8.211.

[486] Korea first written submission, para. 260. Korea insists that its argument "is not a formalistic complaint about the section of the report in which these factors must be examine." Korea first written submission, para. 264. However, Korea belies this assertion by declining to address the Commission's explicit analyses of these two factors in other sections of the report.

[487] *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.").

Substantial Cause of Serious Injury to the Domestic Industry."[488] And, to make a valid claim under Article 4.2(a), Korea as the complaining party would need to address the relevant findings *wherever they occurred in the published report* and demonstrate some inconsistency with the Safeguards Agreement. In limiting its arguments to the text of section entitled "The Domestic Industry is Seriously Injured," Korea has failed to meet this burden.

235. The Commission evaluated the rate and amount of the increase in imports in the "Increased Imports" section near the beginning of its report because increased imports were a condition precedent for the subsequent analysis of serious injury and causation. 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). Addressing the rate and amount of the increase in imports and the share of the market taken by increased imports in the section titled "The Domestic Industry Is Seriously Injured," as Korea would have apparently preferred, would have made little sense because neither factor measured the performance of the *domestic industry*.[489] Moreover, as other sections of the report addressed those factors in detail, inclusion in the injury analysis would be redundant. Here, the Commission provided the requisite evaluation of the rate and amount of the increase in imports and the share of the market taken by increased imports in those portions of its report where the evaluation was most relevant, consistent with Article 4.2(a).[490]

236. In sum, the Commission provided a reasoned and adequate evaluation of the rate and amount of the increase in imports and the share of the market taken by increased imports, consistent with Articles 3.1 and 4.2(a). The Panel should therefore reject Korea's claim that the Commission failed to do so.

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

[489] *E.g., Argentina – Footwear (EC) (Panel)*, para. 8.167 (identifying the "injury factors listed in Article 4.2(a)" as "production, changes in the level of sales, productivity, capacity utilization {sic}, profits and losses, and employment," while omitting the rate and amount of the increase in imports and the share of the market taken by increased imports).

[490] Contrary to Korea's argument, Korea first written submission, paras. 266-68, the Commission evaluated the rate and amount of the increase in imports and the market share taken by the increased imports in a "substantive manner," as discussed in section I.D.2 above. In particular, the Commission explained that the domestic industry defended its market share, in part, by reducing its prices to compete with significant and increasing volumes of low-priced imports of LRWs. *See* USITC Report, pp. 38-44 (Exhibit KOR-1). The Commission did not simply "list" the relevant data concerning increased import volume and market share, which was the panel's concern in *Korea – Pneumatic Valves (Japan) (Panel)*, para. 7.189.

3. The Commission fully explained how all factors, positive and negative, supported its serious injury determination

237. The Commission thoroughly explained how its evaluation of all relevant factors supported its determination that the domestic industry was seriously injured. It observed that the domestic industry had invested heavily in the development and production of competitive new LRWs during the period of investigation, and should have been well positioned to capitalize on the increase in apparent U.S. consumption during the period.[491] The Commission found that instead, "the domestic industry's financial performance declined precipitously during the period of investigation, necessitating cuts to capital investment and R&D spending that imperil{ed} the industry's competitiveness."[492]

238. The Commission further explained that its findings about the industry's poor financial performance reflected the domestic industry's increasing operating losses in each year of the 2012-16 period.[493] While Whirlpool, by far the largest domestic producer, began the period of investigation showing an operating profit in 2012, it subsequently suffered operating losses, worsening each year through 2016.[494] GE also had operating losses throughout the period of investigation, with those losses worsening each year.[495] As a ratio to net sales, the industry's operating loss also worsened in each year of the 2012-14 period, narrowed in 2015, and then widened in 2016.[496] The Commission also found that the industry suffered operating losses in interim 2016 and 2017.[497] The industry's net losses showed a similarly adverse trend.[498]

239. As indicative of injury, the Commission found that the domestic industry's inability to earn an adequate return on its investments in new LRW models had caused the curtailment of capital investment and R&D expenditures in 2016.[499] As the Commission explained, the domestic industry had increased its capital and R&D spending 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

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

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

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

[494] USITC Report, p.24 (Exhibit KOR-1); Korea first written submission, para. 294.

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

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

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

[498] USITC Report, p. 33 n.207 (Exhibit KOR-1).

[499] USITC Report, p. 36 (Exhibit KOR-1).

LRW production to avoid the antidumping and countervailing duty orders.[500] As a result of its worsening financial losses, the domestic industry reduced capital investment and R&D spending in 2016 relative to 2015, and also relative to 2012, delaying and cancelling numerous new LRW products.[501] Noting the importance of innovation and features to driving LRW sales, the Commission found these reductions further evidence that the domestic industry was seriously injured.[502]

240. Emphasizing the domestic industry's "dramatically worsening financial losses during the period of investigation," the Commission concluded that both "the magnitude of domestic industry's operating and net losses . . . and the resulting . . . cuts in capital and R&D spending in 2016, lead us to conclude that there has been a significant overall impairment in the position of the domestic industry" sufficient to constitute serious injury.[503]

241. The Commission also explained why the relevant factors showing seemingly neutral or positive trends did not detract from its determination that the domestic industry was seriously injured.[504] In particular, the Commission recognized that the domestic industry did not suffer a significant idling of productive facilities or any significant unemployment or underemployment.[505] 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.[506] As the Commission explained, however, the domestic industry was unable to earn an adequate return on these investments despite their offering competitive new LRWs and strong demand growth.[507] In other words, the domestic industry's increased capacity, production, capacity utilization, and employment were not generating positive economic returns but were rather yielding worsening operating and net losses during the period of investigation.

242. Furthermore, the Commission explained that the domestic industry's relatively stable market share during the period of investigation, which contributed to the industry's increasing production, capacity utilization, and employment, was not reflective of a healthy industry. As the Commission explained, the domestic industry had defended its market share, in part, by

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[500] 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. *Ibid.*, p. 36 n.219.

[501] USITC Report, p. 36 (Exhibit KOR-1).

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

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

[504] *See Dominican Republic – Safeguard Measures (Panel)*, para. 7.313.

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

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

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

reducing its prices to compete with increasing volumes of low-priced imports.[508] Based on the moderate to high degree of substitutability and the importance of price to purchasers, the Commission found that the pervasively lower prices on increasing volumes of subject imports would have forced domestic producers to either lower their own prices or else lose retailer floor spots and sales.[509] 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.[510] The Commission found that the domestic industry's declining sales prices and increasing COGS to net sales ratio directly resulted in the industry's worsening operating and net losses during the period of investigation.[511] In other words, the Commission found that the domestic industry had only been able to maintain its market share in the face of intense competition from increasing volumes of low-priced subject imports by sacrificing its financial performance.[512]

243. In finding the domestic industry seriously injured, the Commission thoroughly explained how its evaluation of each relevant factor supported its serious injury determination. Specifically, the Commission explained how the domestic industry suffered worsening operating and net losses during the period of investigation, in turn forcing the industry to cut its capital and R&D spending in 2016, thereby imperiling its competitiveness. The Commission also explained that the seemingly positive trends in volumetric measures of the industry's performance were driven by substantial investments that yielded negative returns and sales price reductions forced by increasing volumes of low-priced imports of LRWs. In short, the Commission provided a reasoned and adequate explanation of how the facts supported its serious injury determination, consistent with Articles 3.1, 4.2(a), and 4.2(c).

244. In sum, the Commission's finding that the domestic industry was experiencing seriously injury complied fully with SGA Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c). The Commission provided a reasoned and adequate explanation of its consideration of all relevant factors, including all listed factors, predicated on objective data. The Commission also provided a reasoned and adequate explanation of how its evaluation of relevant factors supported the conclusion that the domestic industry was seriously injured. Accordingly, the Panel should uphold the Commission's serious injury determination as consistent with the Safeguards Agreement.

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

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

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

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

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

245. In challenging this determination, Korea mistakenly argues that the Commission overlooked 13 allegedly "positive trends" in the domestic industry's performance, and asserts that "{i}f the domestic industry was seriously injured, whether due to its allegedly worsening profitability or otherwise, such injurious effects must have been reflected across the above-mentioned factors."[513] Korea also contends that the Commission failed "to provide the required reasoned and adequate explanation of why and how there could be a finding of serious injury despite the multiple positive trends . . . ."[514] Korea mischaracterizes both the obligations under SGA Articles 4.1(a) and 4.2(a) and the Commission's analysis of serious injury.

246. Articles 4.1(a) and 4.2(c) do not obligate competent authorities to find "injurious effects . . . reflected across" any particular factors or proportion of factors evaluated. Rather, as explained by the Appellate Body, those articles require competent authorities to "evaluate{} *all relevant factors*" and then "provide{} a *reasoned and adequate explanation* of how the facts support their determinations."[515] The Appellate Body has also recognized "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.[516] 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.[517] In this case, the Commission evaluated all relevant factors and explained how the factors, including those seemingly exhibiting neutral or positive trends, supported its determination that the domestic industry was seriously injured.

247. Korea also mischaracterizes the Commission's serious injury determination when asserting that the Commission based its determination "on only one out of the eight listed factors, profits and losses."[518] On the contrary, the Commission found that three of the eight listed factors exhibited trends adverse to the domestic industry, including the doubling of subject import volume during the period of investigation, the significant increase in subject import

[513] Korea first written submission, paras. 274, 276.

[514] Korea first written submission, para. 306.

[515] *US – Lamb (AB)*, para. 141.

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

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

[518] Korea first written submission, paras. 270, 300, 304.

penetration of the U.S. market, and the "precipitously" declining financial performance of the domestic industry.[519]

248. Furthermore, the Commission did not base its serious injury determination solely on the listed factors but also on an evaluation of "all relevant factors of an objective and quantifiable nature having a bearing on the situation of {the} industry," consistent with Article 4.2(a). In this regard, the Commission found adverse trends with respect to three additional relevant factors, including a decline in the industry's sales prices, an increase in the industry's COGS to net sales ratio, and a decline in the industry's capital and R&D expenditures.[520] Thus, the Commission predicated its serious injury determination on six relevant factors that exhibited trends adverse to the domestic industry during the period of investigation.

249. The Commission also explained why the relevant factors showing seemingly neutral or positive trends, including many of those highlighted by Korea, did not detract from its determination that the domestic industry was seriously injured.[521] In particular, the Commission explained that, under the totality of the circumstances in the U.S. market, the domestic LRWs industry was in fact seriously injured, despite the industry's relatively stable market share during the period of investigation (which contributed to the industry's increasing production, capacity utilization, and employment).[522] As the Commission explained, the domestic industry had defended its market share, in part, by reducing its prices to compete with increasing volumes of low-priced imports.[523] The Commission found that the domestic industry's declining sales prices and increasing COGS to net sales ratio directly resulted in the industry's worsening operating and net losses during the period of investigation.[524] Thus, the Commission provided a reasoned and adequate explanation for why, even though several factors exhibited seemingly neutral or positive trends, the domestic industry was nevertheless seriously injured.

250. Indeed, Articles 4.1(a) and 4.2(a) cannot be read to require declines in all quantitative measures of a domestic industry's performance, as Korea seems to suggest. For example, in allowing a safeguard measure in response to an increase in imports that is "absolute or relative to domestic production," Article 2.1 explicitly envisages that imports may *decrease* with respect to one of these measures.

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

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

[521] *See Dominican Republic – Safeguards Measures (Panel)*, para. 7.313. Korea acknowledges that the Commission evaluated each of the thirteen factors it highlights, providing the relevant citations to the Commission's report. *See* Korea first written submission, para. 274.

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

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

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

251. Korea also argues that that the Commission's injury finding was inconsistent with Article 4.2 in that it provided no "analysis of the degree of 'seriousness' of the injury."[525] Korea highlights the Commission's findings that the industry failed to capitalize on increased demand and was unable to carry out domestic production at a reasonable level of profit. However, these do not represent the full extent of the Commission's findings regarding the magnitude of the serious injury. The Commission also found that "{t}he domestic industry's financial performance declined precipitously during the period of investigation," with growing operating and net losses in every year of the period peaking in 2016.[526] The Commission further 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 curtailed its capital investment and R&D expenditures in 2016" to a level lower than in 2015 and 2012.[527] As the Commission explained, the industry's "greatly reduced level of capital investment and R&D spending in 2016" constituted further evidence of serious injury "{g}iven the extent to which LRW sales are driven by innovation and features."[528] After five years of growing financial losses, the domestic industry's inability to "earn a positive return on investments" had forced cuts to the industry's capital and R&D expenditures that "imperil{ed} the industry's competitiveness."[529] These findings belie Korea's assertion that the Commission failed to analyze the degree of seriousness of the injury caused by increased imports.

4. The Commission objectively evaluated the domestic industry's profits and losses and did not neglect to consider relevant facts.

252. The Commission thoroughly examined the data on the financial condition of the domestic industry producing LRWs and reasonably found that these data were indicative of a seriously injured industry. As noted above, it observed that despite significant investments in product development and increasing apparent domestic consumption, the domestic industry's profitability "declined precipitously" over the period of investigation.[530] Specifically, the Commission found that the domestic industry's operating losses had worsened in each year of the 2012-16 period, considered the industry's total operating loss during the period, and observed that both Whirlpool and GE suffering worsening operating losses during the period with the exception of an operating profit by Whirlpool in 2012.[531] As a ratio to net sales, the industry's operating loss worsened in each year of the 2012-14 period, narrowed in 2015, and then widened

[525] Korea first written submission, para. 305.

[526] USITC Report, pp. 33-34 & n.207.

[527] USITC Report, pp. 36-37.

[528] USITC Report, pp. 36-37.

[529] USITC Report, pp. 33, 35; Hearing Tr. 56-57 (Fettig) (Exhibit US-2).

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

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

in 2016.[532] The Commission also found that the industry suffered operating losses in interim 2016 and 2017.[533] The industry's net losses showed a similarly adverse trend, worsening in every year of the 2012-14 period, improving in 2015, and the worsening in 2016 to the largest net loss of the period. [534]

253. The Commission did not stop with its analysis with its evaluation of profitability statistics. It also addressed the respondents' arguments that the data were unreliable.

a. The Commission properly rejected the argument that profits on dryers offset reported losses from LRW production.

254. The Commission also evaluated respondents' argument that it should consider the domestic industry's profitability in the entire laundry segment, including sales of dryers, because domestic producers allegedly offered matching washers and dryers to retailers at the same net wholesale price and used higher profits on dryers to compensate for lower profits on LRWs.[535] In rejecting this argument, the Commission explained that the focus of its analysis was domestic producers as a whole of the like or directly competitive product, and no party had argued that dryers were like or directly competitive with imported LRWs and covered parts.[536]

255. The Commission evaluated all the record evidence concerning whether Whirlpool and GE sold matching LRWs and dryers at the same net wholesale prices and found that evidence "mixed."[537] In the end, the Commission found that, as a factual matter, the record did not support respondents' claim that domestic producers offset losses on washers with profits on matching dryers.[538]

256. As the Commission noted, Whirlpool and GE officials stated under oath that their LRWs and matching dryers are seldom sold together at wholesale and never at the same net wholesale price.[539] Thus, Whirlpool's Chairman and CEO stated at the hearing:

> In the last case {LRWs from China}, I testified that we evaluate our washer business by itself; that we expect to earn a positive return on investments on our

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

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

[534] USITC Report, p. 33 n. 207 (Exhibit KOR-1).

[535] USITC Report, p. 34 (Exhibit KOR-1).

[536] USITC Report, p. 34 (Exhibit KOR-1).

[537] USITC Report, p. 35 & n.216 (Exhibit KOR-1).

[538] USITC Report, pp. 34-35 (Exhibit KOR-1).

[539] USITC Report, p. 35 n.216 (citing Hearing Tr. 157 (Tubman), 160-61 (Tubman), 162 (Pepe)) (Exhibit KOR-1).

> washer investments; and that you cannot subsidize a product business like this with profitability off of other products. . . . I am testifying today under oath and I don't take that lightly. At Clyde, the only appliance that we make is washing machines. The return on investments at Clyde must come from our washer business. Plain and simple, that's the truth.[540]

257. GE stated that it did not and could not use profits on sales of dryers to compensate for losses on sales of LRWs because GE does not produce dryers domestically, but rather imports them pursuant to a contract manufacturing agreement that precludes outsized profits on sales of dryers.[541] Consistent with these statements by Whirlpool and GE, responding domestic producers reported in their questionnaire responses that few LRWs were sold "paired" with matching dryers."[542] On the other hand, responding importers reported that matching pairs of LRWs and dryers accounted for most of their sales, and respondents provided affidavits from three current and former employees of appliance retailers stating that all major manufacturers offered matching LRWs and dryers for the same wholesale price.[543] Although respondents also provided a document purporting to show "net wholesale pricing" for matching LRWs and dryers, the Commission noted that the prices listed were not for actual sales, and the extent to which the wholesale prices listed in the document were subject to further negotiation was unclear.[544] Thus, while there was evidence both for and against the respondents' "joint pricing" theory, the Commission considered that the evidence against the theory was more compelling, particularly given that petitioners' evidence was based on the personal direct knowledge of domestic producers about their own operations. The sworn testimony of Whirlpool's top official and GE's statement that it does not even produce dryers domestically conclusively refuted respondents' theory that domestic producers of LRWs could use profits on sales of dryers to compensate for their worsening losses on sales of LRWs. Korea's repetition of the arguments made to the Commission provides no valid basis to conclude that this finding was inconsistent with the Safeguards Agreement.

258. Nor does Korea's citation to Whirlpool's statement concerning an altogether different "pricing practice" undermine the Commission's finding.[545] The practice that Korea claims was "acknowledged" by Whirlpool was *not* the selling of LRWs and matching dryers for the same net wholesale price but rather Whirlpool's "assign{ment} to their washer and matching electric

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[540] USITC Report, p. 35 (quoting Hearing Tr. (Exhibit US-2) 56-57 (Fetig)) (Exhibit KOR-1).

[541] USITC Report, p. 35 (Exhibit KOR-1).

[542] USITC Report, p. 35 n.216 (Exhibit KOR-1).

[543] USITC Report, p. 35 n.216 (Exhibit KOR-1).

[544] USITC Report, p. 35 n.216 (Exhibit KOR-1).

[545] Korea first written submission, para. 283 (Exhibit KOR-1).

dryer the same MAP level . . . ."[546] As the Commission explained, "{s}uppliers offer a minimum advertised price ('MAP') for each LRW model, above which they will support retailers with advertising funds."[547] In other words, MAP prices are minimum advertised retail prices, not net wholesale prices, and matching LRWs and dryers possessing the same MAP need not be sold for the same net wholesale price.

259. The Commission also found 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 industry's worsening operating and net losses on sales of LRWs during the period of investigation.[548] Contrary to Korea's assertion that the Commission "did not develop this point,"[549] the Commission's reasoning is complete. Respondents' "joint pricing theory" could at most account for profit margins on sales of LRWs that were consistently lower than profit margins on sales of matching dryers for Whirlpool, which was the only domestic producer of LRWs and matching dryers.[550] If respondents' theory were correct, Whirlpool should have been able to maintain a modest level of profitability on its sales of LRWs, given its operating profit in 2012, strong demand growth, and the competitiveness of the company's LRWs. Whirlpool instead suffered dramatically worsening operating losses, which peaked in 2016.[551] As the Commission observed, "{r}espondents do not claim that Whirlpool compensated for these increasing losses with increasing profits on sales of matching dryers, nor explain how Whirlpool could have earned increasing profits on sales of dryers when dryer prices would have declined with matching LRW prices during the period of investigation under their 'joint pricing' theory."[552] In other words, the Commission found that there could have been no "increase in profitability levels in the dryer segment" to compensate for the domestic industry's worsening losses on sales of LRWs, as Korea speculates,[553] because dyer prices and profits would have declined with washer prices and profits under respondents' theory. Thus, on various grounds,

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[546] Korea first written submission, para. 283.

[547] USITC Report, p. 26 (Exhibit KOR-1).

[548] USITC Report, pp. 35-36 & n.217, 46-47 (Exhibit KOR-1).

[549] Korea first written submission, para. 291. Given that the Commission did fully explain why it was rejecting respondents' "joint pricing" theory, it appears that Korea's argument again is premised on the fallacy that competent authorities must confine all analysis of serious injury to a "serious injury" labeled section of their public report. As discussed above, Safeguards Agreement Articles 2.1 and 3.1do not impose such an obligation. Indeed, because respondents asserted that their dryers argument was relevant to both serious injury and causation, the Commission reasonably analyzed the argument in both the serious injury and causation sections of its public report.

[550] USITC Report, pp. 36 n.217, 46-47 (Exhibit KOR-1).

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

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

[553] Korea first written submission, para. 291 (Exhibit KOR-1).

the Commission provided a reasoned and adequate explanation for its rejection of respondents' "joint pricing" theory.

b. Comparison with Whirlpool's company-wide North American profits does undermine the Commission's conclusions regarding profitability.

260. The Commission also provided a reasoned and adequate explanation for its rejection of respondents' argument that the profit margins for Whirlpool's overall North American operations somehow cast doubt on data showing domestic industry's profit margins on sales of LRWs were decreasing.[554] Noting that the focus of its serious injury analysis was producers as a whole of the like or directly competitive article, the Commission explained that Whirlpool's financial results for its North American segment were not informative because they were based predominately on products other than LRWs.[555] As with dryers, no party had argued that appliances included in the companywide data – domestically produced dishwashers, ovens, and refrigerators – were like or directly competitive with imports of LRWs and covered parts, and this was clearly not the case. Consistent with Articles 4.1(c) and 4.2(a), the Commission correctly limited its evaluation of profits and losses to the profits and losses of the domestic industry producing residential washers, including LRWs and belt driven washers, and covered parts.

261. In fact, the Commission observed that LRWs accounted for only 13.1 to 13.5 percent of the North American segment's total revenues, meaning that Whirlpool's profit margins for its North American operations would primarily reflect sales of products other than LRWs.[556] Based on this objective data, the Commission reasonably concluded that there was no inherent contradiction between the divergent trends in the financial performance of Whirlpool's sales of LRWs and its North American operations.

262. Finally, the Commission noted that it had thoroughly verified Whirlpool's domestic producers' questionnaire response in *LRWs from China*, which contained much of the same data as its domestic producers' questionnaire in the safeguard investigation, and found that all primary information reported by Whirlpool, including financial information, "was reasonable and complied with applicable guidelines."[557] To wit, Commission staff had audited Whirlpool's books and records, and verified the accuracy of Whirlpool's reported financial losses in its LRWs operations.

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[554] USITC Report, p. 34 n.210 (Exhibit KOR-1).

[555] USITC Report, p. 34 n.210 (Exhibit KOR-1).

[556] USITC Report, p. 34 n.210 (Exhibit KOR-1).

[557] USITC Report, p. 34 n.210 (Exhibit KOR-1). Whirlpool's domestic producers' questionnaire response in the safeguard investigation would have contained much the same information as its questionnaire response in *LRWs from China* because the scope of the two investigations was identical and the periods of investigation overlapped substantially. *Ibid.*, pp. 20 n.98, I-9.

263. In sum, the Commission thoroughly evaluated the respondents' "joint price" theory and argument concerning Whirlpool's North American operations and provided a reasoned and adequate explanation for its conclusion that neither factor shed light on the domestic industry's worsening financial losses during the period of investigation. Thus, the Commission's evaluation of these alleged relevant factors was consistent with SGA Articles 3.1, 4.1(a), 4.2(a) and 4.2(c). The Panel should reject Korea's claims to the contrary.

5. The Commission objectively evaluated the share of the domestic market taken by increased imports in light of respondents' arguments concerning "innovation"

264. The Commission recognized that the degree of competition between domestic and imported LRWs was pertinent to an evaluation of the effects of increased imports. It gathered extensive evidence on interchangeability and purchaser perception, and applied that evidence to its consideration of respondents' argument that subject imports were superior to domestically produced LRWs in terms of brand, innovation, and design.[558] As the Commission explained, *all* responding purchasers, who accounted for nearly all purchases of LRWs during the period of investigation, reported that subject imports were either always (11) or usually (eight) interchangeable with domestically produced LRWs.[559] Further, the Commission observed that most responding purchasers reported that domestic LRWs were either comparable to or superior to imported LRWs in terms of 23 factors that influenced purchasing decisions, including consumer preferences for particular brands and features resulting in high store turnover, frequency of returns/reliability, and product range.[560] The Commission also found that Whirlpool, GE, LG, and Samsung each reported introducing numerous innovative features on their LRWs during the period of investigation, while both domestic and imported LRWs were rated highly in publications and surveys during the period.[561] In 2016, 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 recommended impeller-based TL LRW models.[562] Reviewed.com ranked domestic LRWs among six of the top ten TL LRW models and among four of the top ten FL LRW models.[563] The consumer survey data submitted by respondents showed that a higher percentage of consumers identified Maytag and Whirlpool as "good brand names" for washers than LG and Samsung in 2016.[564] Based on this and other evidence, the Commission reasonably

[558] Korea first written submission, para. 312.

[559] USITC Report, p. 27 (Exhibit KOR-1).

[560] USITC Report, p. 29 (Exhibit KOR-1).

[561] USITC Report, pp. 29-30 (Exhibit KOR-1).

[562] USITC Report, pp. 29-30 (Exhibit KOR-1).

[563] USITC Report, p. 30 (Exhibit KOR-1).

[564] USITC Report, p. 30 (Exhibit KOR-1).

concluded that domestic and imported LRWs were comparable in terms of non-price factors, with a moderate to high degree of substitutability.[565]

265. Korea nevertheless argues that the Commission failed to objectively evaluate the market share of imported LRWs by "neglecting to consider what the respondents had consistently argued . . . the domestic industry's inability to effectively serve a newly emerging market segment that is dominated by the foreign exporters."[566] In this regard, Korea speculates that subject imports' supposedly superior innovation resulted in them dominating the one-third of demand for LRWs that was discretionary, and not driven by the need to replace a failing LRW.[567] The findings summarized above show that the Commission did consider respondents' arguments on innovation. However, it did so in a holistic fashion, as one of several factors motivating washer purchases, and concluded that on the whole, domestically produced LRWs were comparable to imported LRWs in terms of non-price factors. This finding belied the contention that "innovation" gave imported LRWs an insurmountable advantage over domestic LRWs, or could explain the market share enjoyed by imports.

266. Korea also argues that its market segmentation theory discredits the Commission's finding that low-priced imports forced the domestic industry to lower prices to retain market share, thereby causing a precipitous drop in profits. Korea portrays the allegedly inferior innovation of domestic products as an "alternative" and "more 'plausible explanation" of why the domestic industry "was able to capture and benefit from much of the increasing consumption during the POI; but their market share did not expand because there arose a new market demand *(i.e.,* 'innovation' demands) that was captured mostly by the foreign imports."[568]

267. This is not the case. Far from benefitting from increasing consumption during the period of investigation, the Commission explained, the domestic industry was unable to capitalize on increasing demand, despite substantial investments in competitive new LRW models, because increasing volumes of low-priced subject imports depressed and suppressed domestic like product prices, causing the industry to suffer worsening operating and net losses during the period.[569] Far from struggling to gain market share against competition from innovative subject imported LRWs commanding a price premium, as Korea suggests, the domestic industry was forced to defend its market share against increasing volumes of low-priced subject imports by reducing its sales prices.[570] As the Commission explained, "{r}espondents' claim that sales of imported LRWs were driven by features and innovations favored by consumers, which should

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[565] USITC Report, p. 30 (Exhibit KOR-1).

[566] Korea first written submission, para. 307.

[567] Korea first written submission, paras. 310, 318.

[568] Korea first written submission, para. 318.

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

[570] USITC Report, pp. 40-43 (Exhibit KOR-1).

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."[571] Indeed, the Commission found that subject imports were priced lower than comparable domestic LRWs in 70 of 92 quarterly comparisons, or 76.1 percent of the time, by a weighted-average margin of 14.2 percent.[572] The Commission also noted that prices declined on most of LG's and Samsung's self-identified "innovative" LRW models between the year of their introduction and 2016, with the exception of some models from Samsung.[573] Korea's "innovation" theory is directly at odds with the objective data evaluated and explained by the Commission.

268. The Commission thoroughly considered respondents' argument that subject imported LRWs were qualitatively superior to domestically produced LRWs and provided a reasoned and adequate explanation for its rejection of the argument, consistent with SGA Article 4.2(c). The Panel should therefore reject Korea's claims that the Commission overlooked the argument.

6. The Commission based its serious injury determination on the correct domestic industry definition and objective data.

269. Korea's argument that the Commission's serious injury determination was "vitiated" by its flawed domestic industry definition is entirely derivative of its claim that the Commission improperly defined the domestic like product and domestic industry.[574] Korea's argument fails because, as discussed in section I.B above, the Commission's definition of the domestic industry was fully consistent with the Safeguards Agreement.

270. Korea also challenges the objectivity of the Commission's data based on an alleged "mismatch" in the treatment of data concerning domestically produced belt driven washers in different data sets.[575] Korea misunderstands the Commission's reasonable approach to these data. Article 3.1 calls on the competent authorities to make "reasoned conclusions" on "pertinent issues of fact and law." The first step in reaching a "reasoned conclusion" is to ensure that the evidence is sound. As Korea itself acknowledges, Whirlpool is by far the largest domestic

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

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

[573] USITC Report, p. 42 n.261 (Exhibit KOR-1). Contrary to Korea's suggestion that the significant increase in subject imports consisted of multi-chambered LRWs such as Flexwash and Sidekick, Korea first written submission, para. 311, respondents made no such argument during the investigation, and LG and Samsung only introduced such products towards the end of the period of investigation. *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).

[574] *See* Korea first written submission, paras. 320-322.

[575] Korea first written submission, para. 330.

producer of LRWs,[576] and the Commission's report comprehensively included its LRWs data, as well as all data from GE's and Staber's LRW operations.[577]

271. The Commission determined, however, not to rely on the financial results reported for sales of belt driven washers, and excluded these data from the aggregate industry results.[578] Because Alliance happened to be the only domestic producer of belt driven washers, the industry financial data therefore did not include data on this subset of domestic residential washers, but do account for the largest producers' LRWs data.[579] The Commission identified no problems with Alliance's shipment or apparent consumption data, so the industry data on these factors (and derivative market share data) include all four U.S. producers.

272. Korea argues that this approach is a distortion "intentionally created by the Commission."[580] To the contrary, the problem arose because of flaws in reported data. The Commission used all of the *reliable* data on domestic residential washers, including LRWs and belt driven washers, in its possession, which led it to base its conclusion on the industry's financial performance on data reported by three producers (Whirlpool, GE, and Staber) that accounted for the vast majority of domestic industry sales of the like product.[581] Indeed, domestic production of belt-driven washers was "very, very small,"[582] and Korea acknowledges "that the domestic industry is largely defined by a single U.S. producer, Whirlpool."[583] By basing its analysis on reliable data, and only reliable data, without regard to source, the Commission's approach comports fully with Articles 3.1, 4.1(a), and 4.2(a).

273. As the Appellate Body explained in *US – Lamb*:

> We do not wish to suggest that competent authorities must, in every case, actually have before them data pertaining to *all* those domestic producers whose production, taken together, constitutes a major proportion of the domestic industry. In some instances, no doubt, such a requirement would be both impractical and unrealistic. Rather, the data before the competent authorities must be sufficiently representative to give a true picture of the "domestic industry".

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[576] Korea first written submission, para. 294.

[577] *See* USITC Report, pp. I-24, III-8 (Exhibit KOR-1).

[578] USITC Report, p. 33 n.205 (Exhibit KOR-1).

[579] USITC Report, p. 15 (Exhibit KOR-1).

[580] Korea first written submission, para. 331.

[581] *See* USITC Report, p. 24 (Exhibit KOR-1). Whirlpool, GE, and Staber produced no PSC/belt drive LT washers or CIM/belt drive FL washers. *See ibid.*, p. 15.

[582] Hearing Tr. 98-99 (Levy) (Exhibit US-2).

[583] Korea first written submission, para. 294.

> What is sufficient in any given case will depend on the particularities of the "domestic industry" at issue.[584]

Given that the Commission's financial data covered almost all of the domestic industry's operations, these objective data were "sufficiently representative" for the Commission's analysis of the domestic industry's worsening financial losses during the period of investigation.

274. Because the Commission predicated its serious injury definition on the correct domestic industry definition and objective data covering the financial performance of domestic producers accounting for the vast majority of the industry's sales, the Commission established that the domestic industry was seriously injured in accordance with the Safeguards Agreement. The Panel should therefore reject Korea's claims to the contrary.

F. The Commission Complied with SGA Articles 2.1, 3.1, 4.2(b) and 4.2(c) in Finding a Causal Link between Increased Imports and the Domestic Industry's Serious Injury

275. The Commission based its finding of a causal link between increased imports and the serious injury to the domestic industry on a detailed evaluation of the evidence and consideration of the party arguments. It began by examining the relevant trends, noting the correspondence between the increasing volume of imports and the decreasing performance of the domestic industry.[585] It scrutinized quarterly pricing data on domestic producer and importer sales of six LRW products, strictly defined based on comments from the parties, and observed that imported products were priced lower than comparable domestic products prices in most quarterly comparisons, often by considerable margins.[586] Given the moderate-to-high degree of substitutability between imported and domestic washers and the importance of price to purchasers, the Commission found that the pervasively lower prices on imported LRWs would have forced domestic producers to reduce their prices as a means of defending their market share.[587] The Commission also found that domestic producers' costs increased over this period, placing them in a cost-price squeeze as import competition prevented them from increasing prices to cover their costs.[588] These observations led the Commission to find that imports depressed and suppressed domestic prices, which in turn caused the industry's operating and net losses to worsen to the point where the industry curtailed its capital and R&D expenditures.[589]

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[584] *US – Lamb (AB)*, para. 132.

[585] USITC Report, p. 38-39 (Exhibit KOR-1).

[586] USITC Report, p. 40-43 (Exhibit KOR-1).

[587] USITC Report, p. 40, 42-43 (Exhibit KOR-1).

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

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

Together, these developments demonstrated the causal link between increased imports and the serious injury experienced by the domestic industry.

276. The Commission also evaluated whether other factors might explain the serious injury and attenuate the causal link identified in the first stage of its analysis. It considered the two other causes posited by respondents, their "joint pricing theory" that profits on dryers compensated for losses on matching washers and their assertion that the domestic industry's declining market share resulted from the alleged "deterioration" of U.S. brands in the eyes of consumers.[590] As noted above, the Commission found that the record did not support respondents' joint pricing theory.[591] The Commission also explained that respondents' theory, if true, should have resulted in Whirlpool maintaining a modest level of profitability during the period of investigation and could not explain Whirlpool's worsening operating and net losses during the period.[592] The Commission also found that the evidence did not support respondents' assertions that non-price factors caused consumers to favor imported over domestic LRWs.[593] This analysis led the Commission to find that there were no factors other than increased imports that could have caused the domestic industry's worsening financial losses that formed the basis for its finding of serious injury.[594]

277. Korea challenges five aspects of the Commission's causation analysis. None of its claims withstands scrutiny.

1. The Commission examined the coincidence of trends between the increase in imports and the declining financial performance of the domestic industry.

278. In analyzing causation, the Commission found that the domestic industry's prices decreased over the investigation period while its costs increased, creating a cost-price squeeze and causing the industry's operating and net losses to worsen.[595] The Commission then observed that imports of LRWs increased "significantly" in terms of both volume and market share.[596] It explained that the market otherwise appeared favorable to domestic producers, as their LRW products were competitive and demand growth was "strong."[597] In this environment, "the only explanation for the domestic industry's declining prices and increasing COGS to net sales ratio is

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[590] USITC Report, p. 45 (Exhibit KOR-1).

[591] USITC Report, p. 45-46 (Exhibit KOR-1).

[592] USITC Report, p. 46-47 (Exhibit KOR-1).

[593] USITC Report, pp. 47-51 (Exhibit KOR-1).

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

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

[596] USITC Report, p. 38-39 (Exhibit KOR-1).

[597] USITC Report, p. 38 (Exhibit KOR-1); *see also ibid.*, p. 33.

the significant increase in low-priced imports of LRWs during the period of investigation."[598] Thus, the Commission not only demonstrated a coincidence of trends, it also explained how the upward trend in imports explained the downward trend in the domestic industry's financial performance.

279. Korea argues that this analysis was inconsistent with Articles 4.2(a) and 4.2(b) because it addresses only price factors, and fails to address "positive developments" in the industry and to "explain why the increase in imports did not coincidentally lead to a negative trend in so many of the injury factors."[599] Korea errs, both in that price and profitability are highly relevant indicators of serious injury, and in that the Commission did consider the allegedly positive developments highlighted by Korea.

280. Article 4.2(a) instructs competent authorities to examine all relevant factors, "in particular," the rate and amount of increase in imports, the imported product's market share, changes in levels of sales, production, productivity, capacity utilization, profits and losses, and employment. Article 4.2(c) calls on them to provide in their report "a demonstration of the relevance of the factors examined," indicating that the "relevance" of individual factors may vary, and allowing for the possibility that the analysis may indicate that some factors are not relevant at all.

281. Thus, negative developments in any one, or any combination, of the relevant factors may indicate that imports have increased under such conditions as to cause serious injury; conversely, positive developments in one or more factors may not be "relevant." Thus, Korea's observation that the Commission focused on prices and profitability does not by itself establish an inconsistency with Article 4.2(a). Indeed, in *US – Steel Safeguards*, the panel recognized that adverse price trends and their effect on profitability may be critical to a proper analysis:

> *{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, although consideration of prices is not necessarily mandatory. The Panel agrees with the argument advanced by the European Communities insofar as it submits that price will often be relevant to explain how the increased volume of imports caused serious injury. Indeed, we consider that relative price trends as between imports and domestic products will often be a good indicator of whether injury is being transmitted to the domestic industry (provided that the market context for such trends are borne in mind) given that price changes have an immediate effect on profitability, all other things being equal. In turn, profitability is a useful measure of the state of the domestic industry.[600]

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

[599] Korea first written submission, para. 367.

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

In fact, profitability is in many ways the *result* of the levels and values of sales, production, productivity, capacity utilization, and employment factors referenced in Article 4.2(a), and may allow the competent authorities to track an industry's overall situation with respect to those factors.

282. Korea argues that the Commission "ignored" allegedly positive trends, in particular the fact that market share "fluctuated in a narrow band during the investigation period and was roughly the same in 2016 as it was in 2012.[601] The Commission did not "ignore" these facts. It devoted two pages of its causation analysis to a consideration of trends in market share, concluding that they were the result of domestic industry's efforts to defend its market share, in part, by reducing its prices to compete with significant and increasing volumes of low-priced imports.[602] Based on the moderate to high degree of substitutability and the importance of price to purchasers, the Commission found that the pervasively lower prices on increasing volumes of subject imports would have forced domestic producers to either lower their own prices or else lose retailer floor spots and sales.[603] These conclusions explained, in detail, why the relative stability of domestic producers' market share did not detract from the conclusions drawn from the coincidence of increased imports with declining financial performance. As such, the Commission's treatment of market share was consistent with Article 4.2(a), and its analysis provided reasoned conclusions demonstrating the relevance of the factors examined for purposes of Articles 4.1 and 4.2(c).

283. Korea also asserts that the Commission failed to examine trends in production, capacity, utilization, revenue, employment, wages, and R&D spending.[604] It does not provide any explanation as to why it considers that the Commission failed to address these issues, or how the relevant trends were inconsistent with the finding that the increase in low-priced imports suppressed and depressed prices, causing profits to drop.

284. In fact, the Commission did explain why factors showing seemingly neutral or positive trends did not detract from its determination that the domestic industry was seriously injured by subject imports.[605] In particular, the Commission recognized that the domestic industry did not suffer a significant idling of productive facilities or any significant unemployment or underemployment.[606] 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

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[601] Korea first written submission, para. 368 (citing USITC Report, p. 39 (Exhibit KOR-1)).

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

[603] USITC Report, pp. 42-43 (Exhibit KOR-1).

[604] Korea first written submission, para. 369.

[605] *See Dominican Republic – Safeguard Measures (Panel)*, para. 7.313.

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

the period.[607] As the Commission explained, however, the domestic industry was unable to earn an adequate return on these investments despite competitive new LRWs and strong demand growth.[608] Due to increasing volumes of low-priced subject imports that depressed and suppressed domestic like product prices, the Commission found, the domestic industry suffered worsening operating and net losses during the period of investigation, forcing cuts to capital and R&D expenditures that imperiled the industry's competitiveness.[609]

285. In sum, the Commission's report provided reasoned conclusions that increased imports seriously injured the domestic industry by undercutting and depressing and suppressing domestic industry prices. The Commission established not only a coincidence between increased import volume and market share, on the one hand, and the industry's worsening financial losses and cuts to capital and R&D spending, on the other. It also demonstrated that positive trends in other factors did not detract from this conclusion. Korea has accordingly failed to establish that the Commission's analysis was inconsistent with Articles 2.1 or 4.2(a), or that its report failed to provide reasoned conclusions and demonstrate the relevance of the factors considered for purposes of Articles 3.1 and 4.2(c).

2. The Commission reasonably found that increasing volumes of low-priced subject imports depressed and suppressed domestic like product prices.

286. The Commission explained in its analysis of trends that the domestic industry's increasing operating and net losses during the period of investigation resulted directly from the declining prices on sales of domestically produced LRWs during a time of increasing costs, which placed the industry in a cost-price squeeze.[610] The evidence showed that imported goods sold for prices lower, and often much lower, than comparable domestic goods. Given strong demand growth, increasing costs, and the moderate to high degree of substitutability between imported and domestic LRWs, the Commission reasoned that the significant increase in low-priced imports of LRWs was the only explanation for the industry's declining prices.[611]

287. In rebuttal, Korea asserts that the industry's costs did not really increase and that the Commission's pricing comparisons were unreliable because they did not cover the entirety of the market, grouped together products that were not sufficiently similar for proper pricing

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

[608] *See* USITC Report, pp. 33, 36, 38, 44 (Exhibit KOR-1).

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

[610] USITC Report, p. 38 (Exhibit KOR-1). The domestic industry's ratio of cost of goods sold ("COGS") to net sales increased from 2012 to 2016. *Ibid.*

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

comparisons, and were inconsistent with pricing data provided by the respondents. None of these criticisms is valid.

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

288. 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."[612] Korea observes that the industry's average unit COGS did not increase in every single year of the period of investigation, but this in no way contradicts the Commission's finding that the industry's costs "generally increased."[613] Though decreasing in 2015 and 2016, the industry's average unit COGS remained higher in 2016 than in 2012 and increased in most of the periods examined by the Commission (i.e., between 2012 and 2013, 2013 and 2014, and in interim 2016 as compared to interim 2017).[614]

289. Korea also notes that raw material costs did not increase as a share of total COGS.[615] However, this does not contradict the Commission's finding that raw material costs increased on a per unit basis, as Korea suggests. It signifies only that increases in raw material costs coincided with comparable increases in the other components of total COGS, namely other factory costs and labor costs.[616] Indeed, Whirlpool reported that "total raw material costs for LRWs generally increased as various models used more raw materials on a per unit basis."[617] Whether driven by raw material costs, other factory costs, or labor costs, objective evidence clearly supported the Commission's finding that the domestic industry's unit COGS "generally increased" during the period of investigation.

290. Record evidence also supported the Commission's finding that the domestic industry's increasing ratio of COGS to net sales placed the industry in a cost-price squeeze.[618] An industry's COGS to net sales ratio measures the industry's ability to recover its production costs through sales revenues. As the Appellate Body has explained:

> {W}e note that the COGS/sales ratio expresses the portion of total sales value that is accounted for by costs directly associated with making a particular good. A higher COGS/sale ratio therefore indicates that such costs make up a higher

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

[613] Korea first written submission, para. 378 (Exhibit KOR-1).

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

[615] Korea first written submission, para. 378.

[616] Korea first written submission, para. 378; USITC Report, p. III-10 (Exhibit KOR-1).

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

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

> portion of sales value, leaving a smaller margin for selling, general and administrative expenses, and profits. The COGS/sales ratio therefore provides an indication of whether the sales value is sufficient to cover the production costs of the goods that are sold.[619]

When an industry's COGS to net sales ratio increases, it means that the industry is increasingly unable to recover its production costs through revenues, either because costs are increasing faster than prices, prices are declining faster than costs, or costs are increasing while prices are declining. The latter situation is known as a "cost-price squeeze" because the combination of increasing costs and declining prices "squeezes" an industry's profits. In this case, the Commission found that the domestic industry's production costs generally increased while the industry's sales prices declined between 6.2 and 43.7 percent on the six pricing products, despite strong demand growth and competitive LRW products that should have enabled the industry to cover its increasing costs with higher prices.[620] Consequently, the domestic industry's ratio of COGS to net sales "increased steadily" in every year of the 2012-16 period and in interim 2017 compared to interim 2016, causing the industry's gross profits to decline throughout the period in absolute terms and relative to net sales.[621] These objective data supported the Commission's finding that the domestic industry suffered a "cost-price squeeze" during the period of investigation, and disprove Korea's assertion that production costs did not increase.[622]

b. The Commission explained how pervasive subject import underselling depressed and suppressed domestic like product prices in light of the relevant conditions of competition.

291. The Commission reached its conclusion that increasing imports at low prices suppressed and depressed prices for domestic washers after a thorough analysis of data and other evidence on pricing, within the context of the conditions of competition in the U.S. washers market.

292. The Commission began with the views expressed by producers, importers, and purchasers in their responses to its questionnaires. It observed that most responding domestic producers and purchasers reported that domestic and imported LRWs were always interchangeable, while most responding importers reported that they were sometimes interchangeable.[623] Most responding purchasers reported that domestic LRWs were either comparable to or superior to imported LRWs in terms of 23 factors that influenced purchasing

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[619] *China – Tyres (AB)*, para. 243.

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

[621] USITC Report, p. 43 n.264, III-10 (Exhibit KOR-1).

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

[623] USITC Report, p. 27 (Exhibit KOR-1).

decisions.[624] The Commission also observed that Whirlpool, GE, LG, and Samsung each reported introducing numerous innovative features on their LRWs during the period of investigation, while both domestic and imported LRWs were rated highly in publications and surveys during the period.[625] Respondents' own consumer survey data showed that a higher percentage of consumers identified Maytag and Whirlpool as "good brand names" for washers than LG and Samsung in 2016.[626] Based on this and other evidence, the Commission reasonably concluded that domestic and imported LRWs were comparable in terms of non-price factors, with a moderate to high degree of substitutability.[627]

293. The Commission also examined the role that pricing played in purchasing decisions, finding that price was an important factor in choosing between LRWs from different suppliers. Although price, quality, and features were among the most important factors influencing purchasing decisions,[628] the Commission explained, more responding purchasers ranked price/pricing/cost as among the top three factors influencing their purchasing decisions, and as the number one factor influencing their purchasing decisions, than any other factor.[629] Most responding domestic producers and purchasers reported that differences other than price were only sometimes significant to purchasers choosing between domestic and imported LRWs, although most responding importers reported that such differences were always significant.[630] As further evidence of the importance of price in the LRW market, the Commission cited the prevalence of discounting, retailers' negotiations with LRW suppliers over MAPs and profit margins, and retailers' allocation of floor space to LRW models based on relative profit margins.[631] (Korea notes that other factors affected purchasing decisions, but does not dispute the Commission's finding that price was an important factor.[632])

294. The Commission also gathered information on prices by including in its domestic producer and importer questionnaires a request for data on prices charged to their customers. To do this, it proposed four "pricing products," each defined in a neutral way so as to cover

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[624] USITC Report, p. 29 (Exhibit KOR-1).

[625] USITC Report, pp. 29-30 (Exhibit KOR-1). As the Commission found, in 2016, 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 recommended impeller-based TL LRW models. *Ibid.*, pp. 29-30. Reviewed.com ranked domestic LRWs among six of the top ten TL LRW models and among four of the top ten FL LRW models. *Ibid.*, p. 30.

[626] USITC Report, p. 30 (Exhibit KOR-1).

[627] USITC Report, p. 30 (Exhibit KOR-1).

[628] USITC Report, p. 27 (Exhibit KOR-1).

[629] USITC Report, p. 27 (Exhibit KOR-1).

[630] USITC Report, pp. 27-28 (Exhibit KOR-1).

[631] USITC Report, p. 28 (Exhibit KOR-1).

[632] Korea first written submission, para. 380.

comparable foreign and domestic products.[633] The Commission allowed all parties to comment on the definitions. Samsung and LG themselves recommended inclusion of these four pricing products, two without change from the Commission's proposal, and two with a minor modification.[634] The Commission ultimately collected quarterly pricing data on domestic producer and importer sales of these four products (products 1-4) and two additional products (products 5-6), including one (product 5) that respondents had recommended in *LRWs from China.*[635]

295. Based on the resulting data, the Commission found that 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 margin of 14.2 percent.[636] 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.[637] Belying respondents' argument that subject import sales were driven by features and innovation, which should have commanded a price premium, the Commission found that subject imports were generally priced lower than comparable domestic LRWs and that prices declined on most subject imported models that respondents identified as particularly innovative.[638] As further support, the Commission found that Whirlpool was forced to lower its prices to a particular retailer in 2014 and to retract announced price increases in 2012 and 2014 after retailers used low-priced subject imports in negotiations with Whirlpool.[639]

296. Given the moderate to high degree of substitutability and the importance of price to purchasers, the Commission explained, the pervasively lower prices on subject imports would have forced domestic producers to either lower their own prices or else lose retailer floor spots and sales.[640] 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.[641] The record also showed that the domestic industry's ratio of COGS to net sales increased during the period.[642] Given strong demand growth, rising costs, and the competitiveness of the domestic industry's LRWs, the Commission found that the

[633] *See* Whirlpool's Comments on the Draft Questionnaires, p. 5 (Exhibit US-6).

[634] USITC Report, p. 41, note 255 (Exhibit KOR-1).

[635] USITC Report, pp. 41 n.255, V-26 (Exhibit KOR-1).

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

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

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

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

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

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

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

only explanation for the industry's declining prices and increasing COGS to net sales ratio was the significant increase in low-priced subject imports during the period of investigation.[643]

297. Based on all these objective data, the Commission reasonably concluded that increased volumes of low-priced imports depressed and suppressed domestic like product prices, thereby causing the industry's worsening operating and net losses.[644] The Panel should therefore reject Korea's claim that the Commission failed to provide such an explanation.

c. Korea does not identify any WTO inconsistency in the Commission's conclusions regarding the causal link between import prices and the serious injury suffered by the domestic industry.

298. Korea challenges the Commission's finding that subject imports undersold the domestic like product to a significant degree on two grounds, neither persuasive.

299. First, Korea mistakenly contends that the Commission's finding that increased volumes of low-priced imports depressed domestic prices was based on "a simple observation of price decline" with no examination of "whether imports have explanatory force for the occurrence of the trends."[645] As discussed in the preceding section, however, the Commission thoroughly explained how large and increasing volumes of low-priced imports that pervasively undersold the domestic like product depressed and suppressed domestic like product prices, in light of the moderately high degree of substitutability between subject imports and the domestic like product and the importance of price to purchasers. Thus, the Commission did not merely consider "what is happening to domestic prices," as Korea claims, but rather explained how "subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices" based on "the price and . . . the volume of such imports."[646]

300. Second, contrary to Korea's argument that the Commission's price comparison methodology was flawed, the Commission based its analysis of subject import underselling on pricing data collected on six strictly defined pricing products that permitted applies-to-apples price comparisons. The Commission ensured that its pricing product definitions were representative of competition in the U.S. market by inviting petitioners and respondents to comment on the appropriate definitions in their comments on the draft questionnaires.[647] Indeed, Korea cannot seriously argue that "the product categories included in the USITC's pricing

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

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

[645] *See* Korea first written submission, paras. 382-84.

[646] *China – GOES (AB)*, para. 138.

[647] *See* Whirlpool's Comments on the Draft Questionnaires 4-6 (Exhibit US-6); LG's Comments on the Draft Questionnaires, 24-26 (Exhibit US-7); Samsung's Comments on the Draft Questionnaires, 22 (Exhibit US-8).

analysis were not representative of the LRW market" when, as the Commission noted, five of the six pricing products were advocated by respondents themselves as representative of such competition in their comments on the Commission's draft questionnaires (Products 1-4) and in *LRWs from China* (Product 5).[648] As further evidence that these pricing product definitions were representative, the Commission observed that the definitions yielded pricing data covering an "appreciable percentage" of domestic producer and importer shipments, "well within the range that the Commission has considered reliable in previous investigations."[649]

301. Although Korea objects that the Commission did not define a pricing product covering agitator-based TL LRWs, the Commission reasonably declined to define such a product because doing so would have imposed an unnecessary reporting burden on domestic producers without yielding price comparisons, since there were few imports of agitator-based TL LRWs during the period of investigation.[650] Korea does not explain how a pricing product definition covering few, if any, imports could be "informative of the 'price undercutting,' if any, by the imported products."[651] Nor did the absence of such a pricing product render the Commission's pricing data unrepresentative, given that around half of the domestic industry's shipments and nearly all subject import shipments in 2016 consisted of LRWs other than TL LRWs with agitators.[652]

302. Similarly unpersuasive is Korea's argument that the Commission's pricing products were not representative because they were adopted from *LRWs from China* "and not updated to reflect the relevant scope of products in the marketplace for the safeguard investigation."[653] The Commission had no need to "update" the pricing products "to reflect the relevant scope" because the scope of the safeguard investigation was the same as the scope of the antidumping duty investigation of *LRWs from China*, which had ended only 11 months earlier.[654] Furthermore, as the Commission noted with respect to the safeguard proceeding, "{i}n their comments on the draft questionnaires, respondents proposed no additional pricing product definitions corresponding to new models introduced since LRWs from China . . . ."[655]

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[648] USITC Report, p. 41 n.255 (Exhibit KOR-1); LG's Comments on the Draft Questionnaires25-26 (Exhibit US-7); Samsung's Comments on the Draft Questionnaires 22 (Exhibit US-8).

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

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

[651] *China – Broiler Products (Panel)*, para. 7.483.

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

[653] Korea first written submission, para. 400.

[654] USITC Report, pp. I-4, I-9 (Exhibit KOR-1).

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

303. Korea asserts that the Commission's pricing products were "too broad," because "each included multiple models with a range of features."[656] It is mistaken. By strictly defining the physical characteristics of each pricing products based upon the views of the parties, the Commission ensured that differences in product mix did not affect its pricing comparisons. Korea seeks to impugn the Commission's approach by citing the criticism of "price comparison on the basis of a 'basket' of products of sales transactions" in *China – Broiler Products*. The situation in this proceeding is completely different. In *China – Broiler Products*, the panel found that the investigating authority had acted inconsistently with the ADA by "rel{ying} for its findings of price undercutting on a comparison of subject import and domestic average unit values that included different product mixes without taking any steps to control for differences in physical characteristics affecting price comparability or making necessary adjustments."[657] Similarly, in *China – X-Ray Equipment*, the panel found that that because "the dumped imports consisted only of 'low-energy scanners,' while there was no such limit on the energy levels of the domestic like product" the investigating authority "clearly failed to conduct an objective examination of positive evidence by proceeding with its price effects analysis without even considering, let alone taking into account, these differences in the products being compared."[658]

304. In this case, by contrast, the Commission did not compare subject import and domestic prices on sales of a "broad basket" of goods, but rather obtained prices on sales of six strictly-defined pricing products. In this way, the Commission ensured that sales prices were compared on domestic and imported LRWs possessing similar capacities and the same configuration (TL of FL), Energy Star rating, drive type, features (e.g., water heater, steam cycle, LCD display), lid material, and color.[659] This is the same methodology endorsed in *US – Tyres*, in which the panel found that "price comparisons . . . undertaken in respect of six different products, each of which was defined by reference to particular size, load index, and speed rating criteria . . . provide{d} a proper basis for comparing prices."[660] The Panel should reject Korea's arguments challenging the Commission's pricing products similarly based on strictly defined physical characteristics.[661]

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[656] Korea first written submission, para. 399.

[657] *China – Broiler Products (Panel)*, para. 7.494.

[658] *China – X-Ray Equipment (Panel)*, para. 7.68.

[659] USITC Report, p.V-26 (Exhibit KOR-1).

[660] *US – Tyres (Panel)*, para. 7.255.

[661] The Safeguards Agreement does not reference price much less impose any obligation on competent authorities to analyze subject import underselling using any particular methodology. Consequently, competent authorities may analyze subject import underselling using any methodology that provides "a sufficient factual basis to allow them to draw reasoned and adequate conclusions." *See US – Lamb (AB)*, para. 52. Because the Commission's price comparison methodology "provide{d} a proper basis for comparing prices," *US – Tyres (Panel)*, para. 7.255, respondents' preference for "an alternative approach to collect sales data" is immaterial. Korea first written submission, para. 401.

305. In sum, the Commission provided a thorough explanation, predicated on objective data, for its finding that significant and increasing imports of LRWs at prices pervasively lower than domestic prices depressed and suppressed domestic like product prices. Korea has identified no legal error in the Commission's analysis or any way in which its explanation was not reasoned or adequate.

3. Korea identifies no error in the Commission's treatment of covered parts and agitator-based TL LRWs.

306. Korea argues that the Commission "failed to address certain highly relevant conditions of competition" that in its view "negate any affirmative finding of causation,"[662] namely conditions concerning covered parts and agitator-based TL LRWs. Contrary to Korea's argument, the Commission thoroughly explained why its treatment of both covered parts and agitator-based TL LRWs did not detract from its finding of a causal link between subject imports and the domestic industry's serious injury.

307. Korea is incorrect in asserting that the Commission "considered that LRW parts could cause price effects, which in turn allegedly caused serious injury."[663] The Commission's report contains no such finding. Under SGA Articles 2.1 and 4.1(c), the Commission was obligated to consider the impact of increased imports of LRWs on "producers as a whole of the like . . . products," including LRWs, belt driven washers, and covered parts, not the impact of increased imports of parts on producers of parts.[664] Nor would it have made any sense for the Commission to have considered the impact of imports of covered parts on domestic producers of covered parts in light of the Commission's recognition 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 of repairing them."[665] Accordingly, in establishing a causal link between subject imports and the domestic industry's serious injury, the Commission focused its analysis on the locus of competition between subject imports and the domestic industry, which was the U.S. market for LRWs.[666]

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[662] Korea first written submission, para. 408.

[663] Korea first written submission, para. 411.

[664] *See Dominican Republic – Safeguard Measures (Panel)*, para. 7.236 (finding that the competent authority was not obligated to demonstrate that imports increased separately with respect to imports of bags and imports of tubular fabric because the product under investigation encompassed both products and "the definition adopted by the competent authority is that which governs the definition of the product under investigation, as well as the way in which the relevant data should have been analyzed in the investigation.").

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

[666] *See* USITC Report, pp. 27-32 (Exhibit KOR-1). We note that respondents made no argument before the Commission that the increase in imports of LRWs during the period of investigation consisted of covered parts or that covered parts otherwise severed the causal link between increased imports and serious injury. The absence of

308. The Commission also provided a thorough explanation for its finding that "differences in product mix did not attenuate import competition to a significant degree," even though agitator-based TL LRWs accounted for half of domestic industry shipments but few imports.[667] As the Commission explained, half of domestic industry shipments consisted of FL and impeller-based TL LRWs, which competed directly with imported LRWs, and domestic TL LRWs competed with imported FL LRWs insofar as consumers frequently cross-shopped TL and FL LRWs.[668] The Commission also found that imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based TL LRWs.[669] Given Korea's characterization of agitator-based TL LRWs as "under-performing," increased imports of impeller-based TL LRWs at the same price point as domestically produced agitator-based TL LRWs would have harmed domestic industry sales of such LRWs.[670] Indeed, the Commission noted that in *LRWs from China*, subject imports of 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.[671] The Commission also noted that there was some evidence on the record that lower prices on more fully featured subject imports adversely affected the sales volumes and prices of less fully featured domestically produced LRWs, which would include agitator-based TL LRWs.[672]

309. The Commission also provided a thorough explanation for its rejection of respondents' argument that U.S. LRW brands suffered in the eyes of consumers due to the domestic producers' reliance on sales of agitator-based TL LRWs. As the Commission explained, the Traqline data submitted by respondents showed that more consumers preferred the Whirlpool and Maytag washer brands than the LG and Samsung washer brands, and all responding purchasers reported that domestically produced LRWs were comparable or superior to subject imports in terms of consumer preferences for particular brands resulting in high store turnover.[673] The Commission also observed that the domestic industry's production of agitator-based TL LRWs had not prevented the industry from also offering a full range of FL and impeller-based TL LRWs, which accounted for a major proportion of the industry's substantial capital expenditures and R&D expenses during the period of investigation.[674] Such LRW models

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such arguments confirms that the inclusion of covered parts did not have a meaningful effect on the outcome of the investigation.

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

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

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

[670] Korea first written submission, paras. 413, 415.

[671] USITC Report, p.32 n.202 (Exhibit KOR-1).

[672] USITC Report, p.32 n.202 (Exhibit KOR-1).

[673] USITC Report, pp. 30, 50 (Exhibit KOR-1).

[674] USITC Report, p. 50 (Exhibit KOR-1).

represented around half of the industry's shipments in 2016.[675] Finally, notwithstanding Korea's suggestion that consumers shunned agitator LRWs, the Commission observed that the popularity of agitator-based TL LRWs rebounded after 2015, with the market share of such models in interim 2017 approaching that of 2012.[676]

310. Therefore, Korea errs in asserting that the Commission failed to address the conditions of competition represented by the inclusion of covered parts or domestic producers' sales of agitator-based TL LRWs. As such, this argument fails to identify any inconsistency with SGA Articles 2.1, 3.1, 4.2(b) or 4.2(c).

4. The Commission provided a reasoned and adequate explanation for its finding that neither "joint pricing" nor consumer perceptions of U.S. brands were causes of the serious injury identified by the Commission.

311. During the USITC's investigation, respondents alleged that two factors other than increased imports caused the serious injury experienced by the domestic industries: the "joint pricing theory" discussed above and the alleged "deterioration" of U.S. brands. The Commission determined that neither theory was supported by evidence on the record, much less an important cause of injury to the domestic industry.[677]

312. Korea challenges the Commission's analysis of alternative causes of injury on two grounds. First, Korea argues that the "substantial cause" test applied by the Commission "without additional explanation, will fail to comply with the requirement of 'separating and distinguishing' the injurious effects of all factors."[678] Second, Korea asserts that the Commission failed to properly separate and distinguish injury allegedly caused by "joint pricing" and the alleged "deterioration" of U.S. brands in the eyes of consumers.[679] Both assertions are mistaken. The Commission's analysis was consistent with Articles 2.1 and 4.2(b), and its report set forth the findings and reasoned conclusions, including a detailed analysis of the case and demonstration of the relevance of the factors examined for purposes of Articles 3.1 and 4.2(c).

a. The Commission applied the statutory "substantial cause" standard in a manner consistent with SGA Article 4.2(b)

313. In establishing a causal link between increased imports and serious injury, the Commission first demonstrated that increased imports of LRWs were a "substantial cause" of

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

[676] USITC Report, p. 50 (Exhibit KOR-1).

[677] USITC Report, p. 45 (Exhibit KOR-1).

[678] *See* Korea first written submission, paras. 420-28.

[679] *See* Korea first written submission, paras. 429-54.

serious injury to the domestic industry, and, indeed "the only explanation" for the injury.[680] The Commission then established that the two alternative causes of injury argued most vigorously by respondents were not important causes of injury because "neither {was} supported by the record evidence."[681] The conclusion that "imports are an important cause of serious injury not less than any other cause" and the underlying reasoning satisfied the obligation under SGA Article 4.2(b) to evaluate whether factors other than imports are causing injury to the domestic industry, and the admonition not to attribute any such injury to increased imports.

314. Korea's argument that the Commission was somehow incapable of complying with SGA Article 4.2(b) is based upon the erroneous premise that the Appellate Body found the "'substantial cause' test" under U.S. law inconsistent with the Safeguards Agreement "as such" in *US – Lamb*.[682] The Appellate Body made no such finding, nor did the complaining parties in that dispute make an "as such" claim against that test.[683] Rather, the Appellate Body found that the Commission's analysis of alternative causes of injury inconsistent with Article 4.2(b) *under the facts of that particular case*:

> The USITC concluded only that each of four of the six "other factors" was, relatively, a less important cause of injury than increased imports . . . . in so doing, the USITC acknowledged implicitly that these factors were actually causing injury to the domestic industry at the same time. But, to be certain that the injury caused by these other factors, whatever its magnitude, was not attributed to increased imports, the USITC should also have assessed, to some extent, the injurious effects of these other factors. It did not do so . . . In short, without knowing anything about the nature and extent of the injury caused by the six other factors, we cannot satisfy ourselves that the injury deemed by the USITC to have been caused by increased imports does not include injury which, in reality, was caused by these factors.[684]

The Appellate Body predicated these findings on "the explanation given by the USITC for its conclusions on the relative causal importance of the increased imports, as distinguished from the

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[680] USITC Report, p. 38 (Exhibit KOR-1). The "substantial cause" standard derives from section 201 of the Trade Act of 1974, which provides that the President may take action under the Act if the Commission "determines under section 202(b) that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry . . . ." Trade Act of 1974, § 201(a) (Exhibit US-9). The statute defines "substantial cause" as "a cause which is important and not less than any other cause." *Ibid.*, § 202(b)(1)(B) (Exhibit US-9).

[681] *See* USITC Report, p. 51 (Exhibit KOR-1).

[682] Korea first written submission, paras. 427-28.

[683] *US – Lamb (Panel)*, para. 5.57 ("New Zealand *has not claimed*, in the portion of the first submission at issue, that the US Safeguard Statute is on its face inconsistent with WTO law."). Nor has Korea raised an "as such" claim in this dispute.

[684] *US – Lamb (AB)*, paras. 185-86.

injurious effects of the other causal factors," not on any "as such" inconsistency between the U.S. law and the Safeguards Agreement.[685] Indeed, the Appellate Body emphasized that "the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the Agreement on Safeguards."[686] Thus, the application of the "substantial cause" standard is not, in and of itself, inconsistent with SGA Article 4.2(b).

315. Article 4.2(b) recognizes that factors other than increased imports may be causing injury at the same time, and thus that there may be multiple causes of injury. In that circumstance, Korea asserts "additional adequate explanation" (beyond the USITC's "substantial cause" approach) is necessary to comply with the requirement not to attribute such injury to increased imports (or what some prior reports refer to as "separating and distinguishing").[687] Korea thus agrees that *not* attributing to the increased imports such injury caused by other factors can be satisfied through the attenuation approach of the USITC if "additional explanation" is provided.[688] Korea also does not endorse certain statements in past reports that could be understood as calling for a measurement and quantification of the effects of other factors.[689] The United States would not agree with statements by the Appellate Body elaborating "separating and distinguishing" that go beyond not attributing to increased imports such injury caused by other factors. However, given the arguments of the parties, the Panel would not appear to need to consider those precise issues in this dispute.

316. The Commission's analysis of alternative causes of injury in this case is readily distinguishable from its analysis of alternative causes of injury in *US – Lamb*. Unlike in *US – Lamb*, in which the Commission "acknowledged implicitly" that four of six other "factors were actually causing injury to the domestic industry," the Commission in this case found that the record evidence did not support either of the alternative causes of injury argued by

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[685] *US – Lamb (AB)*, para. 184.

[686] *US – Lamb (AB)*, para. 181.

[687] Korea First Submission, para. 427 ("Thus, the 'substantial cause' test, without additional adequate explanation, will fail to comply with the requirement of "separating and distinguishing" the injurious effects of all factors.").

[688] *See* Korea First Submission, paras. 340 & 341-49 (explaining that competent authorities should examine, following examining causation through trends in imports and injury factors and through conditions of competition, "(3) Whether other relevant factors have been analyzed and whether it is established that injury caused by factors other than imports has not been attributed to imports").

[689] *US – Lamb (AB)*, para. 130 (stating, in relation to not attributing injury from other factors: "We recognize that the clause 'of an objective and quantifiable nature' {in Article 4.2(a)} refers expressly to 'factors', but not expressly to data. We are, however, convinced that factors can only be 'of an objective and quantifiable nature' if they allow a determination to be made, as required by Article 4.2(b) of the Agreement on Safeguards, on the basis of 'objective evidence'. Such evidence is, in principle, objective data. The words 'factors of an objective and quantifiable nature' imply, therefore, an evaluation of objective data which enables the measurement and quantification of these factors.").

respondents.[690] In rejecting respondents' "joint pricing" theory, the Commission found 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."[691] Similarly, in rejecting respondents' argument that imports increased due to the "deterioration" of U.S. brands in the eyes of consumers, the Commission found that "the record does not support respondents' claim that any such deterioration occurred for non-price reasons" and that the theory "does not explain the domestic industry's declining sales prices during the period of investigation, or any of the resulting injury."[692] That the Commission couched its rejection of these two factors in the language of the U.S. statute, finding neither factor "an important cause of injury," does not negate the Commission's specific findings that neither factor explained any of the injury.[693] Far from finding that either factor "may have contributed to the alleged serious injury of the domestic industry," as Korea mistakenly suggests,[694] the Commission definitively found that "{n}either of respondents' alleged alternative causes of injury {was} supported by the record" or could explain any of the serious injury sustained by the domestic industry.[695]

b. The Commission's findings regarding respondents' "joint pricing" theory demonstrate that it did not attribute to increased imports any injury caused by another factor.

317. The Commission began its analysis of "joint pricing" as a causal factor by referencing its earlier discussion of the issue, addressed in section I.E.3 above, recalling that the record did not support respondents' claim that Whirlpool and GE purposefully compensated for losses on sales of LRWs with profits on sales of matching dryers. The Commission relied on Whirlpool and GE officials' sworn denials that they engage in such a practice or even sell LRWs and matching dryers for the same net wholesale price.[696] The Commission also found 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 industry's worsening operating and net losses on sales of LRWs.[697] Under respondents' theory, Whirlpool should have been able to maintain the modest level of

[690] *US – Lamb (AB)*, para. 185.

[691] USITC Report, p. 45 (Exhibit KOR-1).

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

[693] In finding that "neither of these factors" argued by respondents was "an important cause of injury to the domestic industry," the Commission was complying with the statutory requirement that it find increased imports a "substantial cause" of injury. USITC Report, p. 45 (Exhibit KOR-1). In its detailed analysis of the other factors, the Commission explained that neither factor could explain any of the serious injury sustained by the domestic industry.

[694] Korea first written submission, para. 421; *see also ibid.*, paras. 422-23.

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

[696] USITC Report, pp. 45-46 (Exhibit KOR-1).

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

profitability on sales of LRWs achieved in 2012 throughout the period of investigation, given strong demand growth and competitive products, but instead suffered dramatically worsening operating losses.[698] Respondents did not explain how, if washer and dryer prices were the same, Whirlpool could have compensated for growing losses on LRWs with increasing profits on dryers when declining washers prices would have been accompanied by declining dryer prices and profits.[699] The Commission accordingly concluded that the domestic industry's "joint pricing" of LRWs and matching dryers was not an important cause of injury to the industry.[700]

318. In challenging the conformity of the Commission's determination with Article 4.2(b), Korea reprises its argument that the Commission failed to conduct an objective examination of respondents' "joint pricing" theory or to explain why this alleged other factor was "not an important cause of the price declines."[701] As discussed in section I.D.3.c above, however, the Commission provided a reasoned explanation for its finding that the record did not support respondents' claim that domestic producers offset losses on washers with profits on matching dryers.[702] Korea's specific objections to the Commission's causation analysis in no way detract from this conclusion.

319. First, Korea's asserts that the Commission "ignored . . . most of the evidence presented by the respondents."[703] The Commission's thorough examination of the relevant evidence refutes this argument. The Commission cited sworn testimony from Whirlpool's Chairman and CEO, delivered before the full Commission at a public hearing, categorically denying respondents' claims. In particular, he emphasized that "we evaluate our washer business by itself . . . we expect to earn a positive return on investments on our washer investments . . . ." and stated that "you cannot subsidize a product business like this with profitability off of other products."[704] Based on its assessment that this direct testimony was credible and compelling, the

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

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

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

[701] Korea first written submission, para. 437. The United States observes that respondents never argued that the domestic industry's alleged "joint pricing" of LRWs and matching dryers was "an important cause of the price declines" on the domestic industry's sales of LRWs, as Korea mistakenly claims. *Ibid.* Rather, respondents argued that the domestic industry's alleged practice of selling LRWs and matching dryers for the same price yielded lower profits on LRWs that were compensated for by higher profits on sales of matching dryers. USITC Report, p.45 (Exhibit KOR-1); *see also* LG and Samsung's Prehearing Injury Brief, pp. 91-93 (Exhibit KOR-11); Samsung's Posthearing Brief, p. 14 (Exhibit KOR-10). As the Commission explained, the significant increase in low-priced imports of LRWs during the period of investigation was "the only explanation" for the domestic industry's declining prices and worsening financial losses. USITC Report, p. 38 (Exhibit KOR-1).

[702] USITC Report, pp. 34-35 (Exhibit KOR-1).

[703] Korea first written submission, para. 430.

[704] USITC Report, p. 45 (Exhibit KOR-1).

Commission reasonably relied on it to find that Whirlpool did not purposefully price its LRWs to sell at a loss on the expectation that profitable sales of dryers would compensate.

320. The Commission also relied on GE's statement that "it does not and cannot use profits on sales of dryers to compensate for losses on sales of LRWs because GE does not produce dryers domestically, but rather imports them pursuant to a . . . contract manufacturing agreement that precludes outsized profits on sales of dryers."[705] Given that GE did not even produce dryers, GE would not have been in a position to leverage the allegedly lower production cost of dryers to realize higher profits on sales of matching dryers, and instead reported earning profits on sales of imported dryers that were limited under a contract manufacturing agreement with its foreign supplier. Nor would it have been appropriate for the Commission to consider any profits that GE realized on sales of imported dryers as the profits of any domestic industry, much less the domestic industry producing LRWs. The Commission reasonably relied on this evidence to find that GE did not purposefully price its LRWs to sell at a loss on the expectation that profitable sales of dryers would compensate.

321. The Commission also evaluated other relevant evidence, including the evidence presented by respondents. The Commission found that respondents' proffered 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.[706] Consistent with this testimony, domestic producers reported in their questionnaire responses that few LRWs were sold "paired" with matching dryers.[707] Specifically, one domestic producer reported that it does not track the percentage of its LRWs sold with matching dryers, another domestic producer reported that sales of such pairs accounted for a "small share" of its 2016 sales, and a third domestic producer reported that none of its LRWs sales were bundled with dryers.[708]

322. Second, Korea argues that he Commission "did not address" evidence presented by respondents and summarized in Samsung's posthearing brief.[709] In fact, the Commission explicitly referenced this evidence. It noted that responding importers reported that matching pairs of LRWs and dryers accounted for most of their sales, and that respondents provided affidavits from three current and former employees of appliance retailers stating that all major

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[705] USITC Report, p. 46 (Exhibit KOR-1).

[706] USITC Report, p. 46 n.277 (citing Hearing Tr., 157 (Tubman) (Exhibit US-2), 160-61 (Tubman), 162 (Pepe)) (Exhibit KOR-1).

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

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

[709] Korea first written submission, paras. 433-34; Samsung Posthearing Brief, p. 13 (Exhibit KOR-10), cited in USITC Report, p.46 n.277 (Exhibit KOR-1).

manufacturers offered matching LRWs and dryers for the same wholesale price.[710] Although respondents provided a document purporting to show "net wholesale pricing" for matching LRWs and dryers,[711] the Commission observed that the prices listed were not for actual sales, and the extent to which the wholesale prices listed in the document were subject to further negotiation was unclear.[712] The Commission also found unpersuasive a document that Samsung characterized as "GE's own price list."[713]

323. Based on a thorough evaluation of all relevant evidence, the Commission reasonably concluded that the evidence submitted by respondents did not overcome Whirlpool's and GE's representations of their own business models – that "LRWs and matching dryers are seldom sold together at wholesale and never at the same net wholesale price."[714] Korea's submission provides no basis for questioning the Commission's weighing of the evidence on this point.

324. Korea also argues that "the USITC did not provide support" for its statement that Whirlpool "should have been able to maintain at least a modest level of profitability on its sales of LRWs during the period of investigation, given its operating profit margin . . . strong demand growth, and the competitiveness of its LRWs."[715] In fact, the statement was explicitly an *arguendo* analysis, framed as an implication "{u}nder respondents' theory."[716] The conclusion proceeds directly from respondents' theory – if Whirlpool was using higher profits on dryers to compensate for lower profits or losses on matching washers, and Whirlpool's sales of washers were profitable in 2012, then, *ceteris paribus*, Whirlpool should have been able to sell washers profitably throughout the rest of the period of investigation, given strong demand growth and the competitiveness of its LRWs. The fact that this did not occur, as shown by Whirlpool's worsening operating and net losses on sales of LRWs after 2012, disproved the theory. Moreover, as the Commission observed, "{r}espondents do not claim that Whirlpool compensated for these increasing losses with increasing profits on sales of matching dryers, nor explain how Whirlpool could have earned increasing profits on sales of dryers when dryer prices would have declined with matching LRW prices during the period of investigation under their 'joint pricing' theory."[717]

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

[711] Samsung Posthearing Brief, p. 13 (Exhibit KOR-10).

[712] USITC Report, p. 46 n.277 (Exhibit KOR-1) (citing Samsung Posthearing Brief. p. 13, (Exhibit KOR-10)).

[713] USITC Report, p. 46 n.277 (Exhibit KOR-1) (citing Samsung Posthearing Brief, p. 13 (Exhibit KOR-10)); Samsung Posthearing Brief, p. 13 (Exhibit KOR-10).

[714] USITC Report, p. 46 (Exhibit KOR-1).

[715] Korea first written submission, para. 431, citing USITC Report, p. 47 (Exhibit KOR-1).

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

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

325. Likewise, Korea theorizes that Whirlpool did not need to make a profit on its LRW sales if it "increase{d} sales and profitability of dryers through joint pricing,"[718] but fails to recognize the salient point found by the Commission – that if the "joint pricing" theory were correct, dryer prices and profits would have *declined* along with LRW prices and profits.[719] Indeed, rather than compensating for Whirlpool's growing financial losses on sales of LRWs, Whirlpool's sales of matching dryers would have suffered the same adverse financial trends.

326. Third, Korea asserts that "the USITC did not respond" to evidence that "Whirlpool reported record profits for its North American sales."[720] However, as shown in section I.E.3 above, the Commission provided a reasoned explanation for rejecting the argument that the profitability of Whirlpool's overall North American operations was somehow inconsistent with its worsening losses on sales of LRWs.[721] As the Commission explained, LRWs accounted for only 13.1 to 13.5 percent of the Whirlpool North American segment's total revenues, meaning that Whirlpool's profit margins for its North American operations would primarily reflect sales of products other than LRWs, and hence not be informative for the Commission's consideration of Whirlpool's LRW operations.[722]

327. Korea asserts that "the reported North American results would not be possible if Whirlpool were not generating reasonable profits in its laundry segment."[723] Korea provides no support for this speculation. As an arithmetic observation it is simply untrue – average profits for an entity may indeed be fine if one-eighth to one-quarter of its operations are performing poorly. And the record showed that Whirlpool's "principal products" included not just LRWs and dryers but also "refrigerators and freezers, cooking appliances, dishwashers, mixers, and other portable household appliances," which would have all contributed to the profitability of Whirlpool's North American segment.[724]

328. In sum, the Commission provided a reasoned explanation for its finding that the record did not support respondents' "joint pricing" theory that domestic producers compensated for losses on sales of LRWs with profits on sales of matching dryers. The Commission also explained that even if respondents' theory were valid, Whirlpool's declining prices and worsening financial losses on sales of LRWs would have been accompanied by declining prices and worsening financial performance on sales of dryers. Having found that respondents' "joint pricing" theory could not account for any of the serious injury sustained by the domestic

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[718] Korea first written submission, para. 431.

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

[720] Korea first written submission, para. 435.

[721] USITC Report, p. 34 n.210 (Exhibit KOR-1).

[722] USITC Report, p. 34 n.210 (Exhibit KOR-1).

[723] Korea first written submission, para. 435.

[724] USITC Report, p. I-28 (Exhibit KOR-1).

industry, there was no injury that the Commission might have erroneously attributed to increased imports.

329. Therefore, this argument fails to identify any inconsistency with SGA Article 4.2(b) or 4.2(c).

c. The Commission's findings regarding the alleged "deterioration" of U.S. brands in the eyes of U.S. consumers demonstrate that it did not attribute to increased imports any injury caused by this factor.

330. As discussed in section I.E.2 above, the Commission undertook a thorough examination of the relevant evidence and explained that the record did not support respondents' claims 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.[725] Indeed, the Commission observed that the only injury that respondents purported to explain with their "brand deterioration" theory – the domestic industry's loss of market share during the period of investigation – did not in fact occur.[726] The Commission satisfied the obligation to examine the impact of the alleged brand deterioration on the domestic industry and provided a reasoned explanation for its finding that there was none. None of Korea's specific challenges to the Commission's analysis withstands scrutiny.

331. First, Korea notes that "consumer perception of brands is an important factor affecting the purchasing decisions for LRWs." However, this could signal a potential flaw in the Commission's reasoning only if Korea were correct that imported LRWs were somehow superior with respect to this factor.[727] The Commission considered this possibility, and found that the record evidence highlighted by Korea did not indicate that purchasers considered subject imports superior to domestically produced LRWs with respect to brand.[728] Indeed, the Commission found that most responding purchasers reported that domestically produced LRWs were comparable or superior to subject imports in terms of consumer preferences for particular brands and features, resulting in high store turnover.[729] The Commission found confirmation for this evidence in the myriad consumer surveys and publications submitted by both sides concerning

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

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

[727] Korea first written submission, paras. 439-40.

[728] Korea first written submission, para. 439.

[729] USITC Report, pp. 29, 48 (Exhibit KOR-1).

the relative appeal of different brands, which showed that imported LRWs possessed no advantage with respect to brand. [730]

332. Although respondents highlighted a Forbes article, a market research report, and a survey of millennials indicating that Samsung and to a lesser extent LG were highly regarded as brands generally, Whirlpool highlighted three consumer surveys indicating that consumers preferred Whirlpool and Maytag branded washers to LG and Samsung branded washers during the period of investigation.[731] Respondents' own Traqline consumer survey data showed that a higher percentage of consumers identified Maytag and Whirlpool as "good brand names" for washers than LG and Samsung in 2016, and that a higher percentage of consumers also identified Amana and GE as "good brand names" for washers than LG that year.[732] Korea provides no basis to question the Commission's weighing of the evidence on this issue.

333. Second, the Commission explained that the record did not support respondents' argument that subject imports were superior to domestically produced LRWs in terms of other non-price factors, including innovation and design.[733] As the Commission explained, *all* responding purchasers, accounting for nearly all purchases of LRWs during the period of investigation, reported that subject imports were either always (11) or usually (eight) interchangeable with domestically produced LRWs.[734] Further, the Commission observed that most responding purchasers reported that domestic LRWs were either comparable to or superior to imported LRWs 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.[735] The Commission also found that Whirlpool, GE, LG, and Samsung each reported introducing numerous innovative features on their LRWs during the period of investigation, while both domestic and imported LRWs were rated highly in publications and surveys during the period.[736] In 2016, 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 recommended impeller-based TL LRW models.[737] Reviewed.com ranked domestic LRWs among six of the top ten TL LRW models and among four of the top ten FL

[730] USITC Report, pp. 48-49 (Exhibit KOR-1).

[731] USITC Report, pp. 48-49 (Exhibit KOR-1).

[732] USITC Report, pp. 48-49 (Exhibit KOR-1). Amana, like Maytag, is a brand name of Whirlpool. USITC Report, p. I-28 (Exhibit KOR-1).

[733] Korea first written submission, paras. 440-42.

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

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

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

[737] USITC Report, p. 49 (Exhibit KOR-1).

LRW models.[738] Relying on this and other evidence, the Commission reasonably found that the record did not support respondents' argument that consumers, and by extension retailers, increasingly favored imported LRWs over domestically produced LRWs during the period of investigation for non-price reasons.[739]

334. The Commission also found respondents' argument that imported LRWs were superior with respect to innovation inconsistent with the pricing data showing pervasive subject import underselling. 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."[740] As noted above, the Commission found that subject imports were priced lower than comparable domestic LRWs in 70 of 92 quarterly comparisons, or 76.1 percent of the time, by a weighted-average margin of 14.2 percent.[741] The Commission also noted that prices declined on most of LG's and Samsung's self-identified "innovative" LRW models between the year of their introduction and 2016, with the exception of some models from Samsung.[742] In light of the abundant evidence discrediting respondents' argument that imported LRWs were superior with respect to brand, innovation, and other non-price factors, Korea fails to support its argument that respondents but not domestic producers "were able to serve such newly emerging demand through its brand, innovation, and design".[743]

335. Third, the Commission thoroughly evaluated respondents' argument that U.S. brands suffered in the eyes of consumers due to the domestic industry's sales of agitator-based LRWs,[744] contrary to Korea's claim that "{t}he USITC completely avoided addressing this important factor."[745] As Korea acknowledges, the Commission found that the domestic

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[738] USITC Report, p. 49 (Exhibit KOR-1).

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

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

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

[742] USITC Report, p. 42 n.261 (Exhibit KOR-1). Contrary to Korea's suggestion that the significant increase in subject imports consisted of multi-chambered LRWs such as Flexwash and Sidekick, Korea's first written submission, para. 311, respondents made no such argument during the investigation, and LG and Samsung only introduced such products towards the end of the period of investigation. *See* LG and Samsung Prehearing Injury Brief, at 30 ("In March 2017, Samsung introduced its FlexWash dual-chamber washer to the U.S. Market.") (Exhibit KOR-11); Hearing Tr. at 205 (Riddle) ("{T}his slide showcases LG's *new* TWINWash system . . . .") (emphasis added) (Exhibit US-2).

[743] Korea first written submission, para. 441-42.

[744] USITC Report, p. 50 (Exhibit KOR-1). Whirlpool produced Maytag branded LRWs. *Ibid.* at I-28.

[745] Korea first written submission, para. 444. The United States notes that Korea does not challenge the Commission's findings that the record did not support respondents' arguments that U.S. brands suffered in the eyes of consumers due to the increasing repair rates of Maytag LRWs, mold issues, and Whirlpool's alleged failure to

industry's production of agitator-based TL LRWs in no way prevented the industry from also offering a full range of highly-rated FL and impeller-based TL LRWs, in which the industry invested a major proportion of its capital and R&D expenditures during the period of investigation.[746] This was not the Commission's "only apparent assessment and consideration" of the issue, however, as Korea mistakenly contends.[747] The Commission also found that the popularity of agitator-based TL LRWs had rebounded after 2015, with the market share of such LRWs approaching 2012 levels,[748] belying Korea's contention that they were "a LRW model that is in decline."[749] Given this, the domestic industry's competitive line-up of FL and impeller-based TL LRWs, and evidence that consumers generally favored U.S. branded washers, the Commission had an ample evidentiary basis for its rejection of respondents' argument that U.S. brands had suffered in the eyes of consumers from the domestic industry's alleged reliance on sales of agitator-based TL LRWs.

336. Finally, Korea argues that the Commission "missed the mark" in finding that the premise of respondents' "brand deterioration" argument – that brand deterioration allegedly explained the domestic industry's declining market share during the period of investigation – was inconsistent with the domestic industry's relatively flat market share.[750] Rather than explaining how the Commission "missed the mark," however, Korea simply repeats its argument that imports of LRWs served "innovation demands" that the domestic industry was somehow incapable of satisfying.[751] As shown above, the Commission provided a reasoned explanation rejecting respondents' argument that consumers, and by extension retailers, increasingly favored imported LRWs over domestically produced LRWs during the period of investigation for non-price reasons, including innovation.[752]

337. Korea readily admits that the domestic industry "had rather stable market share throughout the POI,", and there is no dispute that the industry's market share was roughly the same in 2016 as in 2012.[753] Nor does Korea deny that respondents made no argument that the

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differentiate Whirlpool and Maytag branded LRWs. USITC Report, pp. 49-50 (Exhibit KOR-1). Nor does Korea challenge the Commission's finding that respondent's analysis of Traqline data did not establish that non-price factors accounted for the apparent increase in consumer consideration of import LRW brands and the apparent decline in consumer consideration of domestic LRW brands. USITC Report, pp. 50-51 (Exhibit KOR-1).

[746] USITC Report, p. 50 (Exhibit KOR-1); Korea first written submission, para. 445.

[747] Korea first written submission, para. 445.

[748] USITC Report, p. 50 (Exhibit KOR-1).

[749] Korea first written submission, para. 445.

[750] Korea first written submission, paras. 446-47; USITC Report, p. 48 (Exhibit KOR-1).

[751] Korea first written submission, paras. 447-48.

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

[753] Korea first written submission, para. 447; USITC Report, p. 39 (Exhibit KOR-1).

alleged deterioration of U.S. brands contributed to the domestic industry's declining sales prices during the period of investigation, as the Commission found.[754] In sum, the Commission provided a reasoned explanation for its finding that the record did not support respondents' argument that the domestic industry's loss of market share resulted from the "deterioration" of U.S. brands in the eyes of consumers. As the Commission thoroughly explained, the record showed that subject imports had no advantage over domestically produced LRWs with respect to the non-price factors argued by respondents, including brand, innovation, and the domestic industry's production of agitator-based TL LRWs. The Commission also found that respondents' theory could not explain the domestic industry's declining prices or any of the resulting injury. Having found that respondents' "brand deterioration" theory did not explain any of the serious injury sustained by the domestic industry, brand deterioration was not an "other factor" causing injury, and the Commission did not attribute the effects of that factor to the increased imports.[755] Therefore, Korea's argument fails to identify any inconsistency with SGA Articles 2.1, 3.1, 4.2(b) or 4.2(c).

5. The Commission's causation analysis was predicated on a proper finding of increased imports and the correct definition of the domestic industry

338. Korea's argument that the Commission's causation analysis was "skewed" by its flawed determination of increased imports and "vitiated" by its flawed domestic industry definition[756] are entirely derivative of its claims that the Commission improperly found increased imports and defined the domestic industry incorrectly. Korea's argument fails because, as discussed in sections I.B and I.C above, the Commission's definition of the domestic industry and finding of increased imports were fully consistent with the Safeguards Agreement. It has accordingly identify any inconsistency with Articles 2.1, 3.1, 4.2(b), or 4.2(c).

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

[755] *See US – Steel Safeguards (AB)*, para. 491.

[756] *See* Korea first written submission, paras. 455-461.

IV. KOREA HAS NOT SHOWN THAT THE WASHERS SAFEGUARD MEASURE WAS INCONSISTENT WITH SGA ARTICLES 5.1 AND 7.1. (KOREA'S CLAIM 6)

339. The USITC found that imports of LRWs caused serious injury because the significant and increasing volume of such imports were sold at prices pervasively lower than those for comparable domestic washers. This led to price suppression and depression at a time when domestic producers' costs were increasing, resulting in a dramatic worsening of financial losses. The U.S. safeguard measure remedied the injury caused by imports – and only the injury caused by imports – with two elements. It addressed the *increase* in imports by imposing a TRQ on washers set at the average level of imports for the 2014-2016 period during which the serious injury occurred, with an out-of-quota tariff that would likely be preclusive. The measure addressed the *low prices* with both the TRQ and an in-quota tariff on washers set at a level to reduce or eliminate price suppression and depression.

340. Similarly, the safeguard measure addressed covered parts with a combination of quantitative- and value-based elements. It imposed a TRQ at a level reflecting imports during the period of investigation, which parties agreed were used almost exclusively to repair previously sold models, with a substantial additional amount to facilitate foreign producers' efforts to ramp up production at new U.S. facilities. The measure imposed no in-quota duty, and an out-of-quota rate set so as to lessen any incentive for Samsung and LG to displace their expected U.S. production of parts with imported covered parts for simple assembly.

341. Korea's claim that this combination of elements went beyond "the extent necessary to prevent or remedy serious injury and to facilitate adjustment" for purposes of SGA Article 5.1 is utterly baseless.

342. All of Korea's arguments suffer from one or more of the same thematic difficulties that plague Korea's arguments in other sections of its submission: they are unsupported by both the text of the Safeguards Agreement and Article XIX of GATT 1994, including as understood in prior reports; they repeat assertions Korea already tenuously raised with respect to Articles 2, 3, and 4, but which have no application to Article 5.1; and they mischaracterize the USITC's record and findings.

343. Korea also offers no support for its claim under Article 7.1 that the United States applied the safeguard for a longer period of time than is necessary. Accordingly, the Panel should find that Korea has not established that the United States breached its obligations under SGA Articles 5.1 and 7.1.

A. Korea's Article 5.1 Claim Is Without Merit.

1. The framework.

344. Korea argues that the washers safeguard measure is inconsistent with the obligation under the first sentence of Article 5.1, which states: "{a} Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." The

relevant definition of "prevent" is "to forestall or thwart by previous or precautionary measures;" "provide beforehand against the occurrence of (something); make impracticable or impossible by anticipatory action; stop from happening."[757] "Remedy" means "put right, reform (a state of things); rectify, make good."[758] Thus, a safeguard measure satisfies Article 5.1, first sentence, if it rectifies existing injury attributed to increased imports or forestalls such injury in the future. "Facilitate adjustment" means to promote the adaptation to changed circumstances.[759]

345. For a safeguard measure to be consistent with the Safeguards Agreement, there may be two "separate and distinct" inquiries at issue. The first inquiry may concern the right to apply a safeguard measure. In the first inquiry, a complaining party may allege that the *competent authorities* have not properly determined that increased imports have caused serious injury to a domestic industry. The second inquiry may concern whether the right to apply a safeguard measure has been exercised, through the application of a measure, within the limits set out in WTO rules. In the second inquiry, a complaining party may allege that the *Member* has not applied the safeguard measure only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.[760]

346. Once a Member establishes that increased imports caused serious injury to the domestic injury, it may apply a safeguard measure as long as it is necessary to remedy (or prevent) the serious injury and to facilitate adjustment. Article 5.1 does not restrict a Member's discretion to act within this limitation. The Member may choose any form for the measure – for example, a tariff, TRQ, or quantitative restriction. It may also choose the level of the measure – an *ad valorem* duty rate, a specific duty amount, a particular volume subject to a quota or TRQ, etc.

347. Article XIX of GATT 1994 provides context for the Safeguards Agreement. The working group that reviewed the U.S. Article XIX measure on felt hats and hat bodies recognized that comparing the remedial effect of a measure and the injury caused by increased imports is not a matter of empirical precision:

> {M}embers of the working party considered that it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market, and that it would be desirable

[757] New Shorter Oxford English Dictionary, p. 2348.

[758] New Shorter Oxford English Dictionary, p. 2540.

[759] New Shorter Oxford English Dictionary, pp. 27 and 903.

[760] *US – Line Pipe*, Appellate Body Report, para. 84.

> that the position be reviewed by the United States from time to time in the light of experience of the actual effect of the higher import duties. [761]

The same holds true with respect to Article 5.1. A Member cannot know at the time of taking a measure what precise future effect it will have on imports or on the position of the domestic industry.

348. 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. As the Appellate Body noted in its reports in *Korea – Dairy* and *US – Line Pipe*: "Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary.'"[762] 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.

349. The exception to this observation appears in the second sentence of Article 5.1, which requires a "clear justification" for any safeguard measure in the form of a quantitative restriction that reduces the quantity of imports below the average of imports during a recent, representative three-year period.[763] In *Korea – Dairy*, the Appellate Body focused on the difference between the first and second sentences of Article 5.1, explaining, "we do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure *other* than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years."[764] In *US – Line Pipe*, the Appellate Body reiterated, correctly, that "{i}t is clear, therefore, that apart from one exception, Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary.'"[765]

2. The United States applied its safeguard measure no more than the extent necessary to remedy the serious injury found by the USITC and to facilitate the industry's adjustment.

350. The washers safeguard measure consisted of two main elements: (1) a 1.2 million unit TRQ on LRWs with an in-quota rate of 20 percent in year one, 18 percent in year two, and 16

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[761] *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, GATT/CP/106, report adopted on 22 October 1951, para. 35. The Appellate Body cited this report as part of the GATT 1947 *acquis*. *US – Line Pipe*, (*AB)*, para. 174.

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

[763] This provision is not at issue here, because the TRQs for washers and covered parts are not quantitative restrictions.

[764] *Korea – Dairy (AB)* para. 99, *quoted in US – Line Pipe (AB)*, para. 233.

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

percent in year three, and out-of-quota rates of 50, 45, and 40 percent, respectively; and (2) a 50,000 unit TRQ on covered parts (baskets, tubs, cabinets, and subassemblies thereof) with no in-quota tariff and an out-of-quota tariff of 50 percent in year one, with tariffs at 45 percent and 40 percent in years two and three, respectively, on units in excess of 70,000 and 90,000, respectively.[766]

351. The President imposed this safeguard measure in Proclamation 9694 of January 23, 2018, with an effective date of February 7, 2018, after taking account of the USITC's report, including the serious injury findings, the Commissioners' views on remedy, and the Commission's recommended remedy. The President chose remedial action nearly identical to what the USITC recommended. In taking this approach, the President steered a middle ground between the remedies requested by the parties: domestic producers' proposal of a 50 percent tariff on all LRWs, and Samsung and LG's proposal that a safeguard measure was unnecessary because they planned to establish production facilities in the United States.[767]

3. Korea errs in arguing that the washers safeguard measure sought to remedy injury attributable to factors other than increased imports.

352. Korea's first argument is essentially derivative of its challenge to the USITC determination. It recognizes that the washers safeguard measure addresses the serious injury the USITC found to exist, repeats its argument that the USITC improperly attributed injury from other factors to the increased imports, and asserts that this means the safeguard measure must address injury unrelated to the increased imports.[768] Section III.F of this submission demonstrates that Korea's nonattribution argument is incorrect – the serious injury found by the USITC is attributable exclusively to increased imports. As Korea concedes that the washers safeguard measure addresses the serious injury found by the USITC, it errs in arguing that the remedy covered injury related to factors other than increased imports.

353. It is, however, important to correct misstatements in the argument presented in Korea's submission. Korea mistakenly and repeatedly refers to the USITC's "acknowledgement" that factors other than increased imports contributed to serious injury.[769] The USITC made no such acknowledgement; in fact, after evaluating Korea's assertions that factors other than injury caused the serious injury found by the Commission, the USITC came to the opposite conclusion – that increased imports alone caused the serious injury to the domestic industry.[770]

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[766] Proclamation 9694, para. 7, Annex pp. 1-2, *printed at* 83 Fed. Reg. 3553-54 (Jan. 25, 2018) (Exhibits KOR-1 & US-10).

[767] USITC Report, pp. 73, 78 (Exhibit KOR-1).

[768] Korea first written submission, paras. 482-89.

[769] Korea first written submission paras. 484-86.

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

354. However, assuming *arguendo* that the panel were to find that the USITC mistakenly attributed to increased imports injury caused by other factors, that would not by itself mean there was *no* serious injury. To make a *prima facie* case under Article 5.1, Korea would need to identify the serious injury caused by increased imports, and establish that the United States applied the safeguard measure beyond the extent necessary to remedy *that* injury (and to facilitate adjustment).

4. The effect of collateral trade remedies.

355. Korea notes – as did the USITC – that the United States adopted and maintained antidumping and countervailing duty measures on LRWs from certain sources during the investigation period. It argues that Article 5.1 required the United States "to take into account prevailing protection afforded the domestic industry"[771] in evaluating the permissible extent of the safeguard measure, and that it failed to do so.

356. Korea makes two errors. As a legal matter, the Safeguards Agreement does not obligate a Member to deal with concurrent safeguard and unfair trade measures in any particular way. Thus, it is not enough to simply note that both types of measures are in place. To establish an inconsistency with Article 5.1 would require a demonstration as to how the application of *this safeguard measure* at the same time as *the specific antidumping and countervailing duty measure* went beyond the extent necessary to prevent or remedy serious injury. Korea simply assumes this to be the case, and nowhere sets out an analysis showing that it is true. In addition, as a factual matter, Korea is incorrect. The USITC took account of the existing trade remedy measures in its analysis.

357. First of all, the Safeguards Agreement does not obligate a Member to take any particular approach to application of a safeguard measure to products already covered by an antidumping or countervailing duty measure. It is worth noting in this regard that SGA Article 11.1(c) provides that:

> This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.[772]

Thus, the Safeguards Agreement explicitly does not apply to measures under Article VI of GATT 1994, such as antidumping and countervailing duty measures.

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[771] Korea first written submission, para. 490.

[772] SGA Art. 11.1(c).

358. The only support Korea provides for its argument consists of citations to the USITC's report regarding the steel safeguard measures and certain European Commission reports that Korea sees as evidence that Members adjust their safeguard measures to account for existing trade remedies.[773] These fail on multiple levels. As domestic proceedings, they do not establish that the particular action taken was WTO-consistent, or even necessary from the perspective of the Safeguards Agreement. Moreover, the adjustments cited by Korea are tailored to the precise factual situations at hand, and do not establish that similar adjustments were necessary with respect to the washers safeguard measure.[774]

359. It is also important to note that, whereas safeguard measures address *fairly* traded products, antidumping and countervailing duty measures address *unfairly* trade merchandise and are limited as to source. The primary purpose of the remedy is to bring the prices of imports from a given source to fairly traded levels. If a safeguard measure assumes fairly traded prices, there is no need to adjust for existing antidumping and countervailing duty measures.

360. In this particular case, the petitioner explicitly stated that it sought a global safeguard because in the wake of unfair trade measures adopted by the United States on imports from Korea (antidumping and countervailing duties) and Mexico, and China (antidumping duties only). Samsung and LG moved production to countries that were not covered by the orders. The covered agreements do not discipline this sort of country-shifting as such. However, as Korea argues that the trade remedies had already sufficiently restrained supply or imposed pricing discipline, the potential to shift to other countries would circumvent those constraints, at least as far as production of LRWs for the U.S. market goes. The data clearly bears out this conclusion: for example, imports of LRWs from China into the United States dropped precipitously in 2017, after the antidumping order went into effect.[775] They quickly increased from Thailand and Vietnam.

361. Finally, the USITC did discuss the impact of existing trade remedies in a number of places, including as background to the descriptions of the industry and earlier investigations, as a relevant factor in determining injury, and in the causation section.[776] The USITC noted, as cited

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[773] Korea first written submission, para. 493 & nn.441-42.

[774] It is also worth noting that in the determination cited in paragraph 493, footnote 441, the EU appears to have first decided to apply a TRQ, and only took existing trade remedy measures into account exclusively in allocating the TRQ among import sources. As the United States did not provide country allocations in either of the TRQs applied through the washers safeguard, this example suggests that no further adjustment is necessary. The determination cited in paragraph 493, footnote 442, did not adjust the safeguard measure to account for existing trade remedies. It merely noted that an adjustment might be necessary *at a later date*, and stated that the EU *might* make an adjustment in certain (unspecified) circumstances.

[775] USITC Report, p. II-1 (Exhibit KOR-1).

[776] USITC Report, pp. 22-23, 25-26, 36 note 219, 39, 56, 59, 68, 77, I-3-I-6, I-9, II-1, V-4, app. F (Exhibit KOR-1).

by Korea, that serial antidumping and countervailing duty orders had some effect on restraining imports. However, it also found that the short-term benefit to the domestic industry that resulted from these orders was in the form of temporary market-share gains, not an increase in prices.[777] It was the depression and suppression of prices for the domestic like product that resulted in the industry's worsening financial losses. The USITC's partial equilibrium modeling also accounted for existing trade remedies in the sense that country-specific duty rates entered as inputs would have reflected subsidy and dumping duties.

362. Korea, therefore, has presented no basis for its argument that the United States failed to take trade remedies orders into account and in so doing acted inconsistently with Article 5.1.

5. The covered parts TRQ was necessary to ensure that the Samsung and LG U.S. production facilities played their planned role in the domestic industry's adjustment to import competition.

363. Korea asserts, as it does throughout its submission, that imported parts do not compete with domestic parts, and argues that as a consequence, the TRQ on parts is inconsistent with Article 5.1 because it is not "necessary" to prevent or remedy serious injury or facilitate adjustment.[778] Once again, Korea omits critical facts and misses the point most crucial to the discussion.

364. First, as demonstrated above,[779] Korea omits the most critical evidence about covered parts. It is true that the USITC found that imports of covered parts did not directly compete with domestically produced covered parts.[780] However, allowing limitless imports of low-priced covered parts would create a risk that it would be more attractive for Samsung and LG to convert their planned full-scale U.S. production facilities into mere kit assembly operations. In that scenario, Samsung and LG could partially circumvent the safeguard remedy by importing low-priced covered parts for simple domestic assembly into LRWs in direct competition with LRWs produced domestically from domestic parts. Thus, including covered parts in the safeguard measure was necessary to prevent serious injury. In addition, as bringing those plants to full manufacturing operation was an important part of the domestic industry's adjustment to import competition, the covered parts TRQ was necessary to facilitate the industry's adjustment.[781]

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[777] USITC Report, pp.39-40 (Exhibit KOR-1).

[778] Korea first written submission, para. 496.

[779] See discussion above in Section III.

[780] *See* USITC Report, p. 16 (Exhibit KOR-1). The USITC also noted that production of covered parts and their subassemblies are vertically integrated with LRW production in the United States, which is relevant for purposes of defining the domestic industry and finding serious injury to that industry. *Ibid*., p. 19.

[781] USITC Report, p. 74 ("LG and Samsung's proposal that the Commission impose no import restrictions on imports of covered parts would make it possible for LG and Samsung partially to circumvent the safeguard

365. Therefore, the parts TRQ did not result in application of the safeguard measure beyond the extent necessary within the meaning of Article 5.1.

6. Korea's comparison of the 20 percent in-quota duty with the 14.2 percent average margin of underselling is not relevant to the evaluation whether the safeguard sent beyond the extent necessary to prevent or remedy serious injury and facilitate adjustment.

366. Korea also argues that the United States applied the washers safeguard measure in breach of Article 5.1 because the 20 percent in-quota tariff exceeded the 14.2 percent average margin of underselling in the USITC pricing comparisons. The comparison is invalid because the underselling margin reflects the difference in price paid by unrelated U.S. customers, while the tariff rate is the additional duty applied to imports. Korea provides no basis to consider that importers would pass the full amount of the tariff on to their customers. Thus, Korea's tariff-rate-to-underselling-margin comparison does not accurately reflect the likely effect of the tariff on import prices, and accordingly cannot measure whether the United States applied the measure beyond the extent necessary to prevent or remedy serious injury and facilitate adjustment.

367. Korea also seeks to impugn the remedy applied by the United States by referring to the views of Vice Chairman Johansen and Commissioner Broadbent, who recommended against an in-quota tariff.[782] Their opinion demonstrates only that reasonable minds may differ, as two other Commissioners – Chairman Schmidtlein and Commissioner Williamson – recommended an in-quota TRQ at essentially the same level eventually adopted by the President.[783] Neither group represented a majority and, accordingly, the Commission did not reach an institutional recommendation on this point. The United States has explained that the TRQ alone would address the quantitative 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 reached a different conclusion does not detract from this logic.

368. Therefore, Korea's argument fails to establish that the in-quota tariff in inconsistent with Article 5.1.

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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.") (Exhibit KOR-1).

[782] Korea first written submission, para. 502.

[783] 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).

7. Findings regarding unforeseen developments are not relevant to a safeguard measure's consistency with Article 5.1.

369. The final segment of Korea's legal analysis repeats Korea's assertions regarding the absence of a finding regarding unforeseen developments, asserts that the ITC failed to scrutinize the industry's adjustment plan, and asserts that "facilitating adjustment was not even considered by the President."[784] It then declares that this succession of assertions means that the United States applied the safeguard measure in a manner inconsistent with Articles 5.1 and 7.1.[785] Korea provides no logic explaining the relationship among these assertions, or how they support the ultimate conclusion.

370. They are also incorrect. Proclamation 9694 explicitly states that the President determined that the safeguard measure would prevent or remedy serious injury and facilitate a positive adjustment to import competition.[786] Thus, the President plainly considered the issue, and reached a conclusion. As noted above in Section IV.A, nothing in Article 5.1 requires a Member applying a safeguard measure (or an official authorizing application of a safeguard measure) to justify that it is applied only to the extent necessary.[787] Thus, the fact that Proclamation 9694 does not elaborate on the reasons behind the President's decision is fully consistent with Article 5.1.

371. The reference to unforeseen developments is irrelevant. Article 5.1 provides that a Member may only apply a safeguard measure to the extent necessary to prevent or remedy *serious injury* and *facilitate adjustment.* Article 7.1 limits a measure to the period of time necessary to achieve these objectives. Neither article references unforeseen developments. Therefore, the presence or absence of a finding of unforeseen developments has no bearing on a Member's compliance with Article 5.1 or 7.1.

372. As for Korea's critique of the domestic producers' adjustment plans, nothing in the Safeguards Agreement requires a domestic industry to submit a plan, or the competent authorities to review such a plan. As the *Korea – Dairy* panel observed:

> We … do not interpret Article 5.1 as requiring the consideration of an adjustment plan by the authorities …. The Panel finds no specific requirement that an adjustment plan as such must be requested and considered in the text of the {SGA} …. Although there are references to industry adjustment in two of its

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[784] Korea first written submission, paras. 506-508.

[785] Korea first written submission, para. 511.

[786] Proclamation 9694, para. 4 (Exhibit KOR-3).

[787] *See also US – Line Pipe (AB)*, para. 233 ("Article 5.1 … does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary.'").

> provisions, nothing in the text of the {SGA} … suggests that consideration of a specific adjustment plan is required before a measure can be adopted.[788]

373. The USITC, however, did consider and summarize the domestic producers' adjustment plans in its views and recommendations on remedy.[789] It also noted the potential positive effects on the industry of Samsung and LG's plans to open domestic production facilities.[790] 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 and 7.1.

B. Korea's Article 7.1 Claim Is Without Merit.

374. Korea makes no independent argumentation on Article 7.1, other than to tack a reference onto several of its mistaken assertions that the United States acted inconsistently with Article 5.1.[791] The obligations are similar – Article 5.1 ties the extent of the remedy in terms of necessity to prevent or remedy serious injury and to facilitate adjustment, while Article 7.1 ties the duration of the measure to the same standard.[792] Therefore, the U.S. demonstration that Korea failed to establish an inconsistency with Article 5.1 applies equally to Article 7.1.

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

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

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

[791] *E.g.*, Korea first written submission, paras. 22, 509, 511, 517.

[792] *See Indonesia – Iron and Steel* (*AB*), para. 5.59; *Ukraine – Passenger Cars (Panel)*, paras. 7.369-7.370.

V. THE UNITED STATES COMPLIED WITH ARTICLES 8 AND 12 IN NOTIFYING ALL THE STEPS OF THE SAFEGUARD PROCEEDINGS AND CONSULTING WITH AFFECTED MEMBERS (KOREA'S CLAIMS 7 AND 8)

375. The United States notified the Committee on Safeguards at each relevant step of the process toward adoption of the washers safeguard measure, from its institution on June 12, 2017, through the announcement of the definitive safeguard measure on January 23, 2018. At each stage, the United States made its notification within one week of the triggering event – well within the periods that past panel and appellate reports have accepted as sufficient for purposes of SGA Article 12.1. Each of the notifications contained all of the relevant information available at the time, except as necessary to protect information submitted to the USITC on a confidential basis in accordance with the obligation under SGA Article 3.2. The United States provided an opportunity for prior consultations beginning on December 11, 2017, and provided for consultations to continue through February 22, 2018.

376. Through this process, the United States provided an opportunity for prior consultations with Members having a substantial interest as exporters of the product, as required under Article 12.3, and endeavored to maintain a substantially equivalent level of concessions and other obligations with those Members, as required under Article 8.1. China, Korea, and Thailand, representing the most voluminous exporters of covered washers during the investigation period, consulted with the United States during the December 11-February 22 period.[793]

377. Korea nevertheless argues that the U.S. notifications and consultations with other Members were inconsistent with SGA Articles 8.1, 12.1, 12.2, and 12.3. It provides no valid basis for these assertions. Korea has split its arguments into two separate "claims" in its written submission. However, as these claims derive from the same set of facts, the United States presents a single consolidated rebuttal.

A. The United States Complied with the Obligations Under Articles 12.1 and 12.2 to "Immediately" Notify the Committee on Safeguards and to "Provide . . . All Pertinent Information."

378. SGA Article 12.1 imposes an obligation that functions primarily as a formality– to 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. There are no additional formal requirements – a Member may structure its notification in whatever way it deems appropriate. SGA 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. The requirements are strictly substantive – a notification may take whatever form the Member considers appropriate as long as it conveys the indicated information.

[793] G/SG/201 (29 January 2019); G/SG/174 (17 April 2018); and G/SG/171 (9 April 2018). The United States also held consultations with Vietnam after the end of that period, on April 3, 2019. G/SG/166 (9 April 2018).

379. Article 12.1 addresses the *timing* of notifications. Specifically, Safeguards Article 12.1 provides that:

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

"Immediately" means at once, without delay, or instantly, and the text of the provision suggest that this temporal requirement be understood in relation to the notification at issue.[794] For example, Article 12.1(a) notes that the Committee is to be notified upon initiating an investigatory process "and the reasons for it." Article 12.2 imposes requirements to supply "all pertinent information" for the notifications in 12.1(b) and (c). Similarly, the appellate report in *US – Wheat Gluten* found that: As regards the meaning of the word "immediately" in the chapeau to Article 12.1, we agree with the Panel that the ordinary meaning of the word immediately "implies a certain urgency." The degree of urgency or immediacy required depends on a case-by-case assessment, account being taken of the administrative difficulties involved in preparing the notification, and also of the character of the information supplied. As previous panels have recognized, relevant factors in this regard may include the complexity of the notification and the need for translation into one of the WTO's official languages. Clearly, however, the amount of time taken to prepare the notification must, in all cases, be kept to a minimum, as the underlying obligation is to notify "immediately".[795]

380. Article 12.2, on the other hand, deals with the *content* of notifications:

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

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[794] New Shorter Oxford English Dictionary, p. 1315.

[795] *US – Wheat Gluten (AB)*, para. 105.

The appellate report in *US – Wheat Gluten* described the relationship as follows: "in our view, timeliness under 12.1(c) is determined by whether a decision to apply or extend a safeguard measure is notified 'immediately'. A *separate* question arises as to whether notifications made by the Member satisfy the content requirements of Article 12.2."[796]

381. The United States provided all notifications immediately and with all pertinent information at each stage of the proceedings leading to the application of the washers safeguard measure, as demonstrated below.

1. Initiation

382. Whirlpool submitted a petition requesting initiation of an investigation under section 201 of the Trade Act on May 31, 2017.[797] The USITC reviewed the petition to evaluate whether it met the criteria for a petition set out in section 202(a)(2) of the Trade Act and in the USITC regulations.[798] The USITC concluded that the petition was missing certain required information, specifically about the percentage of domestic production of the like or directly competitive domestic article accounted for by Whirlpool, total U.S. production of the domestic article, and market shares. On June 2, 2017, the Commission sent a letter requesting Whirlpool to supply the missing information. Whirlpool submitted an amended petition on June 5, 2017. After further review, the USITC determined that "the petition, as amended, was properly filed as of June 5, 2017" and issued a formal notice to that effect on June 7, 2017, instituting an investigation under U.S. law.[799] The United States submitted its notification under Article 12.1(a) to the Committee on Safeguards on June 12, 2017 ("First Notification").[800] The U.S. Federal Register published the USITC notice on June 13, 2017.[801]

383. Korea does not dispute that the First Notification contained all of the information necessary for a notification under SGA Article 12.1(a). Rather, it argues that the USITC initiated the investigation on June 5, 2017, and that the First Notification was untimely because "the United States failed to notify other Members about the initiation until June 12, 2017, which was 7 days later."[802]

384. However, Korea has chosen the wrong date for its evaluation of whether the notification was made "immediately" for purposes of Article 12.1(a). As Korea itself recognizes, "{t}he date

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[796] *US – Wheat Gluten (AB)*, para. 123.

[797] USITC Report, p. I-1, n. 2 (Exhibit KOR-1).

[798] 19 U.S.C. §2252(a)(2) (Exhibit US-9); 19 C.F.R. §206.14 (Exhibit US-11).

[799] Notice of Institution, p. 27,077.

[800] G/SG/N/6/USA/12 (12 June 2017).

[801] Notice of Institution (Exhibit USA-1).

[802] Korea first written submission, para. 551.

of publication of the decision to initiate an investigation is the date on which the investigatory process is said to have been 'initiated' for the purposes of Article 12.1(a)."[803] In the case of the washers investigation, the USITC published the relevant decision on June 13, 2017. As the United States submitted its notification on the day *before* that date, there is no grounds to assert that it was not made "immediately."

2. The ITC Vote on Serious Injury.

385. Following initiation of an investigation, U.S. law provides for a three-stage process in safeguard proceedings. As provided by U.S. law, in this investigation, the USITC first investigated petitioner's claim that increased imports of LRWs and certain parts are a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.[804] In the course of this investigation, the interested parties – including numerous government representatives as well as Korean producers LG and Samsung – submitted received pre- and posthearing briefs and participated in the injury-phase hearing held by the Commission.[805] At the end of the injury investigation, the USITC held a public meeting at which the Commissioners announced their individual conclusions. In this investigation, the USITC unanimously made an affirmative determination of serious injury.

386. Having made an affirmative serious injury determination, the Commission proceeded to the remedy phase of the investigation.[806] In this second phase, the Commission again received submissions from interested parties and held another public hearing. LG and Samsung again submitted briefs and participated at the remedy hearing, held on October 19, 2017. At the end of the remedy phase, the USITC made a recommendation as to what action the President should take to prevent or remedy the serious injury and make a positive adjustment to import competition. On November 21, 2017, the USITC held another public meeting at which the Commissioners announced their individual recommendations. As provided by statute, within 180 days after the filing of the petition, the Commission then transmitted to the President the Commission's institutional views in support of the determination of serious injury and recommended remedy.[807] The submission of the USITC Report to the President commences the

[803] Korea first written submission, para. 539 (*quoting Ukraine – Passenger Cars (Panel)*, para. 7.474).

[804] 19 U.S.C. § 2252(b)(1)(A).

[805] *See* USITC Report, App. B. At the conclusion of the injury hearing, the Commission Chairman announced that the "tentative" date on which the Commission would meet to vote on injury would be October 5, 2017 (which was in fact the date on which the vote occurred). Hearing Transcript, p. 342 (Exhibit US-2).

[806] *See* 19 U.S.C. § 2252(e)(1).

[807] *See* 19 U.S.C. § 2252(f).

third phase of the proceedings, consisting of evaluation by an interagency group, a recommendation by that group, and final action by the President.[808]

387. In the washers proceeding, the USITC held the public vote on serious injury on October 5, 2017.[809] As noted, the Commissioners unanimously determined that increased imports caused serious injury to the domestic industry.[810]

388. On October 12, 2017, the United States submitted a notification under Article 12.1(b) to the Committee on Safeguards, regarding the public vote on this first phase of the investigation ("Second Notification").[811] That notification contained all of the information available at that time – the fact of the USITC's serious injury determination, the precise definition of the product covered by the findings, and indications that the report issued at the end of the proceedings would contain further relevant information.

389. Korea asserts that the Second Notification was both untimely for purposes of Article 12.1(b) and failed to provide "all pertinent information" for purposes of Article 12.2. Both assertions are erroneous.

a. The United States notified the Committee on Safeguards "immediately" within the meaning of Article 12.1(b).

390. With respect to Article 12.1(b) Korea notes that the United States submitted the Second Notification seven days after the USITC vote. Korea asserts that "{t}here is no justification why the United States could not have acted with the required level of urgency" because "the notification concerned merely three pages that did not require translation and, again, the United States has no lack of resources either in capital or in Geneva."[812]

391. A simple arithmetic observation is not sufficient to establish that a Member failed to provide a notification "immediately" for purposes of Article 12.1. Panel and appellate reports have found that "{t}he degree of urgency or immediacy required depends on a case-by-case assessment" and that relevant factors may "include" administrative difficulties involved in

[808] The President has 60 days to take action. This period may expand to 75 days in certain circumstances that did not occur in this proceeding. *See* 19 U.S.C. §2253(a)(4) (Exhibit US-9).

[809] USITC Report, p. I-1 (Exhibit KOR-1).

[810] USITC Report, p. 3 (Exhibit KOR-1).

[811] G/SG/N/8/USA/10 (13 October 2017).

[812] Korea first written submission, para. 555.

preparing the notification, the character of the information supplied, the complexity of the notification, and the need for translation into one of the WTO's official languages.[813]

392. In this instance, the USITC vote provided a single new piece of information – that the USITC had made an affirmative determination of serious injury. The First Notification had already indicated the date of the public vote and the dates for all relevant procedural steps in the remedy stage of the proceeding, both in the body of the text and by attaching the Notice of Institution.[814] (It is worth noting in this regard that the governments of Indonesia, Korea, Taiwan, Mexico, and Vietnam participated in the injury stage of the USITC investigation.) Thus, the degree of urgency and need for immediacy were not high.

393. The administrative task of preparing the notification was not *pro forma*. Although much of the information in the notification was not new, the context in which the United States provided it required that it be tailored. In addition, the notification occurred at a time when government officials responsible for safeguard measures were extremely busy, including with the washers investigation moving into the remedy phase and another safeguard investigation of solar products (already at the remedy stage). USITC and Executive Branch officials needed to coordinate with respect to this activity, which was being conducted pursuant to statutory authority that had not been exercised for 15 years.

394. The finding of the panel in *India – Iron and Steel Safeguard Measures* is instructive in this regard. It found that the submission of a one and one-half page notification under Article 12.1(a) of the initiation of a safeguard measure eight days after publication of the relevant administrative notice was "not unreasonable."[815] The reasons for this finding included that the notification did not merely reproduce the text of a previously published notice and required completion of a number of administrative steps.[816] The Second Notification, too, was not simply the cover sheet for a published notice. Rather, it required review by the USITC investigative team and exchanges between two separate United States agencies (the USITC and the Office of the U.S. Trade Representative USTR).

395. In this context, the United States clearly complied with the Article 12.1(b) obligation to immediately notify the Committee on Safeguards upon making a finding of serious injury caused by imports.

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[813] *US – Wheat Gluten (AB)*, para. 105; *Dominican Republic – Safeguard Measures (Panel)*, para. 7.437; *Ukraine – Passenger Cars (Panel)*, para. 7.461; *India – Iron and Steel Safeguards (Panel)*, paras. 7.323 and 7.325.

[814] *See generally* G/SG/N/6/USA/12 (12 June 2017) and Notice of Institution, p. 27077.

[815] *India – Iron and Steel Products (Panel)*, para. 7.327.

[816] *India – Iron and Steel Products (Panel)*, para. 7.325.

b. The Second Notification provided "all pertinent information."

396. As noted above, the Second Notification references all of the new information that became available as a result of the USITC's serious injury vote. Korea asserts that this represented a failure to comply with the Article 12.1(b) obligation to provide "all pertinent information," because the notification did not specify the "*evidence* of serious injury or threat thereof caused by increased imports."[817] Korea misunderstands. Article 12.2 requires the notification of "pertinent information." At the time they announced their individual votes that increased imports had caused serious injury, the Commissioners had not completed the process of consolidating their individual reasoning and drafting and finalizing the views of the Commission on serious injury. It is these views that identify what information is "pertinent" to the ultimate determination. Thus, the Second Notification contains "all pertinent information" that was available at that time. Nothing in Article 12.2 requires a Member to provide any information in a notification before its competent authorities have identified that information as relevant to their conclusions.

3. Issuance of the USITC Report.

397. The USITC transmitted its report to the President on December 4, 2017. The report consisted of the views of the Commission explaining the determination of serious injury, the views of the Commission explaining the recommended remedy, and the USITC staff report, which aggregated the information provided over the course of the investigation. At the same time, the USITC issued a public version of the report, which contained the same content as the version transmitted to the President, but with business confidential information ("BCI") redacted.

398. The United States submitted a notification under Article 12.1(b) to the Committee on Safeguards on December 9, 2017, ("Third Notification") supplementing the Second Notification.[818] The notification consisted of the 65-page public version of the USITC Report and text indicating the precise portions that provided different types of information of potential relevance to Members.

399. Korea makes two arguments in support of its assertion that the Third Notification was not made "immediately." First, it contends that the Third Notification "sought to correct" the Second Notification by "providing more information," which was obviously not "immediate" because it arrived two months afterward.[819] Korea mischaracterizes the notification. It was not a "correction." The USITC Report represented the final explanation of the Commission's determination. As such, it provided the factual and legal underpinnings of the votes made on October 5, 2017, by providing an in-depth explanation of the Commissioners' reasoning, including by identifying all pertinent information. The determination was accompanied by the

[817] Korea first written submission, para. 563.

[818] G/SG/N/8/USA/10/Suppl.2 (11 December 2017).

[819] Korea first written submission, para. 563.

report of the Commission's staff, which contained hundreds of pages of information and data gathered over the course of the Commission's investigation. Similarly, the Third Notification supplemented the Second Notification by providing additional information and explanation. As noted above, the relevant date for evaluating compliance with Article 12.1 is the date of publication, which for the USITC Report was December 4, 2017. Thus, the United States made the Third Notification five days after the relevant finding of serious injury, not two months.

400. Second, Korea argues that a five-day gap between the issuance of the USITC Report and the Third Notification was not "immediate." It provides *no* support other than to declare that "{t}here is no reason for the 5 days delay." Such a bare assertion is not sufficient to establish that a Member failed to provide a notification "immediately" for purposes of Article 12.1. The Third Notification does not merely enclose the relevant publication. It also pinpoints the location of findings of potential relevance to Members. And, as with the Second Notification, the administrative burden is also relevant, as the United States made the Third Notification at a time when the Executive Branch officials responsible for safeguard proceedings were involved in two concurrent proceedings. In this context, the United States made the Third Notification "immediately" within the meaning of Article 12.1.

401. It is important to note that Korea does not dispute that the Third Notification contained all pertinent information with respect to the USITC's finding of serious injury for purposes of Article 12.2.

4. The decision to take a safeguard measure.

402. In addition to providing all pertinent information regarding the USITC serious injury finding, the Third Notification provided information relevant to Members that might be affected by any safeguard measure. It indicated that the "United States is prepared to consult with those Members having a substantial interest as exporters of the products concerned."[820] It identified the USITC's remedy recommendation as the U.S. proposed safeguard measure, and indicated that the President had until February 2, 2018, to determine what safeguard action, if any, he would take.[821]

403. As noted above, U.S. law requires action within 60 days of the receipt of the USITC Report, during which time an interagency group evaluates the Commission's findings and makes a recommendation as to what action the President should take.[822] In furtherance of this exercise, the Office of the U.S. Trade Representative issued a notice on November 30, 2017, inviting interested persons to submit their views on the appropriate remedy through written submissions

[820] G/SG/N/8/USA/10/Suppl.2, item 1.

[821] G/SG/N/8/USA/10/Suppl.2, items 5 and 6.

[822] 19 U.S.C. §2253(a)(1)(C).

and a public hearing.[823] On December 9, 2017, the United States notified these further procedural steps ("Fourth Notification") as a supplement to the Second Notification.[824] Korea does not challenge the adequacy of the Fourth Notification or assert that it failed to comply with Article 12.2.

404. After completing these processes and taking other steps required by U.S. law, the President signed Proclamation 9694 on January 23, 2018, detailing the proposed measure and indicating that it would take effect on February 7, 2018. The United States submitted a notification under Article 12.1(c) to the Committee on Safeguards on January 26, 2019 ("Fifth Notification").[825] Korea does not dispute that the United States made this notification "immediately" for purposes of Article 12.1(c).

405. However, Korea does assert that the Fifth Notification was inconsistent with Article 12.2 because it cross-referenced the information on findings of increased imports and serious injury in the Second and Third Notifications. Korea argues that these failed to provide "all pertinent information" because "large parts of the relevant information in those sections had been redacted for confidentiality purposes with no sufficient non-confidential summaries to inform interested parties."[826] The United States notes that Korea does not appear to question that the USITC correctly treated the information as confidential, or that the Safeguards Agreement precludes a Member providing confidential information in a notification even if that information would otherwise be "pertinent" within the meaning of Article 12.2. Its sole argument is that the United States acted inconsistently with Article 12.2 by failing to provide nonconfidential summaries that Korea considers to be pertinent.

406. This argument is insufficient to establish an inconsistency with Article 12.2. As noted above, the USITC Report explained the Commission's findings with written characterizations of relevant data and trends. Korea's argument does not address these, or explain why they were insufficient for purposes of Article 12.2. It complains that certain "statistics on the development of imports" were redacted and not summarized "as ranges or similar,"[827] but never identifies the precise statistics or explains how the USITC might have provided a "range or similar" without breaching its obligation under Article 3.2 to protect the confidentiality of the information.

407. What Korea fails to recognize is that both the domestic industry and import sources were highly concentrated. There were two major importers, active in a small (confidential) number of

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[823] The Office of the U.S. Trade Representative, Request for Comments, 82 Fed. Reg. 56,849 (Nov. 30, 2017).

[824] G/SG/N/8/USA/10/Suppl.1.

[825] G/SG/N/10/USA/8 (26 January 2018). The Secretariat treated this notification as a notification under Article 9.1, footnote 2, of the nonapplication of the safeguard measure to certain developing country Members. Korea does not challenge the adequacy or timeliness of the Fifth Notification with respect to this obligation.

[826] Korea first written submission, para. 565.

countries, and two major U.S. producers. Thus, because each foreign producer knew its own data, ranged or indexed data on imports would give each of them a very strong indication of the confidential information provided the other. The concern is even stronger with respect to domestic industry information, as Whirlpool represented a very high share of production in the United States. Producers, who are highly sophisticated, could potentially eliminate any uncertainties as to precise confidential information by interpolating among ranged or indexed data sets. Thus, attempting to provide numerical ranges or indexes of confidential information would be inconsistent with the Article 3.2 obligation that "such information shall not be disclosed without permission of the party submitting it." Korea does not – and could not – argue that Article 12.2 supersedes Article 3.2. Therefore, its argument fails.

B. The United States Complied with Articles 8.1 and 12.3 by Providing an Adequate Opportunity for Prior Consultations and Endeavoring to Maintain a Substantially Equivalent Level of Concessions and Other Obligations.

408. The Third Notification, submitted on December 11, 2017, invited interested Members to consult with the United States "with a view to, inter alia, reviewing the information provided in this notification and the ITC Report, exchanging views on the measure proposed and reaching an understanding on ways to achieve the objective set out in Article 8.1 of the Safeguards Agreement."[828] The notification identified the USITC remedy recommendation as the proposed safeguard measure, and indicated that the President would take action no later than February 2, 2017. The Fifth Notification indicated the action outlined in Proclamation 9694 of January 23, 2018, as the safeguard measure the United States planned to take on February 7, 2017. The Proclamation stated:

> In addition, if I determine within 30 days of the date of this proclamation, as a result of consultations between the United States and other WTO Members pursuant to Article 12.3 of the WTO Agreement on Safeguards, that it is necessary to reduce, modify, or terminate the safeguard measure, I shall proclaim the corresponding reduction, modification, or termination of the safeguard measure within 40 days.[829]

409. The United States accordingly provided a period stretching from December 11, 2017, through February 22, 2018 – 73 days in total – to consult with the United States with a view to seeking a modification to the safeguard measure. During that period, the United States held consultations with Thailand on January 8, 2018; with Korea, on February 1, 2018; and with China on February 12.[830] In all three instances, the United States and the consulting party agreed

[828] G/SG/N/8/USA/10/Suppl.1, item 1.

[829] Proclamation 9694, para. 11 (Jan. 23, 2019).

[830] G/SG/201 (29 January 2019); G/SG/174 (17 April 2018); and G/SG/171 (9 April 2018). The United States also held consultations with Vietnam after the end of that period, on April 3, 2019. G/SG/166 (9 April 2018).

to continue discussions.[831] Korea and Thailand (but not China) agreed that in the meantime, the parties' reciprocal rights and obligations under the Safeguards Agreement would be maintained by considering that the 90-day period set forth in SGA Article 8.2 would not expire until February 7, 2021.[832]

410. Korea nevertheless asserts that the United States failed to provide adequate time for consultations by counting only the 12 days from the January 26, 2018, date of the Fifth Notification to the date on which the measure took effect, February 7, 2018.[833] This argument reflects several errors.

411. First, the opportunity for prior consultations began well before the submission of the Fifth Notification. Article 12.3 states:

> A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under {Article 12.2}, exchanging views of the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

The United States announced its readiness for consultations on December 11, 2017, in the *Third* Notification, which provided all of the information called for in Article 12.2: a description of the merchandise, evidence of serious injury caused by increased imports, a proposed measure, the proposed date of introduction, expected duration, and timetable for progressive liberalization. Thus, there is no basis to assert, as Korea does, that a "meaningful exchange" was possible only after it received, analyzed, and conducted internal consultations regarding the *Fifth* Notification.[834]

412. Second, Korea's argument is based in large part on its assertion that "the measure did not completely follow any of the recommendations made by the USITC Commissioners and was thus novel in nature and form for Korea."[835] In fact, the remedy applied in Proclamation 9694 was nearly identical to the recommendation of the USITC:

	USITC recommendation	**Proclamation 9694**
Duration	**3 year**	**3 years plus one day**
Washers TRQ	**1.2 million units**	**1.2 million units**

[831] G/SG/201 (29 January 2019); G/SG/174 (17 April 2018); G/SG/171 (9 April 2018)

[832] G/SG/201 (29 January 2019) and G/SG/171 (9 April 2018)

[833] Korea first written submission, para. 530.

[834] Korea first written submission, para. 529.

[835] Korea first written submission, para. 532.

Out-of-quota duty (year 1/year 2/year 3)	50%/45%/40%	50%/45%/40%
In quota duty (year 1/year 2/year 3)	20%/18%/15%*	20%/18%/16%
Parts TRQ (year 1/year 2/year 3)	50,000/70,000/90,000 units	50,000/70,000/90,000 units
Out-of-quota duty (year 1/year 2/year 3)	50%/45%/40%	50%/45%/40%
In-quota duty	0	0
Country exclusions	16 FTA partners and CBERA beneficiaries	Canada and certain developing country WTO Members

* Two Commissioners recommended no in-quota duty for washers
Source: USITC Report, pp. 1-2 (Exhibit KOR-1) and Proclamation 9694 (Exhibit KOR-3).

413. There are only three differences. The first, that the duration of the ultimate remedy is one day (less than one tenth of one percent) longer than the USITC recommendation, is meaningless.[836] The second, increasing the in-quota rate in year three from the USITC's recommendation of 15 percent to 16 percent, is an essentially meaningless difference. In its submission, Korea does not explain why this one percent change between the recommendation and the actual remedy would have affected a Member's evaluation of the matters mentioned in Articles 8.1 and 12.3 in any meaningful way.

414. The third difference lies in the changes to the country exclusions. SGA Article 9.1 mandates the exclusion of developing country WTO Members that individually account for less than 3 percent of total imports as long as such Members do not collectively count for more than 9 percent of imports. Thus, the U.S. exclusion of those Members cannot form the basis for considering the safeguard measure "novel in nature and form." And, while the USITC may have recommended the exclusion of all FTA partners, the decision to include them in the final safeguard measure cannot have interfered with any Member's evaluation of the matters mentioned in Articles 8.1 and 12.3. That is because a Member would ground its evaluation of its interests in the first instance on its evaluation of the potential effects of a safeguard measure on its interests. (The decision by the governments of Korea, Mexico, Thailand, Vietnam, and others to appear before the USITC and make submissions in its investigation appear to reflect just such an evaluation.).[837] Thus, the possibility of inclusion in the safeguard measure and its potential effects was not in any way "novel" for Korea when it received the Fifth Notification.

415. The critical point is that Korea's argument frames the issue incorrectly. Article 12.3 calls on Members to provide an adequate opportunity for prior consultations "with a view to . . .

[836] For the sake of clarity, the extra day is necessary to trigger the U.S. statutory provision requiring a midterm review, which SGA Article 7.4 requires for a measure more than three years in duration.

[837] USITC Report, p. 4 (Exhibit KOR-1).

reviewing the information provided under paragraph 2," which in turn governs "the notifications referred to in paragraphs 1(b) and 1(c)." Thus, an evaluation of whether a Member provided an adequate opportunity for prior consultations does not depend exclusively on the content and timing of the *final* notification, as Korea argues. It depends on the *notifications* (plural) *as a whole*, and whether Members received the information *over time* in such a way as to permit consultations that included "reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1."

416. In focusing on the Fifth Notification, Korea ignores the fact that Members received *most* of the relevant information on December 11, 2017, in the Third Notification. While the Fifth Notification did provide additional information, it was limited in nature, making it relatively simple to evaluate how the effects of the final safeguard measure would differ from expectations based on the proposed measure. There is accordingly no basis for Korea's assertion that it could not analyze the measure, consider its consequences, consult with the affected industry, and hold consultations with the United States in the 12 days before the effective date of the safeguard measure.

417. That said, Korea errs in assuming that the February 7, 2018, effective date of the safeguard measure is the last day relevant to its claims. Proclamation 9694 explicitly provides further time for consultations and an opportunity to modify the safeguard measure in response to the results. Thus, there were 27 days between the Fifth Notification and the final opportunity for Korea to consult with the United States prior to finalization of the terms of the safeguard measure. By any standard, that was ample.

VI. THERE IS NO NEED TO ADDRESS KOREA'S PURELY CONSEQUENTIAL CLAIM UNDER ARTICLE II:1 OF GATT 1994 (KOREA'S CLAIM 9)

418. The final argument in Korea's first written submission is in support of a claim under Article II:1 of GATT 1994 that the washers safeguard measure withdrew or modified U.S. concessions without a justification under Article XIX of GATT 1994. The sole basis for the one-paragraph argument is that Korea's arguments regarding the previous claims are correct and that, therefore, the U.S. deviation from the tariff commitments made in its Schedule of Concessions are without justification.[838] The United States has shown in the preceding sections of this submission that Korea's arguments are incorrect, and that the washers safeguard measure was consistent with Article XIX of GATT 1994 and the Safeguards Agreement. Therefore, Korea's derivative claim also fails.

419. Even if the Panel were to find in Korea's favor on one of those claims, a finding with regard to its claim under Article II:1 of GATT 1994 would be superfluous. It would add nothing to the panel's recommendation that the United States bring its measures into compliance with the relevant provisions of the covered agreements. Therefore, assuming *arguendo* that Korea prevailed on one of its other claims, the Panel should exercise judicial economy with respect to this claim.

CONCLUSION

420. For the reasons set out above, the United States requests that the Panel find that Korea has failed to establish any inconsistency with Article XIX of GATT 1994 or the Safeguards Agreement.

[838] Korea first written submission, para. 571.