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UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF LARGE RESIDENTIAL WASHERS

REPORT OF THE PANEL

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CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R , adopted 12 January 2000, DSR 2000:I, p. 515
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R , adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, p. 575
<i>China – GOES (Article 21.5 – US)</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS414/RW and Add.1, adopted 31 August 2015, DSR 2015:VII, p. 3865
<i>Dominican Republic – Safeguard Measures</i>	Panel Report, <i>Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric</i> , WT/DS415/R , WT/DS416/R , WT/DS417/R , WT/DS418/R , and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R , adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R , adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R , WT/DS48/AB/R , adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R , adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R , adopted 18 June 2014, DSR 2014:I, p. 7
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R , WT/DS10/AB/R , WT/DS11/AB/R , adopted 1 November 1996, DSR 1996:I, p. 97
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R , adopted 28 November 2005, DSR 2005:XXII, p. 10637
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R , adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Dairy</i>	Panel Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R, DSR 2000:I, p. 49
<i>Korea – Pneumatic Valves (Japan)</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , WT/DS504/R and Add.1, adopted 30 September 2019, as modified by Appellate Body Report WT/DS504/AB/R, DSR 2019:XI, p. 5935
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R , adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
<i>Philippines – Distilled Spirits</i>	Appellate Body Reports, <i>Philippines – Taxes on Distilled Spirits</i> , WT/DS396/AB/R / WT/DS403/AB/R , adopted 20 January 2012, DSR 2012:VIII, p. 4163
<i>Ukraine – Passenger Cars</i>	Panel Report, <i>Ukraine – Definitive Safeguard Measures on Certain Passenger Cars</i> , WT/DS468/R and Add.1, adopted 20 July 2015, DSR 2015:VI, p. 3117
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R , adopted 5 November 2001, DSR 2001:XII, p. 6027

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

ABBREVIATIONS USED IN THIS REPORT

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

1 INTRODUCTION

1.1 Complaint by Korea

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

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

1.2 Panel establishment and composition

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

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

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

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

Chairperson: Mr Alexander Hugh McPhail

Members: Mr Welber Oliveira Barral
Ms Stephanie Sin Far Lee

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

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, we adopted the timetable, Working Procedures⁵ and Additional Working Procedures on Business Confidential Information (BCI)⁶ on 9 October 2019.⁷

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

¹ Request for consultations by Korea, WT/DS546/1 (Korea's consultations request).

² Request for establishment of a panel by Korea, WT/DS546/4 (Korea's panel request).

³ DSB, Minutes of Meeting held on 26 September 2018, WT/DSB/M/419, para. 7.4.

⁴ Constitution note of the Panel, WT/DS546/5, para. 2.

⁵ Working Procedures of the Panel (Annex A-1).

⁶ Additional Working Procedures of the Panel on Business Confidential Information (Annex A-2).

⁷ We revised these Additional Working Procedures on BCI on 18 October 2019 and on 31 October 2019. We also revised the timetable over the course of the proceedings in consultation with the parties.

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

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

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

2 FACTUAL ASPECTS

2.1 The measure at issue

2.1. The dispute concerns the definitive safeguard measure imposed by the United States on imports of large residential washers (LRWs). The United States imposed this measure pursuant to Proclamation 9694 issued by the US President on 23 January 2018.¹⁰ The measure was imposed following an investigation conducted by the United States International Trade Commission (USITC).¹¹

3 PARTIES' REQUESTS FOR FINDINGS

3.1. Korea requests that the Panel find that the United States' definitive safeguard measure on LRWs is inconsistent with the United States' obligations under the Agreement on Safeguards and the GATT 1994. Specifically, Korea contends that the United States acted inconsistently with¹²:

- a. Article XIX:1(a) of the GATT 1994 and Articles 1 and 3.1 of the Agreement on Safeguards, by failing to provide a reasoned and adequate explanation of the "unforeseen developments" and the "obligations incurred" by the United States, which would have resulted in the alleged increased imports of LRWs causing serious injury;
- b. Articles 2.1, 3.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards, by failing to properly define the domestic industry;
- c. Articles 2.1 and 3.1 of the Agreement on Safeguards, by failing to properly determine that LRWs were imported in "such increased quantities, absolute or relative to domestic production, and under such conditions" to cause serious injury to the domestic industry;

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

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

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

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

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

- d. Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c) of the Agreement on Safeguards, by failing to provide a reasoned and adequate explanation of the existence of a significant overall impairment in the position of the domestic industry based on all relevant factors to support its conclusion that the domestic industry was suffering "serious injury or threat thereof";
- e. Articles 2.1, 3.1, 4.2(b), and 4.2(c) of the Agreement on Safeguards, by failing to provide a reasoned and adequate explanation of the "causal link" between the alleged increased imports of LRWs and serious injury or threat thereof, and failing to ensure that injury caused by other factors was not attributed to the increased imports;
- f. Articles 5.1 and 7.1 of the Agreement on Safeguards, by failing to apply the safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment";
- g. Articles 12.1 and 12.2 of the Agreement on Safeguards, by (i) failing to provide immediate notifications of the different decisions; and (ii) failing to provide all pertinent information in its notifications, including evidence of serious injury or threat thereof caused by increased imports, among others, as a result of the undue redaction of allegedly confidential information and failing to provide adequate non-confidential summaries;
- h. Articles 8.1 and 12.3 of the Agreement on Safeguards, by failing to endeavour to maintain a substantially equivalent level of concessions and other obligations under the GATT 1994 between the United States and Korea in accordance with Article 12.3 of the Agreement on Safeguards;
- i. Article 11.1(a) of the Agreement on Safeguards as a consequence of the inconsistencies identified in paragraphs (a)-(h) above; and
- j. Article II:1 of the GATT 1994, because the safeguard measure amounts to a withdrawal or modification of the United States' concessions without a justification under Article XIX of the GATT 1994, the Agreement on Safeguards or any other provisions of the WTO Agreement.

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

4 ARGUMENTS OF THE PARTIES

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

5 ARGUMENTS OF THE THIRD PARTIES

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

6 INTERIM REVIEW

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

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

7 FINDINGS

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

7.1.1 Standard of review

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

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

7.2. Dispute settlement reports previously adopted by the Dispute Settlement Body (previous DSB reports) have established that the general standard of review contained in Article 11 of the DSU is applicable to disputes involving claims of violation of the Agreement on Safeguards and Article XIX of the GATT 1994.¹³ We agree with previous DSB reports that, pursuant to this standard of review, a panel is required to assess whether the competent authority has examined all pertinent facts and provided an adequate explanation as to how those facts support the determination.¹⁴ However, in conducting such a review, a panel must neither conduct a *de novo* review of the evidence nor substitute its judgement for that of the competent authority.¹⁵

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

7.1.2 Treaty interpretation

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

7.1.3 Burden of proof

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

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

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

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

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

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

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

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

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

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

- a. First, Korea claims that the USITC acted inconsistently with these provisions because it failed to provide a reasoned and adequate explanation regarding the existence of unforeseen developments, which would have resulted in the alleged increased imports of LRWs causing serious injury to the US domestic industry.²¹
- b. Second, Korea claims that the USITC acted inconsistently with these provisions because it failed to provide a reasoned and adequate explanation regarding the obligations incurred by the United States, which would have resulted in the alleged increased imports of LRWs causing serious injury to the US domestic industry.²²

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

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

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

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

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

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

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

¹⁹ Appellate Body Report, *EC – Hormones*, para. 104.

²⁰ Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1197:1, p. 335.

²¹ Korea's first written submission, paras. 59 and 85; second written submission, paras. 47 and 72.

²² Korea's first written submission, paras. 59 and 80; second written submission, para. 51.

²³ Emphasis added.

safeguard measure to be applied consistently with Article XIX:1(a) of the GATT 1994.²⁴ We note that the United States does not dispute that Article XIX:1(a) obligates a Member to demonstrate these circumstances. However, while Korea takes the view that the competent authorities must make this demonstration in their published report, the United States contends that no such demonstration needs to be included in the published report since neither Article XIX:1(a) nor the Agreement on Safeguards requires the competent authorities to make any findings regarding these two circumstances.²⁵ Therefore, we will proceed as follows:

- a. We will first determine whether the two factual circumstances set out in Article XIX:1(a) need to be demonstrated as a matter of fact in the report of the competent authorities.
- b. If yes, we will examine whether the USITC made such a demonstration in its published report. In doing so, as discussed in more detail in paragraph 7.24 below, we note that the United States acknowledges that the USITC made no finding on "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994. With respect to the "effect of GATT obligations", the United States submits that the USITC report demonstrates that the United States undertook tariff obligations with respect to the products at issue and thus complies with Article XIX:1(a) of the GATT 1994.²⁶

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³³ United States' first written submission, para. 41; second written submission, para. 12.

³⁴ United States' first written submission, para. 20; second written submission, para. 12.

³⁵ United States' first written submission, para. 20; second written submission, para. 12.

³⁶ United States' first written submission, para. 50.

³⁷ United States' first written submission, para. 50 (referring to Appellate Body Reports, *Korea – Dairy*, para. 99; and *US – Line Pipe*, para. 236).

³⁸ United States' first written submission, para. 50.

³⁹ United States' first written submission, para. 20.

⁴⁰ United States' first written submission, para. 46.

⁴¹ United States' response to Panel question No. 52, para. 93.

⁴² Appellate Body Reports, *Korea – Dairy*, para. 85; *Argentina – Footwear (EC)*, para. 92.

⁴³ See e.g. United States' response to Panel question No. 46, paras. 83-84; and opening statement at second meeting of the Panel, para. 4.

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

7.19. Like previous DSB reports, we consider that the obligation under Article 3.1 to provide findings and reasoned conclusions on all pertinent issues of fact and law requires findings and reasoned conclusions reached on the factual circumstances set out in the first clause of Article XIX:1(a) of the GATT 1994.⁴⁴ In particular, because unforeseen developments and the effect of obligations incurred are circumstances that must be demonstrated *as a matter of fact in order for a safeguard measure to apply*, we consider them to be "pertinent issues" under Article 3.1.

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

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

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

7.2.2 Unforeseen developments

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

⁴⁴ Appellate Body Report, *US – Lamb*, para. 76; Panel Report, *Ukraine – Passenger Cars*, para. 7.56.

⁴⁵ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 89; *Korea – Dairy*, paras. 74-75 and 77.

⁴⁶ We note in this regard that while the United States' Article 5.1 argument is based on the report of the Appellate Body in *US – Line Pipe*, the Appellate Body noted in that case that there are two basic enquiries that an interpreter faces under the Agreement on Safeguards. First, whether there is a right to apply a safeguard measure and second, whether that measure has been applied, in the words of Article 5.1, "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". The Appellate Body noted that it is this second enquiry that is addressed in the first sentence of Article 5.1. (Appellate Body Report, *US – Line Pipe*, para. 225).

⁴⁷ Korea's first written submission, para. 85; second written submission, paras. 47 and 72.

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

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

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

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

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

7.2.3 Effect of the obligations incurred under the GATT 1994

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

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

⁴⁸ United States' response to Panel question No. 51, para. 91.

⁴⁹ United States' response to Panel question No. 51, para. 91.

⁵⁰ USITC report, (Exhibit KOR-1), p. 36 and fn 219.

⁵¹ United States' response to Panel question No. 51, para. 92.

⁵² United States' first written submission, para. 54.

⁵³ United States' first written submission, para. 54.

⁵⁴ Korea's first written submission, paras. 59 and 80; second written submission, para. 51.

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

7.30. The United States responds that the tariff concessions speak for themselves, because they reflect WTO bound rates that limit the United States' ability to reduce imports by raising tariffs.⁵⁹ According to the United States, no additional context is needed in the identification of such tariff concessions because the Schedules of Concessions annexed to the GATT 1994 are made an integral part of Part I of that Agreement pursuant to paragraph 7 of Article II of the GATT 1994.⁶⁰

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

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

U.S. tariff treatment

Finished LRWs are classifiable in subheading 8450.20.0063 of the Harmonized Tariff Schedule of the United States ("HTS"), which has a general tariff duty rate of 1 percent *ad valorem*. Parts and subassemblies covered by the scope of the investigation are classified under HTS subheading 8450.90.20, which provides for tubs and tub assemblies, and HTS subheading 8450.90.60, which provides for other parts. These two subheadings ... each have a general duty rate of 2.6 percent *ad valorem*.^[65] Decisions on the tariff classification and treatment of imported goods are within the authority of U.S. Customs and Border Protection.

^[65] Harmonized Tariff Schedule of the United States (2017). Under the U.S.-Israel FTA, the Caribbean Basin Economic Recovery Act ("CBERA") or the Generalized System of Preferences ("GSP") program, the rate of duty is 0 percent.⁶¹

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

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

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

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

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

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

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

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

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

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

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

7.2.4 Conclusion

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

7.3 The USITC's definition of the domestic industry

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

7.37. With respect to covered parts, the USITC noted that the petitioner acknowledged that imported covered parts did not compete with domestically produced covered parts because they may only be installed in specific LRW models for purposes of repairing them.⁶⁶ The USITC however determined that domestic covered parts were "like" imported covered parts based on an assessment of their physical properties, customs treatment, manufacturing process, uses⁶⁷, and marketing channels.⁶⁸ The USITC then stated that "[e]ven if domestically produced parts were not like imported parts ... [it] would still define the domestic industry to include domestic production of such parts pursuant to the 'product line' approach".⁶⁹ In referring to this product line approach, the USITC stated that it also included covered parts in its definition of the domestic industry based on the vertically integrated nature of domestic parts and LRW production.⁷⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

- b. second, the USITC acted inconsistently with Articles 2.1 and 4.1(c) in finding that domestically produced covered parts were "like" imported covered parts, even though those parts did not compete⁷²; and
- c. third, the USITC acted inconsistently with Article 4.1(c) by applying the "product line approach" to define the domestic industry.⁷³

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

For the purposes of this Agreement:

...

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

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

7.42. Article 2.1 of the Agreement on Safeguards reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁶ Fn omitted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.3.2 Likeness of domestically produced parts and imported parts of LRWs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.3.3 Product line approach

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

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

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

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

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

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

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

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

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

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

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

¹¹⁴ Korea's first written submission, paras. 213-215; second written submission, paras. 145-146 (referring to Appellate Body Report, *US – Lamb*, paras. 77 and 90).

¹¹⁵ Korea's first written submission, para. 214 (referring to Appellate Body Report, *US – Lamb*, paras. 77 and 90).

¹¹⁶ United States' responses to Panel question No. 8, para. 3; No. 9(a), paras. 4-5; and No. 9(b), para. 7.

¹¹⁷ United States' first written submission, paras. 182-183; response to Panel question No. 9(a), para. 6.

¹¹⁸ USITC report, (Exhibit KOR-1), p. 17.

¹¹⁹ USITC report, (Exhibit KOR-1), p. 19.

¹²⁰ USITC report, (Exhibit KOR-1), p. 19. (fn omitted; emphasis added)

¹²¹ USITC report, (Exhibit KOR-1), p. 17.

¹²² USITC report, (Exhibit KOR-1), p. 19. (emphasis added)

¹²³ USITC report, (Exhibit KOR-1), p. 19.

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

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

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

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

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

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

7.3.4 Conclusion

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

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

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

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

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

- a. We find that the USITC acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because it included LRW parts in the definition of the domestic industry based on (i) its finding of likeness between imported and domestically produced LRW parts, and (ii) its application of the product line approach. We do not find it necessary to address whether the USITC also acted inconsistently with Article 2.1 for these same reasons.
- b. We reject Korea's claim under Article 4.1(c) of the Agreement on Safeguards, as well as Articles 2.1 and 3.1 of the Agreement on Safeguards challenging the USITC's inclusion of belt-driven washers in the definition of the domestic industry.
- c. We do not find it necessary to address here Korea's claims that as a consequence of the improper definition of the domestic industry, the USITC's determination of serious injury and causation was also inconsistent with Articles 2.1, 3.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards.

7.4 The USITC's determination of increased imports

7.78. Korea claims that the USITC's examination of the increase in imports is inconsistent with Article 2.1 as well as Article 3.1 of the Agreement on Safeguards.¹²⁸ Specifically, Korea submits¹²⁹ that the USITC (a) erred in cumulatively assessing imports of LRWs and imports of LRW parts in its increased imports analysis¹³⁰; (b) failed to consider the increase in imports relative to domestic consumption (i.e. the market share of subject imports) as part of its increased imports assessment¹³¹; and (c) failed to provide a reasoned and adequate explanation in support of its determination of increased imports.¹³²

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

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

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

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

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

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

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

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

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

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

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

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

¹³³ Fn omitted.

¹³⁴ Korea's first written submission, paras. 131-132.

¹³⁵ Korea's second written submission, para. 117.

¹³⁶ Korea's second written submission, para. 117.

¹³⁷ Korea's first written submission, para. 117; opening statement at the first meeting of the Panel, para. 33; and second written submission, para. 117.

¹³⁸ Korea's first written submission, para. 117; opening statement at the first meeting of the Panel, para. 33; and second written submission, para. 117.

¹³⁹ United States' first written submission, para. 199 and fn 405; opening statement at the first meeting of the Panel, para. 16.

¹⁴⁰ United States' first written submission, para. 199. The United States relies on the text of Article 2.1 as well as the DSB report in *Dominican Republic – Safeguard Measures* in arguing that having defined the PUC as LRWs and LRW parts, the USITC was entitled to use a data set for the PUC (overall), rather than for separate products (such as LRWs and LRW parts) within the overall PUC. (United States' first written submission, para. 199 (referring to Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.236)).

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

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

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

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

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

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

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

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

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

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

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

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

¹⁴⁶ Fn omitted; emphasis added.

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

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

7.89. Korea contends, relying on previous DSB reports, that in determining whether imports have increased in such increased quantities as to cause or threaten to cause serious injury to the domestic industry within the meaning of Article 2.1, an investigating authority must consider (a) whether the increase in imports was recent enough, sudden enough, sharp enough, and significant enough; and (b) the trends in imports or changes in imports over the entire period of investigation (POI).¹⁴⁸ Korea asserts that it is not sufficient under Article 2.1 to compare the changes in imports from the start point of the POI to the end point of the POI, and that an investigating authority must consider the intervening trends over the POI.¹⁴⁹ However, per Korea the USITC failed to (a) evaluate and explain the trends in import volumes over the POI, including the rate and significance of the increase¹⁵⁰; and (b) account for the most recent trends in imports, which according to Korea included a deceleration of the rate of increase in imports since 2015 and decline in imports in interim 2017 relative to interim 2016.¹⁵¹

7.90. The United States asserts that the USITC provided a reasoned and adequate explanation consistent with Articles 2.1 and 3.1 of how the facts supported its finding that imports increased in absolute terms and relative to domestic production. The United States submits in this regard that the USITC examined trends in each year of the POI, as well as the rate and amount of increase in imports over this period.¹⁵² In particular, the United States explains that the USITC considered the year-on-year increase in the volume of subject imports (from 2012-2013, 2013-2014, 2014-2015, and 2015-2016), found that subject imports doubled during the POI, and characterized the rate of increase in subject import volume as "steady".¹⁵³ The United States does not dispute that there was a deceleration of the rate of increase in imports since 2015 and a decline in imports in interim 2017 relative to interim 2016.¹⁵⁴ With respect to the deceleration of the rate of increase in imports between 2015 and 2016, the United States responds that the USITC addressed this trend in the serious injury section of its report. Specifically, the United States alleges that the USITC found that the level of imports in 2016 was restrained by the imposition of provisional anti-dumping duties on LRWs from China.¹⁵⁵ With respect to the decline in imports towards the end of the POI, the United States responds that the USITC explained that the absolute volume of imports remained substantial in interim 2017 and was only down from interim 2016 due to supply disruptions related to LG's and Samsung's transfer of production from China to Thailand and Viet Nam and Samsung's recall of 2.8 million units.¹⁵⁶

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

¹⁴⁸ Korea's first written submission, paras. 125-126.

¹⁴⁹ Korea's second written submission, para. 88.

¹⁵⁰ Korea's first written submission, para. 144; second written submission, para. 90. See also, Korea's opening statement at the first meeting of the Panel, para. 32; response to Panel question No. 73, para. 37; and comments on the United States' response to Panel question No. 72(c), para. 59.

¹⁵¹ Korea's first written submission, paras. 138 and 141; second written submission, para. 90. See also, Korea's opening statement at the first meeting of the Panel, para. 32; opening statement at the second meeting of the Panel, para. 26; response to Panel question No. 73, paras. 38-39; and comments on the United States' response to Panel question No. 72(c), para. 63.

¹⁵² United States' first written submission, paras. 193 and 207.

¹⁵³ United States' first written submission, para. 207 and fn 435; second written submission, para. 68. See also, United States' opening statement at the first meeting of the Panel, para. 17; and response to Panel question No. 72(c), para. 17.

¹⁵⁴ United States' first written submission, para. 201; second written submission, para. 58; and responses to Panel question No. 72(a), para. 15; and No. 72(c), para. 19.

¹⁵⁵ United States' response to Panel question No. 72(c), para. 19.

¹⁵⁶ United States' first written submission, para. 193 (referring to USITC report, (Exhibit KOR-1), pp. 30 and 38); second written submission, para. 63. See also, United States' opening statement at the first meeting of the Panel, para. 17.

¹⁵⁷ Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.

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

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

In absolute terms, imports of LRWs increased steadily from *** units in 2012 to *** units in 2013, *** units in 2014, *** units in 2015, and *** units in 2016, a level *** percent higher than in 2012. Imports of LRWs were *** units in interim 2017, as compared to *** units in interim 2016. At the same time, imports increased steadily relative to the domestic industry's production from *** percent in 2012 to *** percent in 2013, *** percent in 2014, *** percent in 2015, and *** percent in 2016. Imports relative to the domestic industry's production were *** percent in interim 2017, as compared to *** percent in interim 2016.¹⁶³

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

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

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

¹⁵⁸ Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

¹⁵⁹ Appellate Body Report, *US – Steel Safeguards*, para. 367.

¹⁶⁰ Panel Reports, *US – Steel Safeguards*, para. 10.163.

¹⁶¹ Panel Reports, *US – Steel Safeguards*, para. 10.163.

¹⁶² See, e.g. Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

¹⁶³ USITC report, (Exhibit KOR-1), p. 20. (fn omitted; redacted original)

¹⁶⁴ In Panel question No. 70, we asked the United States to provide the percentage year-on-year increase in imports over the entire POI. We informed the United States that in answering that question it could treat import volumes in 2012 (the first year of the POI) as 100 (indexed) and map the percentage changes in imports over the result of the POI. We also asked the United States to comment on what sort of additional procedures, beyond the BCI procedures that we had already adopted in these proceedings, it considered necessary to provide use with this information while safeguarding its confidentiality. The United States declined to provide us with the information requested in question No. 70 on grounds of business confidentiality. (United States' response to Panel question No. 70, para. 8). The United States also informed us that it was unable to offer alternative procedures that would adequately preserve the USITC's institutional ability to collect business confidential information in its investigations. (United States' response to Panel question No. 71, para. 10).

¹⁶⁵ USITC report, (Exhibit KOR-1), p. 38. (redacted original)

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

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

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

7.4.4 Conclusion

7.98. In light of the above:

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

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

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

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

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

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

7.5 The USITC's serious injury determination

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

- a. The USITC failed to evaluate *all* the injury factors set out in Article 4.2(a) as part of its serious injury finding, specifically¹⁷¹:
 - i. the rate and amount of increase in imports in absolute and relative terms; and
 - ii. the share of the domestic market taken by increased imports.
- b. The USITC failed to make an objective assessment of profits.¹⁷²
- c. The USITC failed to make an objective assessment of the share of the domestic market taken by increased imports.¹⁷³
- d. The USITC's serious injury finding was vitiated by its flawed definition of the domestic industry on two grounds:
 - i. As a consequence of Korea's claims concerning the USITC's definition of the domestic industry, the USITC's serious injury finding is also flawed.¹⁷⁴
 - ii. When examining profitability, the USITC excluded financial data relating to a producer whom it had included in its scope of the domestic industry.¹⁷⁵
- e. The USITC failed to undertake an objective examination of the significant overall impairment of the domestic industry and based its serious injury determination on declining profitability alone.¹⁷⁶

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

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

¹⁷¹ Korea's first written submission, paras. 260-269.

¹⁷² Korea's first written submission, paras. 278-298.

¹⁷³ Korea's first written submission, paras. 307-319.

¹⁷⁴ Korea's first written submission, paras. 321-327.

¹⁷⁵ Korea's first written submission, paras. 328-330.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.110. Korea contends that the USITC failed to undertake an objective examination of the factor "profits and losses", and to support its finding by a reasoned and adequate explanation, therefore acting inconsistently with Articles 3.1, 4.1(a), 4.2(a), and 4.2(c).¹⁹⁵ Korea alleges that the USITC failed to: (i) account for record evidence of joint-selling practices over washers and dryers and related overall profits in the laundry segment¹⁹⁶; and (ii) engage with evidence that Whirlpool's reported operating losses were inconsistent with its profit margin for its overall North American operations.¹⁹⁷ We address these arguments separately.

Joint-pricing theory

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

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

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

¹⁹⁵ Korea's first written submission, paras. 278 and 298.

¹⁹⁶ Korea's first written submission, paras. 279-291.

¹⁹⁷ Korea's first written submission, para. 292.

¹⁹⁸ Korea's first written submission, paras. 280-284.

¹⁹⁹ Korea's second written submission, para. 178.

²⁰⁰ Korea's first written submission, paras. 287 and 290; second written submission, para. 176.

²⁰¹ Korea's first written submission, paras. 287-291; opening statement at the first meeting of the Panel, paras. 61-64; and second written submission, paras. 176-186.

²⁰² United States' first written submission, para. 254.

²⁰³ United States' first written submission, para. 255; opening statement at the first meeting of the Panel, para. 24.

²⁰⁴ United States' first written submission, para. 257.

²⁰⁵ United States' first written submission, para. 259.

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

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

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

The profit data relied upon by the USITC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.122. We note that the USITC found that the record as whole did not support the respondents' argument that consumers increasingly favoured imported LRWs over domestic LRWs because of non-price factors.²²⁰ The USITC relied on certain data to conclude that there was a moderate to high degree of substitutability between imported LRWs and domestic LRWs. The USITC observed that (a) all responding purchasers (which accounted for nearly all of the purchases of LRWs during the POI) reported that the subject imports were either always or usually interchangeable with domestically produced LRWs²²¹; and (b) most responding purchasers reported that domestic LRWs were either comparable or superior to imported LRWs in terms of most non-price factors, including

²¹² Korea's second written submission, para. 188.

²¹³ Korea's second written submission, para. 188; response to Panel question No. 29, para. 170.

²¹⁴ Korea's first written submission, paras. 307 and 319.

²¹⁵ Korea's first written submission, paras. 310 and 314; second written submission, para. 201.

²¹⁶ Korea's first written submission, paras. 314-316 and 318.

²¹⁷ Korea's first written submission, para. 317.

²¹⁸ Korea's first written submission, para. 309.

²¹⁹ United States' first written submission, paras. 264-265 (referring to USITC report, (Exhibit KOR-1), pp. 27 and 29-30). See also United States' first written submission, para. 267 (referring to USITC report, (Exhibit KOR-1), p. 42 and fn 261); and opening statement at the first meeting of the Panel, para. 26.

²²⁰ USITC report, (Exhibit KOR-1), pp. 29-30.

²²¹ USITC report, (Exhibit KOR-1), pp. 27 and 29.

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

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

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

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

7.125. Korea claims that the USITC's definition of the domestic industry vitiated its serious injury finding based on two grounds²²⁸:

- a. First, Korea contends that because the USITC's serious injury finding was based on an improperly defined domestic industry, this serious injury finding was inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c) of the Agreement on Safeguards.²²⁹
- b. Second, Korea argues that the USITC's serious injury assessment was not objective because, when examining the profitability of the domestic industry, the USITC excluded the financial data of Alliance Laundry Systems (Alliance), the only domestic producer of belt-driven washers (which was part of the domestic industry), thereby relying on

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

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

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

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

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

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

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

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

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

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

7.127. Regarding Korea's second set of claims, the United States argues that the USITC was justified in excluding financial data of the US producer of belt-driven washers (Alliance) when examining the "profits and losses" of the domestic industry because (a) Alliance submitted its questionnaire response late in the investigation, rendering the USITC unable to ensure its financial data were reliable²³³; and (b) the financial data used by the USITC covered almost all of the domestic industry's operations and were therefore sufficiently representative.²³⁴ The United States submits that having defined the domestic industry to include domestic producers of belt-driven washers, the USITC was required to consider data relating to these producers as part of its serious injury analysis, to the extent that those data were found to be reliable. According to the United States, an investigating authority that uses unreliable financial data to analyse serious injury cannot make reasoned conclusions on pertinent issues of law and fact (as required under Article 3.1), and unreliable data is not an objective measure of the industry's financial performance (as required under Article 4.2(a)).²³⁵ The United States asserts that when a domestic producer reports unreliable financial data, the investigating authority may make inferences based on the available information on the domestic industry's financial performance, which in this case consisted of financial data reported by other domestic producers, that accounted for the majority of domestic sales of the like product.^{236, 237}

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.5.6 Conclusion

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

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

²⁴³ Korea's first written submission, paras. 270 and 306.

²⁴⁴ Korea's first written submission, paras. 270 and 273.

²⁴⁵ Korea's response to Panel question No. 22, para. 117.

²⁴⁶ Korea's first written submission, para. 273.

²⁴⁷ The United States argues that the following six factors were indicative of injury: (a) import volume doubled during the POI; (b) the penetration of subject imports in the US market significantly increased; (c) the financial performance of the domestic industry "precipitously" declined; (d) the domestic industry's sales prices declined; (e) the cost of goods sold (COGS) to net sales ratio increased; and (f) the capital and R&D expenditures of the domestic industry declined. (United States' first written submission, para. 247 (referring to USITC report, (Exhibit KOR-1), pp. 33, 36-37, 39, 42-43, and V-28)).

²⁴⁸ United States' first written submission, paras. 237, 241-243, 246, and 249-251.

- b. We reject, for the reasons set out in paragraph 7.119 above, Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC allegedly failed to objectively examine "profit and loss".
- c. We reject Korea's claims under Article 4.2(a) of the Agreement on Safeguards that the USITC allegedly failed to objectively examine the share of the domestic market taken by increased imports.
- d. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC failed to evaluate all injury factors set out in Article 4.2(a).
- e. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 2.1, 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that are consequential to Korea's claims challenging the USITC's definition of the domestic industry.
- f. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC failed to undertake an objective examination of the significant overall impairment of the domestic industry and based its overall finding of serious injury on one factor alone.

7.6 The USITC's causation determination

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

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

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

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

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

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

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

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

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

7.6.1 First stage of the USITC's causation determination

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

- a. the USITC's finding on price effects, which Korea considers to be flawed and incomplete;
- b. the USITC's findings on coincidence in trends between imports and injury factors, which, for the reasons set out below, we find are interlinked with the USITC's price analysis; and
- c. the USITC's failure to address certain conditions of competition in the domestic market, which per Korea negated the USITC's finding on causation.

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

7.6.1.1 The USITC's price effects analysis

7.143. In the underlying investigation, the USITC made the following finding regarding the adverse price effects of subject imports²⁵⁵:

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

Our finding that imported LRWs depressed and suppressed domestic like product prices is also supported by evidence that *low-priced import competition* forced Whirlpool to cut

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

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

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

7.144. The USITC relied on these findings to conclude as follows²⁵⁶:

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

...

In sum, despite strong demand growth and the competitiveness of domestically produced LRWs, the domestic industry experienced increasing operating and net losses during the period of investigation as its sales prices declined while its costs generally increased. The record shows that the domestic industry's declining sales prices during the period of investigation resulted from low-priced import competition, as increasing quantities of low-priced imports depressed and suppressed prices for the domestic like product. We therefore conclude that imports were a substantial cause of serious injury to the domestic industry.

7.145. We note in this regard that the price data that the USITC used to make its finding on price suppression and depression were based on six product categories that covered various types of LRWs, but not agitator-based TL LRWs, which accounted for half of domestic sales but relatively few imports.²⁵⁷ The United States confirms in this regard that the USITC did not ask domestic producers to provide price data on agitator-based TL LRWs.²⁵⁸ In the section of its report where the USITC examined the degree of substitutability between imports and domestically produced LRWs, the USITC acknowledged that agitator-based TL LRWs accounted for half of domestic shipments and few import shipments, but stated that differences in the product mix of imports did not attenuate import competition to a significant degree.²⁵⁹ In particular, the USITC stated as follows²⁶⁰:

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

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

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

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

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

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

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

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

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

7.147. In the underlying investigation, as we noted above, the USITC found that the domestic industry's average cost of goods sold (COGS) and its ratio of COGS to net sales generally increased during the POI, placing the industry in a cost-price squeeze.²⁶¹ Regarding average COGS, the USITC noted that the average COGS increased between 2012-2013 and 2013-2014 before declining in 2015 and 2016 to a level certain percentage higher than in 2012.²⁶² The USITC noted that this average COGS was higher in interim 2017 than in interim 2016.²⁶³ The USITC found that the ratio of COGS to net sales increased steadily from 2012-2013, 2013-2014, 2015-2016, and again from interim 2016 to interim 2017.²⁶⁴

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

- a. costs were actually declining in 2015 and 2016²⁶⁷;
- b. average unit COGS declined in 2014-2015 and 2015-2016²⁶⁸; and
- c. the domestic industry's raw material costs were at their lowest at the end of the POI, and there was no overall substantial change in the cost share of essential inputs during the examined period.²⁶⁹

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

²⁶¹ USITC report, (Exhibit KOR-1), p. 43.

²⁶² USITC report, (Exhibit KOR-1), fn 264.

²⁶³ USITC report, (Exhibit KOR-1), fn 264.

²⁶⁴ USITC report, (Exhibit KOR-1), fn 264.

²⁶⁵ Korea's first written submission, paras. 377-378; response to Panel question No. 31, para. 182.

²⁶⁶ Korea's first written submission, para. 378.

²⁶⁷ Korea's first written submission, para. 378.

²⁶⁸ Korea's first written submission, para. 378.

²⁶⁹ Korea's first written submission, para. 378.

²⁷⁰ United States' first written submission, para. 290.

²⁷¹ United States' first written submission, para. 288.

²⁷² United States' first written submission, para. 289.

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

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

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

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

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

Issues raised by Korea regarding the six product categories

7.153. Korea raises the following issues regarding the six product categories used by the USITC²⁷⁵:

- a. The six product categories included multiple models with different price ranges.
- b. The price data were unrepresentative because they were adopted from an earlier anti-dumping investigation on LRWs from China and not updated:
 - i. Many large-capacity options were not included in the LRW price data.
 - ii. Product category 1 covered models that were no longer being sold by the domestic industry during the end of the POI, and neither were they among LG's top-volume FL LRWs.
- c. The USITC did not provide information on how it made its price comparisons, including whether it made adjustments for any differences between products in the same product category.

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

²⁷³ United States' first written submission, para. 289.

²⁷⁴ Korea's response to Panel question No. 31, paras. 180-182; second written submission, paras. 240-241.

²⁷⁵ Korea's first written submission, paras. 399-404.

²⁷⁶ Korea's first written submission, para. 399.

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

7.155. We note that the USITC specifically considered and rejected the Korean respondents' argument on this point as follows²⁷⁸:

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

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

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

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

²⁷⁷ United States' first written submission, para. 304.

²⁷⁸ USITC report, (Exhibit KOR-1), fn 255.

²⁷⁹ In addition, in the absence of any specific rules in the Agreement on Safeguards determining how an investigating authority should make price comparisons, investigating authorities have a certain degree of discretion in determining how they make such price comparisons, provided such comparisons provide a sufficient factual basis to make objective findings. Nothing in the Agreement on Safeguards prohibits an investigating authority from making price comparisons based on product categories that group products based on characteristics such as capacity or configuration, or requires price comparisons on a more granular, model-specific basis. While an investigating authority is free to make price comparisons on such a model-specific basis, absent any showing that the methodology that the USITC chose (i.e. the adoption of the six product categories) did not allow the USITC to make a proper determination of price effects with respect to the products covered by those product categories, Korea has not established that the USITC acted inconsistently with Article 4.2(b) or any other provision of the Agreement on Safeguards.

²⁸⁰ Korea's first written submission, para. 400.

²⁸¹ United States' response to Panel question No. 37(a), para. 68.

²⁸² United States' response to Panel question No. 37(b), para. 69.

²⁸³ United States' response to Panel question No. 37(b), paras. 70-71.

²⁸⁴ United States' response to Panel question No. 37(b), paras. 70-71.

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

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

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

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

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

²⁸⁵ United States' response to Panel question No. 37(a), para. 68.

²⁸⁶ Indeed, the alternative would have been to simply ignore any imports or domestic sales of this product type and forego collection of price data with respect to this product category.

²⁸⁷ LG's comments on draft questionnaires (12 June 2017), (Exhibit KOR-35), pp. 19 and 24.

²⁸⁸ Korea's first written submission, paras. 402-403.

²⁸⁹ Korea's first written submission, para. 403.

²⁹⁰ Korea's first written submission, para. 403.

²⁹¹ Korea's first written submission, para. 403. See also Korea's second written submission, para. 245.

²⁹² Korea's first written submission, para. 396; response to Panel question No. 77, para. 85.

²⁹³ Korea's response to Panel question No. 33, para. 184; second written submission, para. 238.

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

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

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

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

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

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

²⁹⁴ See e.g. Korea's first written submission, paras. 376, 381, and 394-396; response to Panel question No. 77, para. 85.

²⁹⁵ United States' second written submission, para. 100.

²⁹⁶ United States' first written submission, para. 301.

²⁹⁷ United States' second written submission, paras. 102-104 (referring to USITC report, (Exhibit KOR-1), p. 32 and fns 201-202).

²⁹⁸ United States' first written submission, para. 81.

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

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

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

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

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

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

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

7.6.1.2 The USITC's analysis on coincidence in trends

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

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

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

³⁰³ See, e.g. Panel Report, *China – GOES (Article 21.5 – US)*, para. 7.111. In the context of reviewing the investigating authority's price effects finding under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, the panel expressed the view that if subject imports and domestically produced goods did not compete, it was unlikely that subject imports would suppress or depress domestic prices. However, the panel considered that it did not necessarily follow that just because subject imports and domestic products did compete on price, increases in subject import volume would necessarily have a suppressive or depressive effect on the prices of the domestic product. Instead, according to this panel, it would be incumbent on an investigating authority to show how its factual findings concerning price competition supported its conclusions regarding the suppressive or depressive effect of subject imports on the prices of the domestic like product.

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

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

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

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

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

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

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

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

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

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

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

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

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

7.6.1.3.1 Differences in the product mix between imported and domestic LRWs

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

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

7.6.1.3.2 Competition between imported and domestic parts

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

³¹² USITC report, (Exhibit KOR-1), pp. 42-44.

³¹³ USITC report, (Exhibit KOR-1), pp. 38 and 40.

³¹⁴ Korea's first written submission, para. 412.

³¹⁵ Korea's first written submission, paras. 413-414.

³¹⁶ Korea's first written submission, para. 413.

³¹⁷ United States' first written submission, paras. 308-309.

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

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

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

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

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

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

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

7.6.2 Second stage of the USITC's causation determination

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

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

³¹⁸ United States' response to Panel question No. 38, para. 72.

³¹⁹ Korea's first written submission, para. 409.

³²⁰ United States' first written submission, para. 307.

³²¹ United States' first written submission, para. 307.

³²² United States' first written submission, para. 307.

³²³ USITC report, (Exhibit KOR-1), p. 17. The United States confirms that the USITC's finding was based on likeness between imported parts and domestic parts. (United States' first written submission, paras. 149 and 178).

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

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

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

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

- a. First, we will review Korea's claim challenging the USITC's rejection of the Korean respondents' argument that joint pricing and deterioration of US brands were "other factors" causing injury to the domestic industry. In doing so, we will:
 - i. examine whether, as Korea contends, the USITC acknowledged that these two factors were causing injury to the domestic industry; and
 - ii. if we find that the USITC's finding was that these factors were not causing *any* injury to the domestic industry, whether the USITC provided a reasoned and adequate explanation in support of that finding.
- b. Second, we will review Korea's claim challenging the USITC's application of the substantial cause test.

³²⁴ Korea's first written submission, section VIII.3.3.1 and para. 425.

³²⁵ Korea's opening statement at the first meeting of the Panel, para. 80; second written submission, para. 269; and response to Panel question No. 78, para. 96.

³²⁶ United States' first written submission, para. 316.

³²⁷ See, e.g. Panel Report, *Ukraine – Passenger Cars*, para. 7.334.

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

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

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

7.189. In assessing whether the USITC found that joint pricing was a factor causing injury to the domestic industry, we review the USITC's analysis on joint pricing as a whole, rather than focusing just on those parts of the USITC's report where it was referring to the substantial cause test. Our review of the USITC report shows that while the USITC framed its enquiry in terms of US statutory language by noting that joint pricing was not a factor that was an important cause of injury to the domestic industry, the USITC found joint pricing to not be a factor causing injury to the domestic industry. For instance, the USITC stated that (a) the record did not support the respondents' assertion that Whirlpool and GE purposely priced their LRWs to sell at a loss on the expectation that profitable sales of matching dryers would compensate³³⁰; and (b) the respondents' "joint pricing" theory could not explain the domestic industry's dramatically worsening operating and net losses during the POI.³³¹ We conclude on the basis of our review of the USITC report that the USITC found that joint pricing was not a factor causing injury to the domestic industry, such that the USITC was not required to undertake any non-attribution analysis in respect of this alleged factor.

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

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

- a. an alleged disconnect between Whirlpool's record profits from its North American operations and its losses on US sales of LRWs³³⁵; and
- b. an alleged failure by the USITC to provide any support for its explanation that, if the respondents' joint-pricing theory was true, Whirlpool should have been able to maintain at least a modest level of profitability of LRWs.³³⁶

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

³²⁸ Korea's first written submission, para. 422.

³²⁹ See, e.g. United States' first written submission, fn 693.

³³⁰ USITC report, (Exhibit KOR-1), p. 45.

³³¹ USITC report, (Exhibit KOR-1), p. 51.

³³² Korea's first written submission, para. 429.

³³³ Korea's first written submission, para. 430.

³³⁴ See, e.g. Korea's response to Panel question No. 78, para. 97.

³³⁵ Korea's first written submission, para. 435.

³³⁶ Korea's first written submission, para. 431.

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

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

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

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

³³⁷ United States' first written submission, paras. 319-323.

³³⁸ United States' first written submission, para. 327.

³³⁹ USITC report, (Exhibit KOR-1), pp. 45-46.

³⁴⁰ USITC report, (Exhibit KOR-1), p. 46.

³⁴¹ Korea's second written submission, para. 271.

³⁴² Korea's first written submission, paras. 432-434.

³⁴³ United States' first written submission, para. 322.

³⁴⁴ For instance, the USITC noted that documents filed by Samsung did not show "net wholesale pricing" for matching LRWs and dryers, as respondents claimed, because the prices listed were not for actual sales, and the extent to which the wholesale prices listed in the document may be subject to further negotiation was unclear. (USITC report, (Exhibit KOR-1), fn 277).

³⁴⁵ Korea refers to the expert report of an economist that Korean respondents provided to the USITC, which noted why joint pricing was in line with economic theory, Whirlpool's reference to the laundry segment in its filing with the US Security and Exchange Commission, and to evidence that per Korea demonstrated that relative higher margins on dryers were capable of offsetting lower margins on washers. (Korea's response to Panel question No. 78, para. 99). Korea asserts that the USITC refused to consider the highly plausible alternative explanations regarding joint pricing by the domestic industry based on statements made by the CEO of the petitioner and because under the US statute the focus must be on losses to LRWs. However, we are not persuaded that these undermine the USITC's finding that joint pricing did not explain any injury to the domestic industry. In particular, we have already stated above that the investigating authority needs to determine the serious injury to the domestic industry producing the like or directly competitive product. The USITC found LRWs, not dryers, to be the like product. If a domestic producer suffers losses with respect to the like product at issue, i.e. LRWs, and there is serious injury to the producer on account of losses suffered on the like product, we do not see why higher margins on a product that is not like or directly competitive with the PUC (here, dryers) would undermine that finding. In this regard, we note that the USITC found that the record did not support the respondents' assertion that Whirlpool and GE purposely priced their LRWs to sell at a loss with the expectation that profits from dryers would compensate. (USITC report, (Exhibit KOR-1), p. 45).

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

7.195. Regarding the supposed disconnect between Whirlpool's record profits from its North American operations and its losses on US sales of LRWs, Korea contends that these results would not have been possible unless Whirlpool generated reasonable profits from its laundry segment (which included dryers and LRWs), and asserts that the USITC did not respond to this evidence.³⁴⁶ While Korea submits that the USITC did not respond to this evidence, the record shows that the USITC did in fact respond to this evidence as follows³⁴⁷:

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

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

7.197. As regards Korea's argument that the USITC did not provide any support for its statement that if the respondents' joint-pricing theory was true, Whirlpool should have been able to maintain at least a modest level of profitability of LRWs, Korea contends that because the USITC did not provide such support, its rejection was not based on objective evidence.³⁴⁸ Korea submits in this regard that the essence of its claim is that the USITC's determination on joint pricing was not supported by objective evidence or a reasoned and adequate explanation.³⁴⁹ We note that the USITC provided the following explanation in its report³⁵⁰:

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

³⁴⁶ Korea's second written submission, para. 271.

³⁴⁷ USITC report, (Exhibit KOR-1), fn 210.

³⁴⁸ Korea's response to Panel question No. 42, para. 199.

³⁴⁹ Korea's response to Panel question No. 42, para. 201.

³⁵⁰ USITC report, (Exhibit KOR-1), pp. 46-47. (fns omitted; redacted original)

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

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

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

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

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

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

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

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

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

³⁵¹ USITC report, (Exhibit KOR-1), p. 48.

³⁵² USITC report, (Exhibit KOR-1), p. 51. The USITC found that the respondents' alleged alternative cause of injury, which included deterioration of US brands was not supported by the record evidence and also that the brand deterioration theory "could explain none of the injury sustained by the [domestic] industry".

³⁵³ Korea's response to Panel question No. 43, para. 206.

³⁵⁴ Korea's first written submission, paras. 439-441.

³⁵⁵ Korea's first written submission, paras. 441-442.

³⁵⁶ Korea's first written submission, para. 444.

³⁵⁷ Korea's first written submission, paras. 444-445.

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

- a. that its record did not support the respondents' argument that subject imports were superior to domestic LRWs in terms of non-price factors like brand, innovation, and design³⁵⁹; and
- b. that this argument was also undermined by:
 - i. the price data before the USITC that showed that prices of those imported LRW models that respondents considered to be innovative, and thus should have commanded a price premium, were declining; and
 - ii. the extent to which imported LRWs were found to be priced below domestic LRWs.³⁶⁰

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

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

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

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

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

³⁵⁸ United States' first written submission, para. 331.

³⁵⁹ United States' first written submission, paras. 331 and 333.

³⁶⁰ United States' first written submission, para. 334.

³⁶¹ United States' first written submission, para. 335.

³⁶² United States' first written submission, paras. 336-337.

³⁶³ United States' first written submission, paras. 330 and 337.

³⁶⁴ United States' second written submission, paras. 112-113; USITC report, (Exhibit KOR-1), p. 48.

³⁶⁵ USITC report, (Exhibit KOR-1), p. 51.

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

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

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

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

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

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

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

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

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

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

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

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

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

7.6.2.3 Substantial cause test

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

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

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

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

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

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

³⁷⁷ In this regard, Korea relies on the Appellate Body report in *US – Lamb* to support its view.

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

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

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

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

7.6.3 Consequential claims on causation

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

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

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

7.219. The first sentence of Article 5.1 of the Agreement on Safeguards provides, *inter alia*, that a Member shall apply safeguard measures *only to the extent necessary to prevent or remedy serious injury* and *to facilitate* adjustment. The first sentence of Article 7.1 of this agreement provides that a Member shall apply safeguard measures *only for such period of time* as may be necessary to prevent or remedy serious injury and to facilitate adjustment. Korea makes the following sets of claims under Articles 5.1 and 7.1 of the Agreement on Safeguards³⁷⁸:

- a. The United States failed to limit the application of the safeguard measure to the alleged serious injury caused by increased imports and not by other known factors³⁷⁹:
 - i. The United States acted inconsistently with Article 5.1 because it failed to establish that increased imports caused serious injury to the domestic industry, as required by Article XIX:1(a) of the GATT 1994 and Article 4.2(b) of the Agreement on Safeguards, and therefore the resultant safeguard measure was necessary under Article 5.1.
 - ii. The United States acted inconsistently with Article 5.1 because it failed to apply the measure only to prevent or remedy injury caused by increased imports and not that caused by other factors.
- b. The United States failed to provide a reasoned and adequate explanation to support the form and level of the safeguard measure.³⁸⁰
 - i. The United States acted inconsistently with Article 5.1 because its imposition of the safeguard measure on LRW parts was not necessary given the absence of competition between imported and domestic LRW parts.³⁸¹

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

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

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

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

- ii. The United States acted inconsistently with Article 5.1 because the level of the safeguard measure exceeded what was necessary to remedy serious injury.³⁸²
- c. The United States acted inconsistently with Article 5.1 because it failed to take into account existing import restrictions from anti-dumping and countervailing duties.³⁸³
- d. The United States acted inconsistently with Articles 5.1 and 7.1 because the underlying safeguard measure went beyond what was necessary to facilitate adjustment of the domestic industry.³⁸⁴

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

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

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

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

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

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

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

7.7.2.1 Safeguard measure on LRW parts

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

³⁸² Korea's first written submission, paras. 498-504.

³⁸³ Korea's first written submission, paras. 490-494.

³⁸⁴ Korea's first written submission, paras. 505-511.

³⁸⁵ Korea's first written submission, para. 481.

³⁸⁶ Korea's first written submission, para. 486.

³⁸⁷ Korea's first written submission, paras. 496-497 and 514.

which cannot be the case for non-competing products.³⁸⁸ The United States submits that allowing limitless imports of low-priced parts would create the risk that Samsung and LG would convert their US production facilities into kit assembly operations of LRWs, which would be in direct competition with LRWs that are produced domestically from domestic parts.³⁸⁹ Thus, per the United States, inclusion of covered parts in the safeguard measure was necessary to prevent serious injury and facilitate the domestic industry's adjustment to import competition, and did not result in application of the safeguard measure beyond the extent necessary under Article 5.1.³⁹⁰

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

7.7.2.2 Level of the safeguard measure

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

- a. Korea challenges the level of the in-quota rate (20%) and out-of-quota rate (50%) maintained by the United States, noting that such rates were introduced even though the facts showed weak, non-existent serious injury and average price underselling of only 14.2%.³⁹¹ Korea asserts in this regard that since the USITC found lower domestic prices to be directly responsible for the losses to the domestic industry, limiting the safeguard remedy to the price difference between subject imports and domestic like products would have addressed the domestic industry's serious injury.³⁹²
- b. Korea refers to the statements by two of the four commissioners that in-quota tariff rates would exceed the amount necessary to address serious injury to the domestic industry.³⁹³

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

- a. Noting Korea's comparison of the 20% in-quota tariff with the 14.2% weighted-average margin of underselling, the United States submits that such a comparison cannot accurately reflect the likely effect of the tariff on import prices.³⁹⁴
- b. Regarding Korea's argument that two of the four USITC commissioners recommended against an in-quota tariff, the United States notes that the USITC did not reach an institutional recommendation on this point.³⁹⁵

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

³⁸⁸ Korea's first written submission, para. 496.

³⁸⁹ United States' first written submission, para. 364.

³⁹⁰ United States' first written submission, paras. 364-365 (referring to USITC report, (Exhibit KOR-1), p. 74).

³⁹¹ Korea's first written submission, paras. 499-500.

³⁹² Korea's response to Panel question No. 55, para. 234.

³⁹³ Korea's first written submission, paras. 502-503.

³⁹⁴ United States' first written submission, para. 366.

³⁹⁵ United States' first written submission, para. 367 (quoting USITC report, (Exhibit KOR-1), p. 75).

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

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

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

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

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

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

- a. Referring to the USITC's finding that due to such orders the domestic industry was able to temporarily increase its market share, but not its prices, the United States submits that the depression and suppression of domestic like product prices led to the worsening financial losses of the domestic industry.³⁹⁹
- b. In addition, contending that Samsung and LG moved production of LRWs to countries not affected by the anti-dumping and countervailing measures, the United States points to data showing that imports of LRWs from countries affected by the anti-dumping and countervailing measures, such as China, declined, whereas imports from other countries such as Thailand and Viet Nam increased.⁴⁰⁰

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

³⁹⁶ Korea's first written submission, paras. 490 and 494.

³⁹⁷ Korea's second written submission, para. 288.

³⁹⁸ United States' first written submission, paras. 356-357.

³⁹⁹ United States' first written submission, para. 361.

⁴⁰⁰ United States' first written submission, para. 360.

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

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

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

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

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

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

⁴⁰¹ Korea's first written submission, paras. 509 and 511.

⁴⁰² See, e.g. Korea's first written submission, paras. 506 and 510.

⁴⁰³ United States' first written submission, paras. 370 and 372 (referring to Appellate Body Report, *US – Line Pipe*, para. 233; and Panel Report, *Korea – Dairy*, para. 7.108).

⁴⁰⁴ Appellate Body Report, *US – Line Pipe*, para. 233.

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

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

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

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

7.7.5 Conclusion

7.241. In light of the above:

- a. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards that is premised on Korea's view, which we have rejected, that the USITC found factors other than increased imports were causing injury to the domestic industry.
- b. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards challenging the form and level of the United States' safeguard measure. To the extent Korea's claim is premised on its view that the duty on out-of-quota LRW parts was not necessary under Article 5.1, for the reasons set out in paragraph 7.226 above, we do not find it necessary to address this aspect of Korea's claim.
- c. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards that the United States acted inconsistently with this provision in failing to take into account existing import restrictions from anti-dumping and countervailing measures.
- d. We reject Korea's claim under Articles 5.1 and 7.1 of the Agreement on Safeguards that the United States failed to limit the safeguard measure to what was necessary to remedy injury and facilitate adjustment.
- e. We do not find it necessary to address Korea's claim under Article 5.1 of the Agreement on Safeguards that is consequential to Korea's claim under Article 4.2(b) challenging the USITC's determination on causation.

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

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

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

⁴⁰⁶ Panel Report, *Korea – Dairy*, para. 7.108.

⁴⁰⁷ Korea's second written submission, para. 302. (emphasis added)

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

A Member shall immediately notify the Committee on Safeguards upon:

- (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
- (b) making a finding of serious injury or threat thereof caused by increased imports; and
- (c) taking a decision to apply or extend a safeguard measure.

7.244. Article 12.2 provides, in relevant part:

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

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

- a. initiates a safeguard investigation within the meaning of Article 12.1(a) (initiation notification);
- b. makes a finding of serious injury or threat thereof within the meaning of Article 12.1(b) (serious injury notification); and
- c. takes a decision to apply or extend a safeguard measure within the meaning of Article 12.1(c) (decision notification).

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

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

7.8.1 Initiation notification

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

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

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

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

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

7.250. We note that even if we consider the date of initiation of the underlying safeguard investigation to be 5 June 2017, as contended by Korea, this would mean that the United States only took seven days to notify the initiation notification. Taking into account the United States' explanation regarding the internal administrative process associated with the preparation of the initiation notification⁴¹² as well as the associated administrative burden⁴¹³, we do not consider that the United States' notification of its initiation of the underlying safeguard investigation was not "immediate" under Article 12.1(a).⁴¹⁴

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

7.8.2 Serious injury notification

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

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

- a. On 5 October 2017, the USITC commissioners held a public vote on serious injury in which they determined that increased imports caused serious injury to the domestic industry:
 - i. On 12 October 2017, the United States notified the Committee on Safeguards under Article 12.1(b) of the WTO Agreement on Safeguards that "there has been a finding of serious injury or threat thereof caused by increased imports".⁴¹⁵ We refer to this

⁴¹⁰ Korea's second written submission, para. 317.

⁴¹¹ United States' response to Panel question No. 81, para. 51.

⁴¹² The United States explains that the US petitioners filed an amended petition on 5 June 2017 requesting initiation of the underlying safeguard investigation. Upon receiving the amended petition, the USITC commenced its internal process of considering whether the petition was properly filed. It concluded on 7 June 2017 that the petition was properly filed and initiated the investigation effective 5 June 2017. Thus, as of 5 June 2017, the United States Trade Representative (USTR), the agency responsible for filing US notifications was uncertain whether the USITC would consider the amended petition to be properly filed and initiate an investigation on this basis. The USTR was informed on 8 June, through the USITC's letter to USTR, that the investigation had been initiated. (United States' second written submission, paras. 132-133).

⁴¹³ With respect to the administrative burden involved in preparing the notification at issue and the character of the information supplied, the United States notes that (a) the USITC and Executive Branch officials needed to coordinate with respect to the notification process; (b) the notification did not just reproduce the text of a previously published notice; (c) the USITC investigation team was required to review the notification, and the process entailed exchanges between different US agencies; and (d) the Executive Branch officials responsible for the safeguard proceedings were involved in two concurrent proceedings (solar and washers). (United States' response to Panel question No. 80, para. 49). Korea contends that the administrative difficulties cited by the United States may offer some insight into why the notification was late, but does not justify it. Korea also contends that the administrative burden cited by the United States is not credible as the United States is an experienced Member and it does not provide evidence of the genuine nature of the alleged concerns. (Korea's comments on the United States' response to Panel question No. 80, para. 111). We have no reason to doubt the genuineness of the burden alluded by the United States and do not consider that such burdens are diminished by a Member's experience with safeguard investigations.

⁴¹⁴ We accordingly do not need to resolve the factual dispute between the parties on whether the safeguard investigation was initiated on 5 June 2017 or 8 June 2017.

⁴¹⁵ Notification under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports: United States of 12 October 2017, G/SG/N/8/USA/10 (13 October 2017) (Original injury notification), (Exhibit KOR-6).

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

1. Provide evidence, citing relevant data and the applicable period of investigation of serious injury or threat thereof caused by increased imports

On 5 October 2017, the U.S. International Trade Commission (Commission) determined that large residential washers are being imported in such increased quantities as to be a substantial cause of serious injury to the domestic industry.

The initiation that led to this determination was notified to the Committee on Safeguards in G/SG/N/6/USA/12 (dated 12 June 2017).

The Commission is now considering the appropriate remedy to recommend to the President, and will forward its injury findings and remedy recommendations to the President by 4 December 2017. *This report* will include the Commission's injury determination, remedy recommendations, certain additional findings, and the basis for its injury determination, remedy recommendations, and findings as well as the factual information compiled in the Commission's posthearing injury report. The United States will provide a copy of *this report*, excluding confidential business information, to the Committee on Safeguards shortly after it is submitted to the President.⁴¹⁶

- b. On 4 December 2017, the USITC transmitted its report to the US President, while also issuing at this time a public version of the report:
 - i. On 9 December 2017, the United States submitted a notification under Article 12.1(b) to the Committee, which supplemented the notification of 12 October 2017 ("supplemental injury notification").

7.8.2.1 Providing all pertinent information

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

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

⁴¹⁶ Original injury notification, (Exhibit KOR-6), p. 1. (fns omitted; emphasis added)

⁴¹⁷ Korea's first written submission, para. 562.

⁴¹⁸ United States' first written submission, para. 388.

⁴¹⁹ United States' first written submission, para. 396.

⁴²⁰ United States' first written submission, para. 396.

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

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

7.257. In addressing this question, we note that that Article 12.2 refers to "notifications referred to in paragraphs 1(b) **and** 1(c)" (in the collective) and identifies the pertinent information that such notifications should contain, without necessarily distinguishing between information contained in an Article 12.1(b) notification and that contained in an Article 12.1(c) notification.⁴²² Some of the information, such as the "proposed date of introduction" of the measure, that is otherwise pertinent under Article 12.2, may not be available at the time a Member makes its serious injury notification under Article 12.1(b), and may only become available when a Member subsequently decides to apply the safeguard measure. The fact that Article 12.2 does not require Members to provide all pertinent information in notifications under Article 12.1(b) alone suggests that Article 12.2 permits Members to provide the pertinent information identified in Article 12.2 in a staggered manner. Therefore, we do not consider that Article 12.2 precludes a Member from supplementing an initial notification under Article 12.1(b) with additional information. When a Member does make such a supplemental notification under Article 12.1(b), and the initial and supplemental notification collectively identify the pertinent information under Article 12.2, we do not consider that the Member could be said to have acted inconsistently with Article 12.2 because its initial notification, taken alone, does not set out all the pertinent information under Article 12.2.⁴²³ We accordingly are not persuaded by Korea's claim that the United States acted inconsistently with Article 12.2 because its original injury notification did not contain the information identified by Korea.

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

7.8.2.2 Immediacy of notification

7.259. Korea contends as follows:

- a. The original injury notification of 12 October 2017 was not immediate under Article 12.1(b) because it was made *seven days* after the USITC had made a finding of serious injury through the public vote of the USITC commissioners on 5 October 2017.⁴²⁴
- b. The supplemental injury notification of 9 December 2017 was not immediate under Article 12.1(b) because⁴²⁵:
 - i. It was made *two months* after the public vote of the USITC commissioners.
 - ii. Even if the publication of the USITC report on 4 December 2017 was the triggering event for assessing whether the United States made an immediate notification under

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

⁴²² Emphasis added.

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

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

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

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

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

- a. The administrative task of preparing the notification was not *pro forma* but had to be tailored.⁴²⁶ The supplemental notification did not just enclose the public version of the USITC report, but also pinpointed to findings of potential relevance to Members.⁴²⁷
- b. The original notification had to be reviewed by the USITC investigating team and required exchanges between two separate US agencies (the USITC and the United States Trade Representative (USTR)).⁴²⁸
- c. The original and supplemental notifications were made at a time when government officials responsible for the safeguard measures were extremely busy, including with the LRW investigation and the solar products investigation.⁴²⁹

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

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

7.8.3 Decision notification

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

7.8.3.1 Providing all pertinent information

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

⁴²⁶ United States' first written submission, para. 393.

⁴²⁷ United States' first written submission, para. 400.

⁴²⁸ United States' first written submission, paras. 393 and 400.

⁴²⁹ United States' first written submission, para. 393.

⁴³⁰ Indeed, considering the USITC report had not been issued when the USITC commissioners held their public vote on serious injury on 5 October 2017, the United States could not be expected to notify any information based on that report.

⁴³¹ Korea's first written submission, para. 564.

⁴³² Korea's first written submission, para. 565.

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

7.265. The United States notes that Korea does not explain why the information that the USITC did provide was insufficient under Article 12.2.⁴³⁴ The United States also asserts that Article 12.2 does not supersede the USITC's obligation under Article 3.2 to not disclose confidential information without permission of the party submitting it.⁴³⁵

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

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

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

7.8.3.2 Immediacy of notification

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

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

⁴³³ Korea's second written submission, para. 326.

⁴³⁴ United States' first written submission, para. 406.

⁴³⁵ United States' first written submission, paras. 405 and 407.

⁴³⁶ Appellate Body Report, *Korea – Dairy*, para. 109.

⁴³⁷ Korea's second written submission, para. 326.

⁴³⁸ Korea's first written submission, para. 565.

⁴³⁹ Korea's first written submission, para. 565.

⁴⁴⁰ Korea's first written submission, para. 548; United States' first written submission, para. 404.

⁴⁴¹ Korea's first written submission, para. 548; United States' first written submission, para. 404.

⁴⁴² Korea's first written submission, para. 556.

and the decision did not need to be translated.⁴⁴³ The United States submits that it complied with Article 12.1(c), and refers to the administrative process relating to the preparation of the decision notification to explain the time taken to notify⁴⁴⁴:

- a. Burden on USITC staff:
 - i. The US Presidential Proclamation in the underlying LRW safeguard measure was signed on the same day as the proclamation in a parallel case on solar products, putting an extraordinary burden on US officials.
 - ii. US officials needed to inform agencies charged with administering the safeguard measure, and respond to questions from the public, including affected governments and foreign producers.
 - iii. The United States considered it critical to obtain a formal copy of the US Presidential Proclamation, but the process has several formalities that slowed receipt of the copies.
- b. Notification preparation:
 - i. To prepare the notification, responsible officials had to extract information from the documents, distil it to ensure maximum comprehensibility, seek comments from relevant officials, and execute necessary changes made by those officials.
- c. Time difference between Washington DC and Geneva:
 - i. The US Presidential Proclamation was signed after close of business, Geneva time (on 23 January 2018) and the notification was transmitted to Geneva in the evening of 25 January 2018. Once the time zone difference is taken into account, the gap between signature of the US Presidential Proclamation and the notification was actually just two days.

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

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

7.8.4 Conclusion

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

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

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

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

⁴⁴³ Korea's first written submission, para. 557.

⁴⁴⁴ United States' response to Panel question No. 62, paras. 104-106.

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

7.276. Thus, as is evident from the text of Article 8.1, and as also recognized in previous DSB reports, a WTO Member cannot endeavour to maintain an adequate balance of concessions under Article 8.1 unless it provides, as a first step, an adequate opportunity for prior consultations on a proposed measure under Article 12.3.⁴⁴⁵

7.277. Korea argues that the United States failed to provide an adequate opportunity for prior consultations under Article 12.3, and therefore did not endeavour to maintain substantially equivalent level of concessions and other obligations under Article 8.1 of the Agreement on Safeguards. Korea's claim under Article 8.1 is thus directly linked to the question of whether the United States provided adequate opportunity for consultations under Article 12.3. Korea contends in this regard that the United States did not provide it with an adequate opportunity for prior consultations because Korea learnt of the scope and effective date of the safeguard measure on 26 January 2018, which is the date the United States notified the decision to apply a safeguard measure under Article 12.1(c), and the safeguard measure went into effect 12 days later, i.e. 7 February 2018.⁴⁴⁶ Korea acknowledges in this regard that the United States and Korea held consultations on 1 February 2018.⁴⁴⁷ However, Korea contends that it did not have sufficient time to analyse the measure, consider its likely consequence, conduct appropriate domestic consultations, and prepare for consultations with the United States.⁴⁴⁸ Therefore, per Korea, the United States did not provide sufficient opportunity for prior consultations.

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

7.279. The question before us is whether the United States provided Korea with adequate opportunity for prior consultations under Article 12.3. In addressing this question, we note from the text of Article 12.3, set out above, that the provision asks Members *proposing to apply a safeguard measure* to provide *adequate opportunity for prior consultations* to Members with substantial interest as exporters of the product concerned with a view to, *inter alia*, (a) reviewing the information provided under Article 12.3, (b) exchanging views on the measures, and (c) reaching an understanding on ways to achieve the objectives set out in Article 8.1. Like previous DSB reports, we consider that Article 12.3 requires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified in Article 12.3.⁴⁵³ We also agree in this regard with previous DSB reports that the obligation to provide adequate opportunity for "prior"

⁴⁴⁵ Appellate Body Report, *US – Wheat Gluten*, para. 146.

⁴⁴⁶ Korea's first written submission, para. 530.

⁴⁴⁷ Korea's response to Panel question No. 84, para. 111.

⁴⁴⁸ Korea's response to Panel question No. 84, para. 112; first written submission, para. 530.

⁴⁴⁹ United States' first written submission, para. 411.

⁴⁵⁰ United States' first written submission, para. 411.

⁴⁵¹ United States' first written submission, para. 416.

⁴⁵² United States' first written submission, para. 417.

⁴⁵³ Appellate Body Report, *US – Wheat Gluten*, paras. 136-137.

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

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

- a. There was disagreement among the USITC's four commissioners on the necessity for in-quota tariffs for LRW units. Thus, Korea could not have known what remedy the US President would apply unless he made a decision in this regard (he ultimately applied in-quota tariffs).⁴⁵⁵
- b. The USITC recommended that the LRW measure not apply to Korea, but the US President decided to apply the measure to Korea.⁴⁵⁶

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

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

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

⁴⁵⁴ Appellate Body Report, *US – Line Pipe*, para. 112.

⁴⁵⁵ Korea's response to Panel question No. 66, para. 264.

⁴⁵⁶ Korea's response to Panel question No. 66, para. 265.

⁴⁵⁷ Korea's response to Panel question No. 66, para. 265; USITC report, (Exhibit KOR-1), pp. 65-66.

⁴⁵⁸ We note in this regard that previous DSB reports, with which we agree, have found when the report of the investigating authorities, notified under Article 12.1(b), did not contain precise recommendations on the nature of the measure to be imposed so as to allow the complainant to accurately assess the likely impact of the measure contemplated, or adequately consult with the imposing Member on the overall equivalent concessions, the exporting Members could not have meaningful consultations based on the Article 12.1(b) notification. (Appellate Body Report, *US – Wheat Gluten*, paras. 141-142).

paragraph 7.280(a)-(b) above.⁴⁵⁹ In addition, we note the United States' submission that the opportunity for consultation continued beyond 7 February 2018, when the safeguard measure came into effect, because the US Presidential Proclamation explicitly provided further time for consultations and an opportunity to modify the safeguard measure in response to the results. However, we disagree with this submission because, as we noted above, the obligation to provide adequate opportunity for "prior" consultations cannot be met if there is insufficient time *prior* to the application of the measure to have a meaningful exchange. It remains undisputed that the safeguard measure went into effect on 7 February 2018.⁴⁶⁰ Therefore, in examining whether Korea had adequate opportunity for prior consultations, we must consider whether Korea had sufficient time prior to the application of the measure on 7 February 2018 to have a meaningful exchange pursuant to Article 12.3.

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

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

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

7.286. In its request for findings, Korea claims that the United States acted inconsistently with Article 11.1(a) of the Agreement on Safeguards because of violations under other provisions of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.⁴⁶¹ Therefore, Korea's claim under Article 11.1(a) is purely consequential and is dependent on a finding of violation with respect to Korea's claims under Article XIX:1(a) and different provisions of the Agreement on Safeguards. We have upheld certain claims made by Korea under Article XIX:1(a) of the GATT 1994 as well as under the Agreement on Safeguards.

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

7.11 Claim under Article II:1 of the GATT 1994

7.288. Korea contends that as long as a Member takes safeguard measures consistently with Article XIX of the GATT 1994 and the Agreement on Safeguards, it may levy tariffs above its bound level.⁴⁶² However, per Korea, the United States imposed a safeguard measure on imports of LRWs even though the prerequisites set forth in Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards were not shown to exist.⁴⁶³ Therefore, according to Korea, by imposing an unlawful safeguard measure the United States imposed duties that were in excess of those set forth in its Schedule of Concessions, thereby violating Article II:1 of the GATT 1994.⁴⁶⁴ The United States notes that Korea's claim is purely consequential and it should fail because the United States' safeguard measures are consistent with Article XIX:1(a) of the GATT 1994 and with the Agreement on Safeguards.⁴⁶⁵ In addition, the United States submits that even if we were to find violations under

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

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

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

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

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

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

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

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

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

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

8 CONCLUSIONS AND RECOMMENDATION

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

- a. With respect to Korea's claims under Article XIX:1(a) of the GATT 1994 and Articles 1 and 3.1 of the Agreement on Safeguards challenging the absence of a reasoned and adequate explanation on "unforeseen developments" and the "obligations incurred" by the United States, which would have resulted in the alleged increased imports of LRWs causing serious injury:
 - i. We find that the USITC acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards because its report does not contain a reasoned and adequate explanation on "unforeseen developments" and the "obligations incurred" by the United States, within the meaning of Article XIX:1(a) of the GATT 1994. We do not find it necessary to address whether the USITC also acted inconsistently with Article 1 of the Agreement on Safeguards for these same reasons.
- b. With respect to Korea's claims under Articles 2.1, 3.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards challenging the USITC's definition of the domestic industry:
 - i. We find that the USITC acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because it included LRW parts in the definition of the domestic industry based on (1) its finding of likeness between imported and domestically produced LRW parts; and (2) its application of the product line approach. We do not find it necessary to address whether the USITC also acted inconsistently with Article 2.1 for these same reasons.
 - ii. We reject Korea's claim under Articles 3.1 and 4.1(c) of the Agreement on Safeguards, as well as Article 2.1 of the Agreement on Safeguards challenging the USITC's inclusion of belt-driven washers in the definition of the domestic industry.
 - iii. We do not find it necessary to address Korea's consequential claims that as a consequence of the improper definition of the domestic industry, the USITC's determination of serious injury and causation was also inconsistent with Articles 2.1, 3.1, 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards.
- c. With respect to Korea's claims under Articles 2.1 and 3.1 of the Agreement on Safeguards challenging the USITC's findings on imports in such increased quantities:
 - i. We find that the USITC acted inconsistently with Articles 2.1 and 3.1 of the Agreement on Safeguards because it failed to provide a reasoned and adequate explanation in support of its finding on increased imports.
 - ii. We reject Korea's claim that the USITC acted inconsistently with Articles 2.1 and 3.1 of the Agreement on Safeguards by (1) cumulating imports of LRWs and LRW parts as part of its increased imports analysis; (2) failing to examine the significance of the increase in imports relative to domestic consumption; and (3) failing to account for

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

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

- d. With respect to Korea's claims under Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c) of the Agreement on Safeguards challenging the USITC's findings on serious injury suffered by the domestic industry:
 - i. We find that the USITC acted inconsistently with Articles 4.2(a) and 3.1 of the Agreement on Safeguards by excluding the profit and loss data of the producer of belt-driven washers from the profit data used to determine the profitability of the domestic industry. We do not find it necessary to separately address whether the USITC also acted inconsistently with Articles 2.1, 4.1(a), and 4.2(c) for these same reasons.
 - ii. We reject, for the reasons set out in paragraph 7.119 above, Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC allegedly failed to objectively examine "profit and loss".
 - iii. We reject Korea's claims under Article 4.2(a) of the Agreement on Safeguards that the USITC allegedly failed to objectively examine the share of the domestic market taken by increased imports.
 - iv. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC failed to evaluate all injury factors set out in Article 4.2(a).
 - v. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 2.1, 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that are consequential to Korea's claims challenging the USITC's definition of the domestic industry.
 - vi. We do not find it necessary to address Korea's claims under Article 4.2(a), as well as Articles 3.1, 4.1(a), and 4.2(c) of the Agreement on Safeguards that the USITC failed to undertake an objective examination of the significant overall impairment of the domestic industry and based its overall finding of serious injury on one factor alone.
- e. With respect to Korea's claims under Articles 2.1, 3.1, 4.2(b), and 4.2(c) of the Agreement on Safeguards challenging the USITC's findings on causation between subject imports and the serious injury to the domestic industry:
 - i. We find that the USITC acted inconsistently with Articles 3.1 and 4.2(b) of the Agreement on Safeguards because it (1) did not provide a reasoned and adequate explanation in support of its finding that subject imports depressed and suppressed prices of the domestic like product as a whole; and (2) did not make a finding on coincidence in trends in a manner consistent with Article 4.2(b). We do not find it necessary to separately address whether the USITC also acted inconsistently with Articles 2.1 and 4.2(c) for these same reasons.
 - ii. We reject Korea's claims under Articles 3.1 and 4.2(b), as well as Articles 2.1, and 4.2(c) of the Agreement on Safeguards challenging the USITC's finding that (1) joint pricing of dryers and LRWs and (2) deterioration of US brands, were not factors causing injury to the domestic industry.
 - iii. We reject Korea's claims under Articles 3.1 and 4.2(b), as well as Articles 2.1 and 4.2(c) of the Agreement on Safeguards challenging the USITC's application of the substantial cause test in the underlying investigation.
 - iv. We do not find it necessary to address Korea's claims under Articles 3.1 and 4.2(b), as well as Articles 2.1 and 4.2(c) of the Agreement on Safeguards regarding the USITC's analysis of non-price related aspects of competition.

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- v. We do not find it necessary to address Korea's claims under Article 4.2(b), as well as Articles 2.1, 3.1, and 4.2(c) of the Agreement on Safeguards that are consequential to Korea's claims challenging the USITC's definition of the domestic industry and its determination on increased imports.
 - f. With respect to Korea's claims under Articles 5.1 and 7.1 of the Agreement on Safeguards:
 - i. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards that is premised on Korea's view, which we have rejected, that the USITC found factors other than increased imports were causing injury to the domestic industry.
 - ii. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards challenging the form and level of the United States' safeguard measure. To the extent Korea's claim is premised on its view that the duty on out-of-quota LRW parts was not necessary under Article 5.1, for the reasons set out in paragraph 7.226 above, we do not find it necessary to address this aspect of Korea's claim.
 - iii. We reject Korea's claim under Article 5.1 of the Agreement on Safeguards that the United States acted inconsistently with this provision in failing to take into account existing import restrictions from anti-dumping and countervailing measures.
 - iv. We reject Korea's claim under Articles 5.1 and 7.1 of the Agreement on Safeguards that the United States failed to limit the safeguard measure to what was necessary to remedy injury and facilitate adjustment.
 - v. We do not find it necessary to address Korea's claim under Article 5.1 of the Agreement on Safeguards that is consequential to Korea's claim challenging the USITC's determination on causation.
 - g. With respect to Korea's claims under Articles 12.1 and 12.2 of the Agreement on Safeguards:
 - i. We reject Korea's claims under Articles 12.1(a), 12.1(b), and 12.1(c) of the Agreement on Safeguards that the United States allegedly failed to "immediately" notify its initiation notification, serious injury notification, and decision notification to the Committee on Safeguards.
 - ii. We reject Korea's claims under Article 12.2 of the Agreement on Safeguards that the United States allegedly failed to provide "all pertinent information" in its serious injury notification and its decision notification.
 - h. With respect to Korea's claims under Articles 8.1 and 12.3 of the Agreement on Safeguards, we find that the United States acted inconsistently with Article 12.3 because it failed to provide Korea with adequate opportunity for prior consultations under Article 12.3 of the Agreement on Safeguards. We find that as a consequence of this violation under Article 12.3, the United States also acted inconsistently with Article 8.1 of the Agreement on Safeguards.
 - i. With respect to Korea's claim under Article 11.1(a) of the Agreement on Safeguards, we do not find it necessary to address this claim.
 - j. With respect to Korea's claim under Article II.1 of the GATT 1994, we do not find it necessary to address this claim.

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

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