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# UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF LARGE RESIDENTIAL WASHERS

REPORT OF THE PANEL

*Addendum*

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

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## ANNEX A

PANEL DOCUMENTS

## ANNEX A-1

WORKING PROCEDURES OF THE PANEL

**Adopted on 9 October 2019**

### General

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

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

### Confidentiality

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

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

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

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

### Submissions

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

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

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

### Preliminary rulings

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first

written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Korea shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

**Evidence**

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Korea should be numbered KOR-1, KOR-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered KOR-5, the first exhibit in connection with the next submission thus would be numbered KOR-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit, indicating the date on which that content was accessed on the website.

**Editorial Guide**

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

**Questions**

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

**Substantive meetings**

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Korea to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Korea presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the United States shall be given the opportunity to present its oral statement first. If the United States chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00 pm (Geneva time) three working days before the meeting. In that case, Korea shall present its opening statement first, followed by the United States. The party that presented its opening statement first shall present its closing statement first.

**Third party session**

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

20. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

21. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

c. Each third party should limit the duration of its statement to 15 minutes and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

**Descriptive part and executive summaries**

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit an integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions and its oral statements at the first and the second substantive meetings of the Panel with the parties. This integrated executive summary may also include a summary of the party's responses to questions following the first and the second substantive meetings of the Panel with the parties. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. Each party's integrated executive summary shall be limited to no more than 20 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

**Interim review**

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

**Interim and final report**

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

**Service of documents**

30. The following procedures regarding service of documents apply to all documents submitted by the parties and third parties during the proceeding:

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (DSRegistry@wto.org) on the due dates established by the Panel, preferably in both Microsoft Word and PDF format, either on a CD-ROM, a DVD or as an e-mail attachment.

b. The electronic version of documents shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Should there be any discrepancy between the Microsoft Word format and PDF format of the documents, the PDF format shall constitute the final version of the party's submission.

c. Each party and third party shall provide the DS Registry (Office No. 2047) with a paper copy of any document submitted to the Panel within 24 hours following the deadline for submitting such document.

d. All emails from the parties and third parties to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If a CD-ROM/DVD is provided, it shall be filed with the DS Registry.

e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party in electronic format only, either as an email attachment or a CD-ROM or a DVD. Each party and third party shall confirm in an e-mail that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the interim report and the final report.

**Correction of clerical errors in submissions**

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

## ANNEX A-2

### ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

**Adopted on 9 October 2019**

**Revised on 18 October 2019**

**Revised on 31 October 2019**

1 The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.

2 For the purposes of these Panel proceedings, BCI is any information that was previously treated by the U.S. International Trade Commission as confidential in the course of the specific safeguard proceeding at issue in this dispute, including any subsequent reviews. These procedures do not apply, however, to any information that is available in the public domain, nor any BCI that the entity providing such information agrees in writing to make publicly available.

3 No person may have access to BCI except a Panelist, a member of the Secretariat assisting the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. However, an outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises.

4 A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Each party and third party is responsible for ensuring that its employees and outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

5 A party submitting BCI shall mark the cover and/or first page of the document containing BCI to indicate the presence of such information. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx". The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit KOR-1 (BCI), or Exhibit USA-1 (BCI)).

6 Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

7 Where a party submits a document containing BCI to the Panel, the other party or third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked and treated as described in paragraph 5. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are present or observing the session at that time. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 5.

8 Third parties' access to BCI shall be subject to the terms of these Additional Working Procedures. Where third parties receive written submissions pursuant to the Working Procedures, the third parties shall receive the redacted version of such written submissions containing BCI and

redacted versions of exhibits thereto. The redacted versions of the parties' written submissions received by third parties pursuant to the Working Procedures and redacted versions of exhibits thereto shall be sufficient to convey a reasonable understanding of the nature of the information at issue.

9 A third party may request access to the non-redacted version of a party's written submission received by a third party pursuant to the Working Procedures or an exhibit thereto containing BCI. The Panel, after consulting the parties, shall decide whether to grant access to such BCI, taking into consideration the sensitivity of the information and the need for the third party to see the information for the purpose of participating effectively in the Panel proceedings. Any such request shall include a list of the third party's representatives and outside advisors who would like to review the BCI. If granted, the third party's access to the non-redacted version of a party's written submission or an exhibit thereto containing BCI will take place on the premises of the WTO Secretariat, unless good cause is shown for an alternative arrangement.

10 If a party considers that information submitted by the other party or third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, to third parties, together with the reasons for the objection. Similarly, if a party considers that the other party or third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings based on the criteria set out in paragraph 2.

11 The Panel will not disclose BCI in its report, or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any BCI.

12 Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded by the WTO Secretariat to the Appellate Body in the event of an appeal of the Report of the Panel, provided that the Appellate Body confirms that it will not disclose BCI in its report, or in any other way, to persons not authorized under these procedures to have access to BCI, other than members of the Appellate Body or a member of the Secretariat assisting the Appellate Body.

## ANNEX A-3

### ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING HOLDING A SUBSTANTIVE MEETING CONDUCTED VIA CISCO WEBEX

**Adopted on 29 January 2021**

**Amended on 21 April 2021**

**General**

1. These Additional Working Procedures set out terms for holding the substantive meeting of the Panel via Cisco Webex Events.

**Definitions**

2. For the purposes of these Additional Working Procedures:

**"DORA"** means the Disputes Online Registry Application.

**"Host"** means the designated person within the WTO Secretariat responsible for the management of the platform for remote participants to participate in the meeting with the Panel.

**"Participant"** means any authorized person attending the meeting, either remotely or from the designated room at the WTO premises, including the Members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the meeting, members of the parties' and third parties' delegations, and interpreters.

**"Platform"** means the Cisco Webex Events platform.

**Equipment and technical requirements**

3. Each party and third party shall be responsible for ensuring that the members of its delegation participating in the meeting with the Panel by remote means join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.

**Technical support**

4. (1) In light of the Secretariat's limited ability to offer remote assistance during, and in advance of the meeting, each party and third party is responsible for providing its own technical support to the members of its delegation.

(2) The host will assist participants in accessing and using the platform in preparation for, and during the course of, the meeting with the Panel.

**Pre-meeting**

Registration

5. Each party and third party shall provide to the Panel the list of the members of its delegation no later than 5 p.m. (Geneva time) 7 working days before the first day of the meeting with the Panel. Such list shall include all members of each party's and third party's delegation, and shall indicate whether they will be participating in the meeting remotely or from the designated room at the WTO premises. Each party and third party shall limit the number of members of its delegation participating at the WTO premises to that set by the Panel in advance of the meeting.

Advance testing

6. Each group of remote participants (members of each party's and third party's delegation) will hold two testing sessions for each substantive meeting, with the Secretariat before the meeting with the Panel: a separate one for each group, and a joint session with all remote participants in the meeting. Such test sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. Remote participants should make themselves available for the test sessions.

**Confidentiality and security**

7. The meeting shall be confidential.

8. Each party and third party shall follow any security and confidentiality protocols and guidelines set by the Panel in advance of the meeting.

9. The remote participants shall connect to the meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

**Conduct of the meeting**

Recording

10. The meeting will be recorded in its entirety via the platform. The recording of the meeting will form part of the panel record.

11. The parties and third parties are strictly prohibited from:

(1) recording, via any means, including audio or video recording, or screenshot, the meeting or any part thereof; and

(2) permitting any non-participant to record, via any means, including audio or video recording, or screenshot, the meeting or any part thereof.

Access to the virtual meeting room

12. The participants shall access the virtual meeting room either remotely in accordance with these Additional Working Procedures or from the designated room at the WTO premises.

13. (1) The host will invite remote participants via email to join the virtual meeting room.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password with unauthorized persons.

(3) Each party and third party shall ensure that only participants from its delegation join the virtual meeting room.

Advance log-on

14. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of the meeting.

(2) In order to ensure that the meeting will start as scheduled, participants accessing the meeting remotely must login to the platform at least 30 minutes in advance of the scheduled start time of the meeting.

(3) Participants accessing the meeting remotely will be placed in a virtual lobby where they will remain until the Panel is ready to start the meeting, at which time the host will admit them to the meeting.

Document sharing

15. (1) Before each party or third party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement through DORA.

(2) Any participant wishing to share a document with the other participants during the meeting will do so through DORA.

Communication breakdown

16. Each party and third party will designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The parties and third parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the meeting. To do so, the party or third party that experiences the technical or connectivity issue shall:

(1) if possible, immediately intervene at the meeting and briefly state the nature of the issue experienced; or

(2) if doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform, by sending an email to olga.falguerasalamo@wto.org, or by calling at +41 22 739 6746.

17. The Panel may postpone the proceedings until the technical issue is resolved or continue the proceedings with those that continue to be connected or are physically present in the meeting room at the WTO.

Participation

18. (1) If a participant attending the meeting remotely wishes to take the floor, the participant should use the "raise a hand" function in the platform, so that the Panel can give the floor to the participant and allow the participant to unmute their microphone and turn their camera on.

(2) If a participant attending the meeting from the WTO premises wishes to take the floor, the participant should raise their placard/flag in the designated room at the WTO premises, so that the host can register the request on the virtual meeting platform and the Panel can give the floor to the participant. When the participant takes the floor, the camera will automatically move to the participant, once their microphone is turned on.

**Structure of the substantive meetings**

First substantive meeting with Parties

19. The first substantive meeting of the Panel with the parties will be conducted as follows:

(1) On the first day of the meeting with the parties, the Panel will invite Korea to make an opening statement to present its case first. Subsequently, the Panel will invite the United States to present its point of view. Before each party takes the floor, the party shall provide the Panel and other participants at the meeting with a provisional written version of its statement by uploading it to DORA. In its opening statement, each party should avoid lengthy repetition of the arguments in its submissions. Each party shall limit the duration of its opening statement to 75 minutes.

(2) On the second day of the meeting with the parties, the Panel will pose questions to the parties, which will be sent to the parties in advance of the meeting. Once the questioning has concluded, the Panel will afford each party an opportunity to present a closing statement, with Korea presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants with a provisional written version of its closing statement, if one is available, by uploading it to DORA. Each party shall limit the duration of its closing statement to 30 minutes.

(3) Following the meeting:

a. Each party shall submit the final written version of its opening statement no later than 5 p.m. (Geneva time) on the first working day following the meeting. By the same deadline, each party shall also submit the final written version of any prepared closing statement that it delivered at the meeting.

b. Each party may send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the other party to which it wishes to receive a response in writing.

c. The Panel will endeavour to send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the parties to which it wishes to receive a response in writing.

d. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the timeframe established by the Panel before the end of the meeting.

Third-party session

20. The third-party session will be conducted as follows:

(1) All parties and third parties may be present during the entirety of this session.

(2) The Panel will hear the oral statements of the third parties, who shall speak in reverse alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement by uploading it on DORA at the start of the third-party session. Each third party shall limit the duration of its statement to 15 minutes and avoid repetition of the arguments already in its submission.

(3) Following the third-party session:

a. Each third party shall submit the final written version of its oral statement no later than 5 p.m. (Geneva time) on the first working day following the third-party session.

b. Each party may send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

c. The Panel may send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

d. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Second substantive meeting with the parties

21. The second substantive meeting of the Panel with the parties will be conducted as follows:

(1) On the first day of the meeting with the parties, the Panel will invite the United States to make an opening statement first, followed by Korea. If the United States chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5 p.m. (Geneva time) three working days day prior to the meeting. In that case, the Panel shall invite Korea to present its opening statement first.

Before each party takes the floor, the party shall provide the Panel and other participants at the meeting with a provisional written version of its statement by uploading it to DORA. In its

opening statement, each party should avoid lengthy repetition of the arguments in its submissions. Each party shall limit the duration of its opening statement to 75 minutes.

(2) After the conclusion of the opening statements, the Panel will pose questions to the parties, which will have been sent to the parties in advance of the meeting. The Panel will continue and conclude the questioning on the second day of the meeting with the parties.

(3) On the third day of the meeting with the parties, the Panel shall afford each party an opportunity to present its closing statement. The party that presented its opening statement first shall present its closing statement first.

Before each party takes the floor, it shall provide the Panel and other participants with a provisional written version of its closing statement, if one is available, by uploading it to DORA. Each party shall limit the duration of its closing statement to 30 minutes.

(4) Following the meeting:

a. Each party shall submit the final written version of its opening statement no later than 5 p.m. (Geneva time) on the first working day following the meeting. By the same deadline, each party shall also submit the final written version of any prepared closing statement that it delivered at the meeting.

b. Each party shall send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the other party to which it wishes to receive a response in writing.

c. The Panel will endeavour to send in writing, no later than 5 p.m. (Geneva time) on the fifth working day following the meeting, any questions to the parties to which it wishes to receive a response in writing.

d. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, no later than 5 p.m. (Geneva time), within a timeframe established by the Panel before the end of the meeting.

22. The above format and structure are without prejudice to how the Panel decides to conduct subsequent meeting(s) with the parties.

**Relationship with the Working Procedures of the Panel adopted on 9 October 2019**

23. These Additional Working Procedures complement the Working Procedures of the Panel adopted on 9 October 2019. To the extent that these Additional Working Procedures conflict with the Working Procedures of the Panel, these Additional Working Procedures shall prevail.

## ANNEX A-4

INTERIM REVIEW

### 1 INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this annex sets out our discussion of the arguments made at the interim review stage. We have revised certain aspects of the Interim Report in light of Korea's request (the United States did not make a request, but provided comments on Korea's request). In addition, we have made certain editorial changes to improve the clarity and accuracy of the Final Report, or to correct typographical and non-substantive errors, including those suggested by the parties. The footnote numbers in the Final Report have changed due to these revisions. The footnote numbers indicated in this annex pertain to those in the Final Report, but we have also indicated the footnote numbers in the Interim Report where they differ from those in the Final Report. The paragraph numbers in the Final Report remain unchanged.

### 2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY KOREA

#### 2.1 The USITC's definition of the domestic industry

##### 2.1.1 Paragraphs 7.39(a), 7.47 and 7.50

2.1. Korea asks us to modify our description of its claim that the USITC acted inconsistently with the Agreement on Safeguards by including producers of belt-driven washers in the domestic industry. In particular, Korea asks us to note that it is also challenging the USITC's failure to provide a reasoned and adequate explanation in support of its definition of the domestic industry.[1] Korea requests us to modify paragraphs 7.39(a), 7.47, and 7.50 to reflect this change.[2] The United States does not comment on Korea's request.

2.2. We have made the changes suggested by Korea in paragraphs 7.39(a) and 7.47. However, we do not find it necessary to make the change suggested by Korea in paragraph 7.50, which contains our analysis, because the issue raised by Korea is adequately covered in paragraph 7.52 of our Report.

##### 2.1.2 Footnote 72 (to paragraph 7.39)

2.3. Korea notes that in footnote 72 of the Interim Report we stated that Korea initially challenged the inclusion of domestic LRW parts because they were not like or directly competitive with imported LRWs, and given the difference between LRWs and LRW parts, the USITC erred by not treating them as separate like products.[3] We also noted in footnote 72 that Korea subsequently clarified that it was challenging the USITC's inclusion of parts within the domestic industry because they were not like or directly competitive with the PUC. Korea contends that while this discussion suggests that Korea changed the contours of its claims, it does not believe there was such an evolution of its claim.[4] Korea accordingly requests us to modify footnote 72 by removing the reference to Korea's initial description of its claim.[5] The United States opposes Korea's request, finding our description regarding the evolution of Korea's claim to be accurate.[6]

2.4. We do not share Korea's views regarding our description of its claim in footnote 72 of our Report. However, modifying footnote 72 in the manner proposed by Korea, i.e. removing the reference to Korea's initial description of its claim, does not affect our analysis in any manner. We have, accordingly, made the change requested by Korea.

[1] Korea's request for interim review, paras. 3-4.
[2] Korea's request for interim review, para. 5.
[3] Korea's request for interim review, para. 9.
[4] Korea's request for interim review, paras. 6-7.
[5] Korea's request for interim review, para. 9.
[6] United States' comments on Korea's request for interim review, para. 2.

## 2.2 The USITC's increased imports determination

### 2.2.1 Paragraph 7.96

2.5. Korea requests us to make certain additions in paragraph 7.96 of the Interim Report in order to clarify the basis for our conclusion on Korea's claim on increased imports.[7] The United States opposes Korea's request, noting in this regard that, as drafted, the paragraph clearly lists the unavailability of business confidential data and the failure to address the degree of decrease at the end of the period of investigation as reasons for concluding that the United States failed to rebut Korea's *prima facie* case on this issue.[8]

2.6. We decline to make the changes suggested by Korea in interim review because our Report adequately sets out the legal as well as factual basis for our conclusion on this issue.

## 2.3 The USITC's serious injury determination

### 2.3.1 Paragraph 7.118

2.7. Korea requests us to revise our findings concerning the USITC's evaluation of the domestic industry's profit data.[9] In particular, Korea submits that we did not address its arguments regarding possible profit shifting and regarding the evidence that the domestic producer Whirlpool was a healthy company.[10] Korea contends that the "key point" it was making was that the USITC accepted the domestic producer's story without engaging in any critical analysis.[11] The United States opposes Korea's request.[12]

2.8. We note that in support of its request, Korea refers back to arguments made in these proceedings, and which we examined in reaching our findings in the Interim Report. For instance, Korea (a) recalls its argument that a significant difference in profit between Whirlpool's sales of washers compared to sales of other products "could" be evidence of profit shifting; (b) refers to Whirlpool's tax filings in 2016 as evidence that was presented to the USITC and which showed that Whirlpool made profits in its overall North American operations; and (c) contends the USITC was required to examine the overall profitability of the laundry segment to verify the injury finding based on profitability in the LRW segment.[13] In making our findings, we noted that the focus of the USITC's injury analysis was on the domestic industry producing the like product, which was made up of LRWs (and covered parts), and not other products such as dryers. Thus, as we stated in that paragraph, it was reasonable that the USITC found uninformative Whirlpool's financial results for its North American operations, given that the like product at issue constituted only 13.1% to 13.5% of total revenue.

2.9. Korea has not explained through these arguments, as we noted in the Interim Report, why the USITC's explanations were not adequate in this regard. Indeed, we do not see from Korea's arguments why the profitability of Whirlpool's North American operations, where LRWs (the like product) formed only 13.1% to 13.5% of total revenue, undermines the USITC's profitability or injury analysis pertaining to the US domestic industry, which was defined on the basis of the producers of LRWs (and LRW parts). In addition, in contending that the USITC's examination of the profitability data was not objective, Korea argues again that "the USITC was required to examine the overall profitability of the laundry segment to verify if it confirmed the injury finding based on profitability in the LRW segment". However, we rejected this argument for the reasons set out in paragraph 7.115 of the Interim Report.[14]

2.10. Moreover, while Korea recalls its argument that the USITC report did not meaningfully explain how Whirlpool's geographically segmented financial data, including its SG&A expenses, were appropriately allocated to the production of LRWs, we note that the USITC explained in its report

[7] Korea's request for interim review, para. 10.
[8] United States' comments on Korea's request for interim review, para. 3.
[9] Korea's request for interim review, para. 11.
[10] Korea's request for interim review, para. 18.
[11] Korea's request for interim review, para. 18.
[12] United States' comments on Korea's request for interim review, para. 5.
[13] Korea's request for interim review, paras. 13-16.
[14] Korea's request for interim review, paras. 15-16.

that it had verified Whirlpool's financial results, including its SG&A expenses using appropriate methodologies from a previous investigation.[15] The USITC noted in this regard that when the SG&A ratios for Whirlpool's North American segment are calculated using the same methodology, the resulting SG&A ratios are in the same range as those Whirlpool reported for LRWs.[16] Korea did not explain, as we noted in the Interim Report, why the USITC's verification of Whirlpool's financial results were inadequate. Thus, we see no reason to revisit our findings or analysis in this regard.[17]

2.11. We, accordingly, decline Korea's request.

### 2.3.2 Paragraph 7.126

2.12. Noting that we found it unnecessary to address Korea's claims challenging the USITC's serious injury determination on the ground that the USITC improperly defined the domestic industry, Korea asks us to make findings on these claims.[18] The United States opposes Korea's request.[19]

2.13. Having found that the USITC acted inconsistently with Article 4.1(c) by including producers of LRW parts in the domestic industry, we explained in our Interim Report that it was unnecessary to make an additional (purely consequential) finding that because of the USITC's improper definition of the domestic industry, its serious injury finding was also inconsistent with the Agreement on Safeguards. We are not persuaded that we need to revisit these findings in the interim review.

### 2.3.3 Paragraphs 7.134-7.135

2.14. Korea notes that having found that in making its overall serious injury finding the USITC relied on an intermediate finding of profitability, which we found to be inconsistent with Article 4.2(a), we found it unnecessary to address Korea's claims that the USITC allegedly based its serious injury determination on declining profitability alone.[20] Korea asks us to make additional findings with respect to Korea's claims in this regard, asserting that it has established that even assuming *arguendo* that the USITC's profitability analysis was reasonable, it still failed to make a proper determination regarding the significant overall impairment of the domestic industry.[21] The United States opposes Korea's request.[22]

2.15. Having considered Korea's request, we are not persuaded that it would be appropriate to make additional findings on an "*arguendo*" basis with respect to Korea's claims. We, accordingly, decline Korea's request.

[15] USITC report, (Exhibit KOR-1), fn 210.
[16] USITC report, (Exhibit KOR-1), fn 210.
[17] Considering these findings, we also saw no basis to agree with Korea's argument that a significant difference in profit between Whirlpool's sales of washers compared to sales of other products "could" be evidence of profit shifting. Korea does not point to any specific evidence before the USITC that shows profit shifting from washers to other products, instead arguing that the differences in profits between washers and other products "could" be evidence of profit shifting. We also note, as we set out in footnote 206 of our Report, that Korea did not argue that profits made on washers were allocated to dryers. Indeed, noting that the USITC stated that the record did not support the respondents' assertion that Whirlpool and GE purposely priced their LRWs to sell at a loss, with the expectation that profitable sales of matching dryers would compensate that loss, Korea contended that "that was not really the argument made by the respondents". Instead, Korea contended that the "main point" not addressed by the USITC was that one cannot view LRW profits in isolation, and reach a conclusion on profitability, given that the industry views LRWs and dryers sales as part of the laundry segment as a whole. (Korea's first written submission, para. 290).
[18] Korea's request for interim review, para. 24.
[19] United States' comments on Korea's request for interim review, para. 6.
[20] Korea's request for interim review, para. 25.
[21] Korea's request for interim review, para. 26.
[22] United States' comments on Korea's request for interim review, para. 7.

## 2.4 The USITC's causation determination

### 2.4.1 Paragraph 7.152

2.16. Korea requests that in resolving its claim concerning the USITC's finding that imports depressed and suppressed domestic prices, we reflect and address the full extent of its arguments.[23] The United States does not comment on Korea's request.

2.17. We consider, as previous DSB reports have also recognized, that we have the discretion to address only those arguments that are necessary to resolve a particular claim.[24] We also agree with previous DSB reports that provided a panel makes an objective assessment of the matter under Article 11 of the DSU, it is not obligated to address each and every argument put forth by a party.[25] Considering how we have resolved Korea's claim in our Report, and also taking into account how Korea presented its arguments in these proceedings, we find it unnecessary to reflect and address the particular arguments alluded by Korea.

2.18. In particular, Korea asks us to reflect and address in our Report, its arguments that the "USITC's price-effect findings involved a simple observation that prices declined", "that the USITC failed to examine sufficiently the relationship between imports and effects on domestic prices" and that "the USITC failed to explain how any price depression was explained by the increased imports".[26] We note that Korea introduced these arguments in paragraph 382 of its first written submission.[27] However, Korea did not substantiate its view. For instance, Korea asserted that "price depression is not simply a matter of prices going down" and "[y]et that is how it was approached by the USITC", before adding that the USITC "failed to explain how any price depression was explained by the increased imports". Korea did not substantiate its assertions by explaining why Korea took this view, considering the USITC's finding is, in fact, based on the relation between the effect of subject imports on domestic prices, with the USITC finding that a "significant and growing quantity of low-priced imports depressed and suppressed prices of the domestic like product".[28]

2.19. Korea may, of course, (and has in these proceedings) challenge the USITC's price effects finding in this regard. Indeed, we have upheld Korea's claim challenging the USITC's price effects finding based on certain arguments that were substantiated.[29] However, we see no basis for reflecting all of its arguments in our Report, especially those we find to be unsubstantiated.[30] We, accordingly, decline Korea's request.

### 2.4.2 Paragraph 7.156

2.20. Korea requests us to make certain revisions in this paragraph. In particular, Korea disagrees with our statement that it did not engage with the USITC's reasoning for rejecting arguments made by the Korean respondents challenging the use of the six product categories to make price comparisons.[31] Korea also disagrees with our statement that it did not show why the USITC's reasoning was flawed in this regard.[32] Korea thus disagrees that it failed to establish a basis

[23] Korea's request for interim review, paras. 27-28.
[24] Appellate Body Report, *EC – Poultry*, para. 135. See also Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 125.
[25] Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 125; *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 134.
[26] Korea's request for interim review, paras. 27-28.
[27] Korea refers to paragraph 385 of its first written submission, but we note that the arguments are introduced in paragraph 382 of Korea's first written submission. Paragraph 385 deals with the issue of price comparability. We also note that having introduced the arguments in paragraph 382, Korea moves on, in paragraphs 383-384 of its first written submission, to quoting and referring to previous DSB reports to develop the appropriate standard to examine a price effects analysis, but does not explain how what it considers to be the appropriate standard applies to the facts of this case.
[28] USITC report, (Exhibit KOR-1), p. 42.
[29] Panel Report, section 8.1(e)(i).
[30] We also note that Korea refers to paragraphs 223 and 240 of its second written submission as parts of its submissions where the arguments that we allegedly did not address were made. However, review of these paragraphs makes it clear that Korea links its arguments to issues that we have addressed in our Report, specifically the non-inclusion of agitator-based TL LRWs in the USITC's price effects analysis. (Korea's second written submission, paras. 223 and 240).
[31] Korea's request for interim review, para. 30.
[32] Korea's request for interim review, para. 30.

for its claim because of the reasons we set out in the Interim Report. Instead, Korea contends that it devoted substantial portions of its submissions to debunking, and engaging with, the USITC's reasoning.[33] The United States opposes Korea's request, noting in this regard that Korea simply repeats arguments made by the respondents before the USITC without providing any specific points to establish a *prima facie* case that the six product categories used by the USITC distorted its price comparisons.[34]

2.21. We note that in paragraph 7.156 of our Report we addressed the issue raised by Korea that the six product categories that the USITC used to make price comparisons included multiple models with different price ranges. In paragraph 7.155 of our Report we noted the USITC's explanation for rejecting the Korean respondents' arguments that the product categories included multiple models with different price ranges (and were thus allegedly overbroad). In paragraph 7.156 we stated that Korea did not engage with specific reasons the USITC set out in that explanation for rejecting the arguments.

2.22. Consistent with our standard of review, we have examined whether the USITC's explanations were reasoned and adequate in light of the record evidence and the arguments made by the respondents. We have not conducted a *de novo* review based on the arguments made by the respondents before the USITC (and recalled by Korea in these panel proceedings). We note, as explained in paragraph 7.156, that it is Korea's burden as the complainant to show the USITC's reasoning and explanations were flawed. Having carefully considered the points made by Korea in its request, we are not persuaded that we need to revise paragraph 7.156 in the manner proposed by Korea.[35] Nonetheless, we have made some modifications to better reflect our reasoning in this regard.

### 2.4.3 Paragraph 7.160

2.23. In paragraph 7.160, we responded to the issue raised by Korea that "there is no information on the manner in which the USITC price comparisons were made, including whether adjustments were made for any differences between products in the same product group".[36] Korea disagrees with our presentation of its arguments, and specifically our statement that Korea did not raise any specific argument to support its claims.[37] Contending that it raised very specific points in this regard, Korea refers to arguments that it made in paragraph 258 of its second written submission and paragraph 68 of its response to Panel question No. 76(a).[38] The United States opposes Korea's request.[39]

2.24. We note that in paragraph 7.160 we were responding to the issue raised by Korea in paragraphs 402-403 of its first written submission. We have added a citation in paragraph 7.160 to these paragraphs of Korea's first written submission to clarify this. However, we are not persuaded that Korea raised specific arguments in support of this issue. In particular, while Korea refers to its response to Panel question No 76(a), that question – and Korea's response – concerned a different

[33] Korea's request for interim review, para. 31.
[34] United States' comments on Korea's request for interim review, para. 8.
[35] For instance, Korea asserts that it devoted "substantial portions to engage and debunk the USITC's reasoning" and cites paragraphs 252-259 of its second written submission. (Korea's request for interim review, para. 31). Korea does not explain what exactly in paragraphs 252-259 contradicts what we said in paragraph 7.156 of our Report. We note that some of the issues raised in these paragraphs, such as Korea's argument regarding the inclusion of washers with large capacity options, are addressed in our Report. (Panel Report, paras. 7.157-7.159). In paragraph 32 of its request, Korea provides some examples of arguments where it challenged the USITC's reasoning. In particular, Korea highlights its argument that the product categories selected by the USITC accounted for a small portion of total imports, and also asserts, referring to its submissions, that it raised elaborate arguments to demonstrate that product categories were too broadly defined to provide meaningful price-to-price comparisons. (Korea's first written submission, para. 399; second written submission, paras. 223, 250, and 258). However, we note that in its explanation, which we quoted in paragraph 7.155 of our Report, the USITC responded to these arguments, which were made by the respondents in the underlying investigation. (See also United States' response to Panel question No. 35(d), para. 64). To the extent Korea's argument is that the USITC should have selected a different method to make price comparisons, i.e. used a model-specific price comparison, we also refer to our explanations in footnote 279 of the Report.
[36] Korea's first written submission, para. 402.
[37] Korea's request for interim review, para. 34.
[38] Korea's request for interim review, para. 35.
[39] United States' comments on Korea's request for interim review, para. 8.

matter. Indeed, the subject of that discussion, as the United States also notes, was price data that the United States confirmed – and we noted – was not used for price comparisons.[40] Similarly, Korea does not show the interlinkage between the issue addressed in paragraph 7.160 and the arguments made in paragraph 258 of Korea's second written submission. We note in this regard that we addressed the issues raised by Korea with respect to this issue in our Report.[41]

2.25. That being said, we are of the view that removing the reference to the statement that Korea did not raise any specific points to its argument does not affect our analysis. We accordingly have modified paragraph 7.160 to remove that statement, and added, as noted above, a citation to the parts of Korea's first written submission where this issue was raised.

### 2.4.4 Footnote 345 (to paragraph 7.194) (footnote 344 of the Interim Report)

2.26. Korea requests us to modify footnote 344 of the Report, disagreeing in particular with our description of its arguments, which it does not consider to be accurate.[42] The United States opposes Korea's request.[43]

2.27. We note that in footnote 344 we referred to Korea's argument in paragraph 430 of its first written submission that the USITC "ignored most of the compelling evidence" presented by the respondents. Korea did not provide any citation to support this argument, and instead, in the sentence that followed, moved on to contend that the USITC relied on a statement made by the representative of one of the domestic producers. Thus, Korea did not specify what "compelling evidence" it was referring to. Hence, we stated in footnote 344 that Korea did not explain what specific evidence the USITC ignored or cite to the evidence on the USITC's record that in its view was ignored. To the extent the evidence referred in paragraph 430 of Korea's first written submission was the specific evidence that, as Korea notes, was addressed in our analysis, we consider that removing our statement in footnote 344 does not affect our analysis.[44] We, accordingly, have made the modification requested by Korea by removing this statement in footnote 344.

### 2.4.5 Paragraphs 7.179 and 7.217

2.28. Noting that we found it unnecessary to address the aspect of Korea's causation claims that challenged the USITC's alleged failure to demonstrate that increased imports of LRW parts caused serious injury, Korea requests us to address it and find a violation.[45] Korea requests that we make a finding as to how the USITC's faulty domestic industry definition vitiated the basis for its causation finding.[46] The United States opposes Korea's request.[47]

2.29. We are not persuaded that we need to revisit the findings we made in paragraphs 7.179 and 7.217 of the interim report.

2.30. We note that in paragraph 7.179 we were examining whether, as Korea claimed, the USITC acted inconsistently with Article 4.2(b) because it failed to demonstrate the conditions of competition were such that increased imports of parts caused serious injury. Article 4.2(b) does not provide a specific methodology to make a causation determination, and does not prescribe how the conditions of competition must be analysed.[48] Thus, in assessing whether the USITC acted inconsistently with Article 4.2(b) we must review the determination made by the USITC.

2.31. In addressing Korea's claim in our Interim Report, we noted the United States' argument that it would not have made any sense for the USITC to consider the impact of imports of LRW parts on domestic producers of LRW parts in light of the USITC's recognition that imports of covered parts

[40] United States' comments on Korea's request for interim review, para. 8; Panel Report, fn 301.
[41] Korea's first written submission, paras. 402-403; Panel Report, para. 7.160.
[42] Korea's request for interim review, para. 40.
[43] United States' comments on Korea's request for interim review, para. 10.
[44] Korea's request for interim review, para. 42.
[45] Korea's request for interim review, paras. 37-39.
[46] Korea's request for interim review, para. 38.
[47] United States' comments on Korea's request for interim review, para. 9.
[48] The United States as well as the European Union as a third party alluded to the different ways in which competition could manifest in the market. Considering the nature of the finding made by the USITC in the underlying investigation, we did not find it necessary to address those arguments. (Panel Report, para. 7.62 and fn 110)

did not compete with domestically produced covered parts. We also noted the United States' submission that in establishing a causal link between subject imports and the domestic industry's serious injury, the USITC focused its analysis on the locus of competition between subject imports and the domestic industry, which was the US market for LRWs. However, as we noted in paragraph 7.179, the USITC found domestically produced LRW parts to be like imported parts, as opposed to finding a single like product covering LRWs and LRW parts. Taking into account how the USITC had defined the domestic industry, which affected its causation determination, and considering we had already found that the USITC acted inconsistently with Article 4.1(c) in finding that domestic LRW parts were like imported parts, we found it unnecessary to make a separate finding on whether the USITC acted inconsistently with Article 4.2(b). Considering the fact-specific nature of our determination, we are not persuaded that a finding under Article 4.2(b) would assist in the resolution of this dispute or is otherwise necessary. We, accordingly, decline Korea's request.

2.32. With respect to paragraph 7.217, we note that here we addressed Korea's claim under Article 4.2(b) that because the USITC's definition of the domestic industry and its determination on increased imports were flawed, the USITC's causation determination, which depended on these findings, was also inconsistent with Article 4.2(b). Having upheld Korea's claims challenging certain aspects of the USITC's definition of the domestic industry and its determination on increased imports were inconsistent with the Agreement on Safeguards, we declined to make findings with respect to this purely consequential claim. We are not persuaded that we should revisit our decision in this regard. We, accordingly, decline Korea's request.

### 2.5 Claims under Articles 5.1 and 7.1 of the Agreement on Safeguards

#### 2.5.1 Paragraphs 7.221-7.241

2.33. Korea contends that to the extent we find it unnecessary to rule on a claim under Article 5.1, we should exercise judicial economy on all claims under Articles 5.1 and 7.1, and not engage in the type of substantive analysis contained in paragraphs 7.221-7.241.[49] In the alternative, Korea contends that we should make findings under each of the claims presented by Korea.[50] Otherwise, per Korea there is an unexplained lack of balance in our evaluation of Korea's claims under Articles 5.1 and 7.1.[51] The United States opposes Korea's request, noting in this regard that whereas some aspects of its claims under Articles 5.1 and 7.1 are consequential to other claims made by Korea, others are not, and thus we acted appropriately in addressing them.[52]

2.34. We note that in making its claims under Articles 5.1 and 7.1 of the Agreement on Safeguards, Korea raised separate grounds of violation under these provisions. We addressed these separate grounds on their own merits. For instance, in paragraph 481 of its first written submission Korea contended that "in the absence of a demonstration of the causal link, the resulting safeguard measure was not appropriate, and therefore, not 'necessary' in the sense of Article 5.1 of the Agreement on Safeguards". Considering we had already made findings on causation, where we upheld certain aspects of Korea's claims, we found it unnecessary to make separate findings on Article 5.1, which would have been purely consequential to our findings on causation. However, to the extent Korea's claims under Articles 5.1 and 7.1 were not consequential to any such findings, we addressed them in our Report.

2.35. In paragraphs 482-489 of its first written submission, Korea based its claim on the ground that "the USITC acknowledged that at least some of the serious injury to the domestic industry was caused by other factors", i.e. factors other than increased imports, and it should have separated and distinguished the role played by these other factors for purposes of applying the measure.[53] In failing to do so, the United States per Korea acted inconsistently with Article 5.1 of the Agreement on Safeguards.[54] Korea's claim here rested on the factual premise that the USITC acknowledged factors other than increased imports were causing injury to the domestic industry. In paragraphs 7.188-7.189 and 7.200-7.201 of our Report we found this factual premise to be

[49] Korea's request for interim review, para. 48.
[50] Korea's request for interim review, para. 51.
[51] Korea's request for interim review, para. 51.
[52] United States' comments on Korea's request for interim review, paras. 11-15.
[53] Korea's first written submission, paras. 484-486.
[54] Korea's first written submission, paras. 486-489.

incorrect. Having rejected the factual premise on which Korea's claim rested, we rejected Korea's claim under Article 5.1. Unlike our finding with respect to the ground set out in paragraph 481 of Korea's first written submission, Korea's claim here was not consequential to our findings with respect to any other claim. Thus, we saw no basis for concluding here that it was unnecessary to address Korea's claim. In addressing other aspects of Korea's claims under Articles 5.1 and 7.1, we followed the same approach.

2.36. We, accordingly, decline Korea's request to (a) either not address any of the claims under Articles 5.1 and 7.1 of the Agreement on Safeguards, or (b) make findings with respect to each of them.

### 2.5.2 Paragraph 7.226

2.37. Korea, as we noted in paragraph 2.33 above, contends that if we find it unnecessary to rule on a claim under Article 5.1, we should not engage in the type of substantive analysis contained in paragraphs 7.221-7.241, including paragraph 7.226. In the alternative, Korea contends that we should make findings under each of the claims presented by Korea. Specifically, with respect to findings contained in paragraph 7.226 of our Report, Korea states that we should find a violation under Article 5.1 (and not exercise judicial economy).[55] Korea contends that there is no reason to deny it the benefit of another finding of violation that relates to the flawed application of the measure.[56] The United States opposes Korea's request.[57]

2.38. Having carefully considered Korea's request, we are not persuaded that we need to revisit our finding in paragraph 7.226. In particular, we do not consider that any finding of violation would assist in the positive resolution of this dispute. We, accordingly, decline Korea's request.

### 2.5.3 Paragraph 7.229

2.39. Korea contends that we rejected its Article 5.1 claim based on a misunderstanding of the argument it actually made.[58] Clarifying its arguments in this regard, Korea requests us to revise our Report to address the argument it actually made.[59] The United States opposes Korea's request, and asserts, by pointing to relevant parts of Korea's submissions in these proceedings, that we did not misunderstand Korea's argument.[60]

2.40. We note that in paragraph 7.227(a) of our Report we set out Korea's argument, which we addressed in paragraph 7.229. In setting out the argument in paragraph 7.227(a), we noted that Korea challenged the United States' duty rates on the ground that such rates were introduced even though the facts showed weak, non-existent serious injury and average price underselling of only 14.2%. We also noted Korea's argument that since the USITC found lower domestic prices to be directly responsible for the losses to the domestic industry, limiting the safeguard remedy to the price difference between subject imports and domestic like products would have addressed the domestic industry's serious injury. Korea has not challenged our description of its arguments in paragraph 7.227(a).

2.41. We also note that in its interim review request, Korea refers to its second written submission, and specifically to paragraphs 297-298 of that submission to clarify the argument it actually made.[61] However, we note that having set out the USITC's findings in paragraph 297 of its second written submission, Korea argued in paragraph 298 of its second written submission as follows:

> Given these findings, the extent to which imports were alleged to undersell domestic prices was highly relevant in designing the LRW safeguard measure to be *commensurate* to the serious injury attributed to the increased imports. Thus, counteracting the price

[55] Korea's request for interim review, para. 52.
[56] Korea's request for interim review, para. 52.
[57] United States' comments on Korea's request for interim review, para. 14.
[58] Korea's request for interim review, para. 53.
[59] Korea's request for interim review, para. 57.
[60] United States' comments on Korea's request for interim review, para. 16.
[61] Korea's request for interim review, paras. 54-57.

> differential would have addressed the domestic industry's serious injury, since it was the lower domestic prices that (allegedly) were "direct[ly]" responsible for the losses.[62]

2.42. In paragraph 299, Korea added as follows:

> However, by applying (i) in-quota tariffs of 20% up to 1.2 million LRW units and a 50% tariff for any subsequent imports; and (ii) a tariff of 50% on any imports parts exceeding 50,000 units, the U.S. safeguard measure went beyond what was necessary to remedy injury. It was not necessary in light of the USITC's findings that, in particular, the average price underselling was only 14%.

2.43. Given these arguments, we consider it was appropriate to examine, as we did in paragraph 7.229, whether Article 5.1 requires investigating authorities to calibrate their safeguard measures to reflect the degree of price underselling. We, accordingly, decline Korea's request.

### 2.6 Claims under Articles 12.1 and 12.2 of the Agreement on Safeguards

#### 2.6.1 Paragraphs 7.226-7.267

2.44. With regard to our rejection of its Article 12.2 claim, Korea disagrees with our finding that Korea failed to show why the information conveyed in the notification was not sufficient.[63] Korea thus requests us to reconsider this finding. The United States opposes Korea's request, noting that while in its interim review request Korea summarizes and cross refers to arguments made in previous submissions, those summaries provide no basis for us to revisit our finding.[64]

2.45. We note that in its interim review request Korea refers to arguments that it made in its submissions, and which we examined in reaching the findings that are set out in our Interim Report. We are not persuaded that we need to revisit these findings. We, accordingly, decline Korea's request.

### 2.7 Section 8 (Conclusions and recommendations)

#### 2.7.1 Paragraph 8.1

2.46. Korea requests us to modify section 8 of our Report, which contains our conclusions and recommendation.[65] The United States considers Korea's request to be outside the scope of interim review, and in any case notes that the DSU provides a panel with discretion to present its conclusions in a format it deems appropriate.[66]

2.47. We are not persuaded that we need to modify section 8 of the Report in the manner proposed by Korea. In these proceedings, Korea raised independent grounds of violation of the same provision. For example, in section 8.1(f)(v) of the Report, we conclude that it was not necessary to address Korea's claim under Article 5.1 that was consequential to its claim challenging the USITC's causation determination. However, Korea did not just claim violation of Article 5.1 on such a consequential basis. Thus, for example, in section 8.1(f)(iii) we rejected Korea's claims under Article 5.1 that the United States acted inconsistently with this provision because the United States failed to take into account existing import restrictions from anti-dumping and countervailing measures. Korea's proposal to modify section 8 would remove these distinctions that we drew in our Report, and which we consider add to the clarity of our conclusions in this case. We, accordingly, decline Korea's request.[67]

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[62] Emphasis original.
[63] Korea's request for interim review, para. 58.
[64] United States' comments on Korea's request for interim review, para. 17.
[65] Korea's request for interim review, para. 68.
[66] United States' comments on Korea's request for interim review, paras. 19-20.
[67] We also note that similar approaches have been followed in other cases. (See e.g. Panel Reports, *US – OCTG (Korea)*, sections 8.2(j) and 8.3(d); and *US – Anti-Dumping Methodologies (China)*, paras. 8.1(a)(i) and 8.1(a)(vi)).

## ANNEX B

ARGUMENTS OF THE PARTIES

## ANNEX B-1

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE REPUBLIC OF KOREA

### I. INTRODUCTION

1. This dispute concerns the safeguard measure imposed by the United States on imports of large residential washers ("LRWs") and certain parts in 2018. Korea considers that the safeguard measure is inconsistent with the obligations of the U.S. under relevant provisions of the General Agreement on Tariffs and Trade ("GATT") 1994 and the Safeguards Agreement.

### II. STANDARD OF REVIEW

2. The general standard of review in Article 11 of the Dispute Settlement Understanding ("DSU") applies to this dispute. Accordingly, the Panel is required to (i) assess whether the U.S. International Trade Commission ("USITC") examined all the pertinent facts; (ii) examine whether the USITC provided adequate and reasoned explanations of how the facts supported its findings; and (iii) consider whether the USITC's explanation addressed fully the nature and complexities of the information on the record and responded to other plausible interpretations of the data. The Panel must find that an explanation by the USITC is not reasoned or adequate if some alternative explanation of the facts is plausible and the USITC's explanation does not seem adequate in light of that alternative explanation.

3. Articles 3.1 and 4.2(c) of the Safeguards Agreement require the publication of a report with "detailed analysis", "demonstration of the relevance of the factors examined", and findings supported by "reasoned conclusions reached on all pertinent issues of fact and law". If there is no reasoned and adequate explanation to support a USITC finding, the Panel must find a violation.

4. The Panel's mandate does not include reviewing new, after-the-fact explanations by the U.S. in the context of this dispute. Such *ex post* rationalizations are irrelevant for purposes of reviewing the reasoned and adequate nature of the explanations provided by the USITC in support of its conclusions.

5. Finally, the Panel must not "find support for [a certain conclusion] by cobbling together disjointed references scattered throughout a competent authority's report".

### III. GENERAL OBSERVATION ON THE U.S.' UNWILLINGNESS TO COOPERATE

6. The Panel gave the U.S. ample opportunities to provide certain unredacted sections of the USITC Report by making numerous specific requests. However, the U.S. has consistently refused to comply. The U.S.' unwillingness to cooperate with the Panel and to provide essential information concerning the factual basis for the USITC's assessments and findings in the underlying investigation prevents the Panel from critically scrutinizing the measure, as it is required to do under Article 11 of the DSU. This refusal also undermines the ability of Korea to seek the "prompt" and "satisfactory" resolution of the dispute under the DSU.

7. It goes without saying that the Panel is entitled to seek any information that it deems "appropriate" pursuant to Article 13 of the DSU. Article 27 of the Vienna Convention on the Law of Treaties ("VCLT") makes it clear that the U.S. cannot invoke its domestic laws as a justification for its failures to comply with its international obligations under the DSU.

8. Nevertheless, the U.S. cites to alleged confidentiality concerns in the underlying USITC investigation as the justification for depriving the Panel and Korea of the relevant information. However, a WTO dispute does not have the same confidentiality concerns as a U.S. domestic investigation, since the entire WTO dispute settlement proceeding is confidential and does not involve any of the commercial actors that participated in the underlying investigation. In addition, at the request of the parties to this dispute – including *the U.S.* – the Panel adopted "Additional Working Procedures of the Panel concerning Business Confidential Information" to

protect the confidentiality of any sensitive information. Hence, there were adequate procedures in place to protect the exchange of business confidential information while ensuring that the Panel can make an objective assessment of the facts and the matter in this dispute. The situation in this dispute is no different from what is frequently the case in WTO disputes involving trade remedies. It is also worth noting that the USITC routinely submits the same confidential information in litigation before U.S. domestic courts.

9. The U.S.' repeated failure to provide the relevant information in this dispute should be duly taken into account by the Panel in its examination of the matter, as it clearly raises what the Appellate Body has called a "serious systemic issue". Korea submits that the Panel is entitled – even required – to draw adequate inferences, including *adverse inferences*, from the U.S.' unwillingness to provide the requested information. Otherwise, the Panel's acceptance of the U.S.' arguments would erroneously amount to a "total deference" to the USITC's findings, which would constitute an error of law under Article 11 of the DSU.

## IV. CLAIM 1: THE U.S. FAILED TO DETERMINE THAT IMPORTS INCREASED AS A RESULT OF "UNFORESEEN DEVELOPMENTS" AND AS THE EFFECT OF "OBLIGATIONS INCURRED"

10. The U.S. failed to address the essential prerequisites for the imposition of a safeguard measure, namely that the alleged increase in LRW imports was the result of "unforeseen developments" and the effect of "obligations incurred" under the GATT 1994.

11. It is well established that competent authorities must affirmatively find that the increased imports were "the result" of these factual circumstances. The burden was on the U.S. to demonstrate, before the imposition of the measure, which "unforeseen" circumstances and which "obligations" under the GATT 1994 that resulted in the increased imports of LRWs and parts, which in turn caused serious injury to the domestic industry. Yet, there was no such analysis and no such findings in the USITC Report or the U.S. President's Proclamation.

12. The failure to respect these foundational conditions means that there was no legal basis to apply the LRW safeguard measure.

13. First, with respect to "unforeseen developments", the term is not even mentioned in any of the USITC's published reports. Korea understands there is no legal requirement under U.S. law to find that increased imports were the result of "unforeseen developments", but that in the past the United States Trade Representative – to ensure compliance with WTO law – has regularly requested the USITC to prepare a supplementary report to examine the issue in safeguard investigations. For reasons unknown to Korea, no such request was made in the LRW investigation and, accordingly, no examination or finding was ever made by the USITC about the existence of unforeseen developments.

14. Second, with respect to the "obligations incurred", the USITC similarly failed to undertake any examination of the issue, let alone any determination of which "obligations" had the "effect" of increasing LRW imports. The USITC Report only contained a short description of the tariff classification and of the applied duty rates for LRWs and parts. Other than simply listing this information, there was no reasoned and adequate explanation that linked the duty rates to "obligations" of the U.S. under the GATT 1994, nor linking the "obligations" to the alleged increased imports.

15. In sum, Korea and the Panel are left guessing what the "unforeseen developments" and the "obligations" under the GATT 1994 could be and how they would be linked to the alleged increase in imports. As a result, the USITC has acted inconsistently with Article XIX:1 of the GATT 1994 and Articles 1, 3.1, and 11.1(a) of the Safeguards Agreement.

16. In its submissions to the Panel, the U.S. remarkably asserts that the increase in imports of LRWs and parts were the result of unforeseen developments and tariff concessions, while at the same time confirming that "[t]he USITC Report does not contain a finding on unforeseen developments within the meaning of Article XIX:1(a) of the GATT 1994". This admission that no relevant finding was made by the USITC is the end of the matter, and the Panel can base its finding on this admission alone.

17. Indeed, the U.S. can point to no part of the USITC Report where such an affirmative finding and reasoned conclusion are set forth. Its limited assertion is based on a footnote reference in the USITC Report that certain *U.S. producers* did not foresee the expansion of international production lines, but it does not refer to a reasoned finding by the USITC itself.

18. The other argument by the U.S. is that Korea is wrong to rely on well-established guidance from the Appellate Body in support of its position. It argues that there is no need to address the question of "unforeseen developments" in the published reports, and that a Member has "discretion as to how, when, and where it demonstrates the existence of unforeseen developments". However, the relevant text of the GATT 1994 and the Safeguards Agreement is unequivocal in this regard and the relevant guidance by the Appellate Body has – without exception – been confirmed and followed by all WTO panels and the Appellate Body. The U.S. cannot point to any example or textual basis to support its preferred reading of the relevant provisions.

19. Certainly, the requirements to examine, affirmatively find, and support with a reasoned conclusion (all set forth in a published report before the imposition of a measure) that the increased imports were the result of unforeseen developments derive from the text of the GATT 1994, General Interpretative Note to Annex 1A (Multilateral Agreements on Trade in Goods), and the Safeguards Agreement. These prerequisites are clearly part of the "pertinent issues of fact and law" that must be addressed in the competent authority's published report as required by Article 3.1 of the Safeguards Agreement. Thus, it is not sufficient for the competent authority to satisfy itself merely that the "unforeseen developments" exist as a factual matter. Rather, the existence of "unforeseen developments" must be addressed *before* imposing a safeguard measure, not three years later in the context of a WTO dispute. The Panel does not need to examine the U.S.' arguments developed in the context of this dispute that seek to fill gaps in the USITC Report, as they amount to *ex post* justifications.

20. The U.S. also wrongly argues that the USITC Report contains a demonstration that the U.S. incurred obligations under the GATT 1994 that resulted in the increased imports. This unsubstantiated assertion is refuted by its own admission that the USITC Report merely "contains a *description* of the tariff lines at issue, including the bound (MFN) rates", but no identification of any GATT obligations and no examination, finding and supporting explanation of how such tariff findings *resulted in* the increased imports.

21. Indeed, the USITC Report contained only a short description of the "tariff treatment" of LRWs and parts under the U.S. Harmonized Tariff Schedule ("HTS"). The USITC did not link this tariff treatment to any "obligations" under GATT 1994, nor any explanation of how the increased imports were the "effect" of such "obligations". The U.S. is incorrect to suggest that "a simple recitation of a relevant tariff concession" is sufficient. The text of Article XIX:1 of the GATT 1994 makes it clear that there are two aspects to be examined: what are the relevant "obligations incurred", and how did these obligations have the effect of increasing imports in such a way as to cause serious injury. The USITC never identified the relevant obligations incurred and certainly did not examine (let alone determine) how the increased imports were the "effect of" these obligations.

22. For the foregoing reasons, Korea submits that the U.S. has failed to rebut its *prima facie* case of violation under Article XIX:1(a) of the GATT 1994 and Articles 1 and 3.1 of the Safeguards Agreement.

## V. CLAIM 2: U.S. FAILED TO MAKE A PROPER DETERMINATION OF "INCREASED IMPORTS"

23. The U.S. failed to make a proper determination that LRWs and parts were imported in "such increased quantities, absolute or relative to domestic production, and under such conditions" as to cause serious injury to the domestic industry.

24. The USITC's finding of increased imports was flawed in many different ways: (i) there was no examination or finding about the degree of recentness, suddenness, sharpness and significance of the increase in imports; (ii) the USITC failed to examine properly the trends in import volumes over the POI, including the rate and significance of the increase; (iii) the

USITC failed to support its finding with a reasoned and adequate explanation given that imports actually decreased in the most recent period of the POI; (iv) the USITC's increased import analysis was based on a flawed dataset and the USITC failed to undertake any proper verification thereof; and (v) the USITC erroneously cumulated imports of LRWs and parts while it was undisputed that imported parts were not in competition with any like domestic product.

25. For the reasons set forth below, Korea submits that the U.S. has failed to rebut its *prima facie* case of violation under Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 3.1 of the Safeguards Agreement.

### V.1. USITC failed to (i) undertake an objective examination based on positive evidence to establish a sufficiently recent, sudden, sharp and significant increase of imports, (ii) examine properly the trends in import volumes over the POI, and (iii) support its finding with a reasoned and adequate explanation

26. The record facts show that the import volume of LRWs decreased in the most recent period of the period of investigation ("POI") (i.e. 2017) and that there was a significant deceleration in the rate of increase since 2015. In response, the U.S. argues that a number of prior WTO disputes allegedly confirm that there is no need for a sharp increase in the most recent POI, and that neither a deceleration nor even a decline in imports prevents an authority from making a finding of increased imports.

27. However, the WTO jurisprudence, based squarely on the text of the Safeguards Agreement, is consistent in requiring that not just any increase suffices, but that the increase in imports must be "recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively". This legal standard requires both a *quantitative* and a *qualitative* analysis.

28. Yet, it is clear that the USITC did not undertake any qualitative analysis about the alleged significance of the increase in imports and did not address either the deceleration or the decrease in the latter part of the POI. There was nothing recent, sudden or sharp about the admittedly "steady" increase in imports, which was followed by a sharp decline in the most recent period of the POI. Indeed, the publicly available data from the USITC show a decrease of 5% in quantity and more than 12% in value for 2017 1Q. This is not the relevant "sudden, sharp and significant increase" in the most recent period that could justify the imposition of an emergency measure.

29. The U.S. attempts to defend the USITC's finding by repeating its finding that imports "nearly doubled" during the POI. The U.S. asserts that it was reasonable for the USITC to rely exclusively on the increase that took place between 2012-2016, suggesting that the drop in the latter part of the POI was not material. However, this finding is based solely on a start-point to end-point analysis, which previous panels and the Appellate Body have consistently rejected as the proper basis for examining whether imports increased in such quantities and under such conditions as to cause serious injury. Indeed, the imports increased only by 26.2% between 2013 and 2016, and by an even smaller percentage between 2013 and 2017 (1Q). This huge discrepancy caused by a slight adjustment of the relevant period further demonstrates the inherently deficient and skewed nature of a start-point to end-point analysis.

30. The USITC neglected to consider the deceleration of LRW import rates in the latter half of the POI, and failed to properly consider the decline in 2017 1Q. Nowhere in the USITC Report can it be found that the USITC had actually considered the deceleration that transpired throughout the latter half of the POI in the proper context. Moreover, the record reveals that the USITC's superficial, result-oriented explanation on the decline in imports in 2017 1Q only paraphrases uncorroborated allegations by the petitioners that does not actually explain the decline. The U.S. cannot argue otherwise.

31. Korea notes that all three LRW import dataset before the Panel (i.e. (i) paragraph 147 of Korea's first written submission, (ii) Exhibit 2D of the Petition, and (iii) Exhibit 2A of the Petition, which the U.S. expressly confirmed to be "consistent" with the USITC's own import

trend analysis), uniformly demonstrate a deceleration in the latter half of the POI, followed by a sharp decline in 2017 1Q. Thus, the Panel has all the data it needs to review Korea's argument and to find that the USITC acted inconsistently with its WTO obligation.

32. In response to the Panel's pointed questions, the U.S. suggests that a qualitative analysis was undertaken by referring to *price*-related considerations of the USITC in the context of the causation examination. However, to comply with Article 2.1, the USITC was required to explain how the *increase* in imports was of "such" significance in terms of volume and value, both quantitatively and qualitatively, to cause serious injury. This is different from examining the coincidence between increased imports and related *price* developments.

33. In addition, the U.S. suggests that imports' market share "significantly increase[d]". This assertion must be contrasted with the USITC's finding that the *domestic industry's* market share "fluctuated within a narrow band during the period of investigation" and that it "was roughly the same" in the POI. Since the total market share is the combination of the domestic industry market share and market share of imports, the fact that there is no real change in the market share of the domestic industry means that there is no real change in market share of imports. Therefore, whatever the percentage increase in the market share of imports (which has been redacted from the public version of the USITC Report), the changes must have been insignificant or merely a result of the deliberate exclusion of belt-driven LRWs from the product under consideration ("PUC").

34. Indeed, there is an internal contradiction in the USITC's findings that imports' market share increased significantly, on the one hand, and that the domestic industry's market share "was roughly the same in 2016 as in 2012", on the other. Since the market share of imports and that of the domestic industry constitutes total U.S. consumption, a finding that imports increased their market share, but the domestic industry's market share remained flat, cannot coexist at the same time. The U.S. explains this contradiction by pointing to the excluded belt-driven LRW imports and that "the significant increase in subject import market share … corresponded to a decline in the market share of out-of-scope imports of belt-driven washers". Again, this assertion is uncorroborated.

35. The U.S. admits that this is an *ex post* rationalization and not an explanation made by the USITC. Thus, the USITC apparently failed to provide any reasoned and adequate explanation on these important qualitative issues. However, assuming *arguendo* that the U.S.' *ex post* rationalization is correct, it only confirms that the *entirety* of the alleged increase in market share of imports was the result of the USITC's arbitrary exclusion of belt-driven LRWs from the PUC. If belt-driven LRWs had been properly covered (as they were for the domestic industry definition), imports' market share would have remained stable throughout the POI, just like the domestic industry's market share. The resulting inconsistency between the market shares of imports and of the domestic industry is a representative example of how this deliberate exclusion/inclusion mismatch by the USITC materially distorted the examination of the conditions for imposing the safeguard measures in the underlying investigation. This does not constitute an objective examination, but an artificial construction of the facts to reach certain conclusions: one supposedly that imports' market share increased when only certain imported models increased at the expense of other declining imported models.

36. Finally, Korea respectfully reminds the Panel that the U.S. continues to refuse to reveal the actual data underlying the USITC's finding. To the extent that there is any doubts as to the veracity or reasonableness of the USITC's increased import analysis, Korea considers that the Panel is entitled to draw adequate and adverse inferences from the U.S.' unwillingness to provide the requested information. The inference that the Panel can draw from this refusal, in light of the substantiated *prima facie* case that Korea has presented, is only that the U.S. has failed to rebut Korea's claim that the USITC failed to make a proper determination that LRWs and parts were imported in "such increased quantities, absolute or relative to domestic production, and under such conditions" as to cause serious injury to the domestic industry.

### V.2. USITC'S INCREASED IMPORT ANALYSIS WAS BASED ON A FLAWED DATASET AND THE USITC FAILED TO UNDERTAKE ANY PROPER VERIFICATION THEREOF

37. In this dispute, the only dataset that matches the USITC's increased import finding that the imports "nearly doubled" during the POI is the dataset contained in Exhibit 2A of the Petition, which was artificially created by the petitioner, Whirlpool, by excluding its own out-of-scope belt-driven LRW imports to the U.S. from the official import data contained in Exhibit 2D of the Petition. Naturally, Korea has constantly and repeatedly raised issues against the veracity and reliability of the dataset contained in Exhibit 2A of the Petition.

38. In response, the U.S. argues that the USITC did not rely on Exhibit 2A, but instead conducted its own increased import analysis based on the data that it gathered from the importers. Korea responded by demonstrating that no data provided by importers could have allowed the USITC to *ex officio* exclude the out-of-scope belt-driven LRWs from the overall LRW import statistics, as imports of belt-driven LRWs cannot be identified based on HTS. Importers of Samsung and LG could not have provided such information either, as Samsung and LG did not export belt-driven LRWs to the U.S. during the POI. The only party that is in possession of the information that could have possibly allowed such an adjustment was the U.S. domestic industry (and their foreign subsidiaries). Yet, the USITC neither requested any underlying data from the domestic industry (or from their foreign subsidiaries) nor conducted any verification of the dataset contained in Exhibit 2A of the Petition.

39. In this dispute, Korea repeatedly highlighted that the dataset used by the petitioner as well as the dataset used by the USITC seem highly questionable. For example, official U.S. import statistics show that the increase in 2012 to 2016 was merely 33.7%, with yearly increases of about 6%, 5%, 8%, 13%, and 5%. In contrast, Exhibit 2A shows over 100% of increase between 2012 and 2016, although it also shows similarly steady annual increase in LRW imports from 2013 to 2016. Even in Exhibit 2A, therefore, the only year that made significant difference so as to create the "over 100%" surge in LRW imports in 2012 to 2016 was the year 2012. As it happens, 2012 was the *only year* in which an artificial adjustment was made by the petitioner by excluding *its own* belt-driven LRW imports from the overall LRW imports.

40. It must be noted that belt-driven LRWs were excluded from the overall LRW imports for every year during the POI, including for 2013, 2014, 2015, 2016, and 2017. For these five years, however, the exclusion was made *automatically* as Whirlpool had allegedly relocated its belt-driven LRW production back to the U.S. (thus no belt-driven LRWs were allegedly imported by Whirlpool during this period). It was only for the year 2012 (which, allegedly, were prior to the relocation) that the exclusion was made *artificially* by Whirlpool after subtracting the number of *its own* belt-driven LRW imports from *its own* foreign subsidiaries.

41. It is noteworthy that Whirlpool's unilateral and fully discretionary adjustment in 2012 was the sole cause of "over 100%" increase in LRW imports between 2012 and 2016. However, the USITC did not even attempt to verify this crucial adjustment. Instead, the USITC seemingly accepted Exhibit 2A, which catered to its result-driven approach, as a given, disregarding all official import statistics that showed opposite of the drastic 100% increase in import volume.

42. The U.S. suggests that the official import statistics were "problem[atic]" because they included data on, among others, "imports of out-of-scope belt-driven washers". However, this circular argument is another good example of the way in which the USITC constructed a results-driven reality. The arbitrary decision by the USITC to gerrymander the scope of its investigation where belt-driven LRWs were *excluded* from the PUC, but *included* in the domestic industry definition (while the financial performance data for the domestic belt-driven LRW producers were again *excluded*) does not represent an objective examination. It is an artificial construction of the facts to reach certain conclusions. Had it not been for the arbitrary decision to exclude belt-driven LRWs from the PUC, there could not have been a finding that imports "nearly doubled" during the POI. The aforementioned debate about market shares reveals that imports of belt-driven LRWs significantly declined during the POI, allowing imports to grow their market share. Thus, by not including the significantly declining levels of belt-driven LRWs, the USITC increased its chances of finding an increase in imports. Furthermore, the exclusion of the declining imports of belt-driven LRWs from the PUC effectively functioned as an upward adjustment to the overall LRW import volume trend.

43. Instead of providing any rebuttal or counter-evidence, the U.S. merely confirms that Exhibit 2A of the Petition is "consistent" with the USITC's increased import analysis. Given the U.S.' refusal to provide any information in this regard despite numerous requests by the Panel, the adequate inference to be drawn by the Panel is that the USITC had accepted the information in Exhibit 2A of the Petition for granted, without undertaking any verification thereof. This, in turn, should lead to a finding that the USITC acted inconsistently with its WTO-obligations.

### V.3. USITC ERRONEOUSLY CUMULATED IMPORTS OF LRWS AND PARTS

44. The U.S. asserts that the USITC was entitled to aggregate import data for LRWs and parts when making the finding of increased imports. This is so even though LRW parts served exclusively a captive market and thus posed no competitive threat whatsoever to domestic LRWs or parts. Thus, it was not consistent with the requirement to undertake an objective examination to cumulate these imports, since any increase in LRW parts could never be "in such quantities … and under such conditions, as to cause" serious injury. However, by including LRW parts in the determination of increased imports, the USITC undoubtedly distorted its increased import analysis. The fact that the Safeguards Agreement does not impose disciplines on the definition of the PUC does not mean that an authority can group any products without examining whether, given the conditions of competition, any increase of these products can be such as to cause serious injury to like domestic products.

## VI. CLAIM 3: U.S. FAILED TO PROPERLY DEFINE THE "DOMESTIC INDUSTRY"

45. The USITC's definition of the domestic industry was inconsistent with Article 4.1(c) of the Safeguards Agreement. This incorrectly defined domestic industry also tainted the injury and causation determinations, rendering them fundamentally flawed.

46. Specifically, first, the USITC included in the domestic industry producers of products that were expressly excluded from the PUC (i.e. belt-driven LRWs). This created a mismatch between the scope of subject imports and the domestic industry, which meant that injury and causation were not assessed based on the same product scope. Second, the domestic industry included producers of LRW parts even though these products were not "like or directly competitive" with imported parts, let alone with imported LRWs. On this, the USITC *expressly* adhered to its longstanding "product line" approach. It is well-established, however, that the USITC's "product line" approach is WTO-inconsistent. Third, the U.S. erred by including parts in the scope of investigation, since it was undisputed that domestic and imported parts were not in competition, and thus did not constitute "like or directly competitive products".

47. For the reasons set forth below, the U.S. has failed to rebut Korea's *prima facie* case demonstrating a violation of Articles 2.1, 3.1, 4.1(c), 4.2(a), and 4.2(b) of the Safeguards Agreement concerning the way in which the domestic industry was defined by the USITC.

### VI.1. USITC'S DEFINITION OF THE DOMESTIC INDUSTRY CREATED A MISMATCH BETWEEN THE DEFINITION OF THE DOMESTIC INDUSTRY AND THE PUC

48. The U.S. has no response to the deliberate mismatch created by the USITC between the PUC and the definition of the domestic industry (i.e. belt-driven LRWs were excluded from the PUC, but included in the domestic industry definition), as it merely repeats what the USITC did. However, a competent authority "bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry". The manner in which the USITC constructed the domestic industry definition to best suit the domestic industry's needs is remarkable. Not only did the domestic industry include producers of non-competing products, such as LRW parts, it also included producers of product models that were expressly and arbitrarily excluded from the PUC. Indeed, as noted, the USITC *included* domestic producers of belt-driven LRWs in the scope of the domestic industry while *excluding* belt-driven LRWs from the scope of the subject imports without any explanation.

49. Imports of this product type showed an overall decline and, thus, excluding them increased the chances of finding an increase in imports. At the same time, there still were foreign

subsidiaries of the U.S. companies (i.e. Electrolux and Haier/GE) that exported the belt-driven LRWs to the U.S. Excluding these products would thus save those foreign subsidiaries from a potential safeguard remedy, while all their global competitors would be subject to the measure. The USITC never explained why belt-driven LRWs were excluded from the PUC, even though the respondents made several submissions on the issue. It only noted that "[t]he Commission need not amend the scope of the investigation to consider out-of-scope washer imports as an alternative cause of injury…". That is not a reasoned and adequate explanation supporting the arbitrarily defined PUC and domestic industry.

50. It is well established that the domestic industry definition cannot exclude part of the domestic producers, such as producers of a certain product type, as this would create a risk of material distortion. Korea submits that it is equally distortive *to add* producers of products that go beyond the product scope defined by the authorities. The wrongly defined domestic industry distorted the relevant injury and causation examination undertaken by the USITC as a whole.

### VI.2. USITC ERRONEOUSLY INCLUDED IN THE DEFINITION OF THE DOMESTIC INDUSTRY LRW PARTS THAT WERE NOT IN COMPETITION WITH IMPORTED PRODUCTS

51. The U.S. argues that competent authorities are at liberty to include "different product *types*" in a domestic industry definition as long as each "type" is "like or directly competitive with" the imported product. Korea agrees with this statement in principle, but that was not the factual situation of the underlying investigation where (i) the domestic industry included both LRW parts and finished LRWs, which are not different product "types", but different products all together, which have different characteristics and are not in competition, and (ii) domestic parts that were not even in competition with the imported parts were included.

52. The U.S. also argues that parts were included in the PUC to avoid circumvention of duties on finished LRWs. However, this does not justify including in the definition of the domestic industry products that are not "like or directly competitive". The Safeguards Agreement does not refer to circumvention as a basis for derogating from the relevant disciplines. No safeguard measure can be imposed to protect domestic producers of "unlike" products, such as those with "only a remote or tenuous competitive relationship with the imported products". That is, however, exactly what the USITC did by including LRW parts, which were acknowledged not to compete with domestic LRW units or parts.

53. Furthermore, the U.S. relies on an erroneous formalistic argument that parts could be included in the domestic industry definition because they were "like" imported parts, even if they were not in competition with imported parts. However, the U.S. fundamentally misunderstands the nature and purpose of the likeness test, as used across several WTO agreements, by suggesting it is not concerned with identifying products that are in competition. The likeness test is a marketplace-based concept to identify those products that are in a close to perfect competitive relationship as interchangeable products. It is not concerned with products that share merely certain physical characteristics, uses, and marketing-channels. Absent competition in the marketplace, there could never be a likeness finding.

54. Whereas "likeness" implies close to perfect substitutability ("a degree of competition that is higher than merely significant"), "directly competitive or substitutable" products would be those that compete to a lesser degree. Thus, in order for two products to be "like" – by definition – they will be in very close competition in the marketplace. If products are not in competition, they cannot genuinely be "like products".

55. The U.S. largely relies on the Appellate Body's traditional criteria for determining "likeness", such as "the physical properties of the products", the "extent to which the products are capable of serving the same or similar end-uses", and "the international classification of the products for tariff purposes". It attempts to turn the "likeness" test into a "physical likeness" test. However, these criteria are not exhaustive and are not treaty text and, most importantly, they are "tools available to panels for organizing and assessing the evidence relating to the *competitive relationship* between and among the products". By unduly focusing on certain physical characteristics of the products, while completely disregarding the question of competition, the U.S. has put the cart before the horse. Notably, the USITC failed to duly consider "end-uses" and "consumer tastes and habits" among the traditional likeness criteria.

If the USITC had correctly considered "consumers' taste and habits" or "end-use" it could not possibly have reached the erroneous conclusion that domestic and imported LRW parts were "like" given their complete lack of substitutability. A proper application of the likeness criteria should thus have revealed the inherent relationship between the concept of likeness and that of products with close to perfect competitive substitutability.

56. Undoubtedly, it was insufficient of the USITC to base its "likeness" finding between imported and domestic parts on the alleged fact that they were "substantially identical in inherent or intrinsic characteristics", especially when there was conclusive evidence that there was no marketplace competition between the products. The imported and the domestic LRW parts did not satisfy the same demand. This error is further aggravated because the USITC had initially found that the imported and domestic parts were not in a competitive relationship.

## VII. CLAIM 4: U.S. FAILED TO MAKE A PROPER DETERMINATION THAT THE DOMESTIC INDUSTRY SUFFERED "SERIOUS INJURY"

57. The U.S. failed to provide a reasoned and adequate explanation in support of the finding that the domestic industry suffered "serious injury". The USITC found "serious injury" based essentially on a single negative trend – profitability – while disregarding all other factors that trended positively. There was certainly no serious injury amounting to a "significant overall impairment" in the position of the domestic industry.

58. Specifically, the U.S. (i) failed to examine all relevant injury factors; (ii) failed to undertake the requisite substantive evaluation of the "significant overall impairment" of the domestic industry; (iii) failed to undertake an objective examination of the one injury factor allegedly trending negatively; and (iv) failed to explain how the limited circumstances of alleged injury were so "serious" to justify the safeguard remedy. In addition, (v) the USITC failed to properly evaluate the factor "share of the domestic market taken by increased imports"; and (vi) the USITC's injury analysis was distorted by using data for products that were excluded from the scope of the investigation and by arbitrarily relying on different datasets.

59. For the reasons set forth below, Korea submits that the U.S. acted inconsistently with Articles 2.1, 3.1, 4.1(a), 4.2(a), and 4.2(c) of the Safeguards Agreement. Consequently, the U.S. also violated Article 11.1(a) of the Safeguards Agreement.

### VII.1. USITC FAILED TO EXAMINE ALL INJURY FACTORS LISTED IN ARTICLE 4.2(A)

60. The U.S. disputes that the USITC failed to evaluate all relevant injury factors. It argues that "the rate and amount of the increase in imports of the product concerned in absolute and relative terms" and "the share of the domestic market taken by increased imports" were examined by the USITC. In support, the U.S. refers to sections of the USITC Report other than the section evaluating injury. However, in these sections of the report, the USITC merely states that the increase in imports was "steady" and that imports increased their "penetration of the U.S. market". These short, descriptive references which cannot be reviewed by the Panel given the lack of available unredacted data, and do not amount to the requisite "evaluation" of these mandatory factors for purposes of determining serious injury.

61. Furthermore, there was simply no reflection, let alone a proper evaluation, of these two factors in the USITC's injury examination. Korea's argument is not a formalistic complaint about the structure of the USITC Report in which these factors were examined. The fact of the matter is that *no section* of the USITC Report "evaluates" these factors as part of an assessment of whether there was a significant overall impairment in the position of the industry.

### VII.2. USITC FAILED TO UNDERTAKE AN OBJECTIVE EXAMINATION OF THE "SIGNIFICANT OVERALL IMPAIRMENT" OF THE DOMESTIC INDUSTRY

62. The U.S. argues that the USITC's examination and explanation properly established the "overall" injurious state of the industry even if there were 13 factors trending positively. It also argues that the injury determination was premised on "six factors" (as opposed to one factor) and that the USITC adequately explained why the positively trending factors did not "detract from its determination". However, the U.S.' suggestion that the serious injury

determination was based on six factors is squarely belied by the USITC Report. That much is clear.

63. While Korea is reluctant to completely rule out even the theoretical possibility that there could be a particular situation of serious injury where essentially only one injury factor trends negatively, at any rate, this would be an extremely rare situation that requires a clear and particularly compelling explanation. This is because the injury factors that must be evaluated under Article 4.2(a) should generally inform the "overall impairment" of the domestic industry. In principle, therefore, a finding of serious injury should be based on the establishment of a significant impairment in the overall position of the domestic industry, which should be evident across the injury factors. In addition, given the close interrelation between profit/loss and several other injury factors under Article 4.2(a), it would be expected that serious injury is also revealed through other factors than profit/loss, although not necessarily to similar degrees.

64. That was never the case in the underlying investigation. The USITC Report shows that the domestic industry, among others, *increased* production, capacity, and utilization; *increased* sales in the most important product segment; *increased* revenue; did *not* lose market share to import competition; *increased* employment, wages, and productivity; *increased* expenditure on R&D; and suffered *no* idling of production facilities. Indeed, the addition of new capacity during the POI confirms that the industry was willing and able to make capital investments, an important indicator of the overall health of the industry. The USITC also found that the domestic industry had not suffered a significant idling of productive facilities and that there had not been any significant unemployment or underemployment. That is a long list of positive factors that simply does not support a conclusion that there was a "significant overall impairment in the position of the domestic industry".

65. Given these facts, for the USITC to find the existence of "serious injury" essentially based on a single negatively trending injury factor, there must be a *very compelling explanation* of how the one factor justifies a finding of "significant *overall* impairment in the position of a domestic industry" in light of all the other factors. However, there was none.

66. Finally, the U.S. entirely fails to address Korea's argument that the USITC never even began to examine whether the alleged injury was of such a nature to represent a "significant" overall impairment of the position of the domestic industry. Nothing in the USITC Report or in the U.S. submissions supports a conclusion that this standard was met in this case.

### VII.3. USITC failed to undertake an objective examination of the factor "profits and losses"

67. The U.S. argues that the examination was proper and the finding was supported by reasoned conclusions. However, it effectively acknowledges that the USITC did not take into consideration the record evidence of joint-pricing practices of washers and dryers, and related overall profit data for the combined laundry segment. It thus admits that the USITC rejected these important and well-substantiated arguments. The reason for the USITC's rejection of this information was that it did not relate to a "like or directly competitive" product, as dryers were not covered products. It also considered that the CEO of Whirlpool denied such a joint-pricing reality. There was no other analysis or "reasoned" conclusion, as these two arguments – one formalistic about the scope of the industry and one anecdotal based on the petitioner's own statement – were the sole reasons for rejecting the substantiated argument of the respondents.

68. However, Korea considers that these reasons did not justify refusing to consider relevant information with important implications for the key factor that was driving the injury analysis. The USITC was required to examine objectively "all relevant factors" having a "bearing" on the state of the domestic industry. The joint-pricing practice and the overall profitability of domestic producers in the laundry segment were clearly such "relevant" factors that had to be addressed and evaluated. Further, these facts were substantiated by empirical evidences and extensive economic analysis.

69. Therefore, the USITC should not have refused to engage with this evidence when making its determination on serious injury, but rather should have objectively examined it and provided a reasoned and adequate explanation in support of its finding in light of this evidence. Simply concluding that the "record is mixed" is not a reasoned and adequate explanation when there were plausible alternative explanations of the record facts. Accordingly, the USITC did not engage with the record evidence showing that the *overall* financial condition of the industry was solid, and that any alleged loss in the narrow segment of LRW sales did not amount to serious injury.

### VII.4. USITC's injury determination was vitiated by its flawed domestic industry definition

70. The U.S. argues that the domestic industry definition did not affect its serious injury determination, even though the USITC created a deliberate mismatch between the PUC used for determining increased imports, on the one hand, and the domestic industry used for the serious injury determination, on the other. It merely repeats the erroneous position that the definition of the domestic industry was appropriate. However, a flawed definition of the domestic industry will necessarily lead to erroneous injury and causation determinations.

71. A further distortion was created by selectively disregarding financial data of the domestic belt-driven LRW producers, while apparently taking other injury factors of the domestic belt-driven LRW producers into account. The U.S. acknowledges that the USITC relied on some of the belt-driven producer's data for part of its injury analysis, but excluded the information when analyzing the domestic industry's financial data. The U.S. argues this was "because of flaws in the reported [financial] data", but does not explain what those flaws were, nor provided the unredacted part of the USITC Report so that the Panel can objectively examine this issue. In any case, the USITC had the responsibility to undertake an objective assessment based on positive information and "objective data" on the state of the industry, yet it created a situation where certain producers' data was used for some metrics while other metrics, including in particular financial performance, was determined based on a smaller subset, without any reasoned or adequate explanation justifying this arbitrary approach.

## VIII. CLAIM 5: U.S. FAILED TO ESTABLISH THE EXISTENCE OF A "CAUSAL LINK" BETWEEN THE ALLEGED INCREASED IMPORTS AND THE ALLEGED SERIOUS INJURY

72. The U.S. imposed the LRW safeguard measure without properly demonstrating the existence of a causal link between the alleged increase in imports and the alleged serious injury to the domestic industry. In particular, the USITC failed to provide a reasoned and adequate explanation supporting the existence of a causal link in light of the general lack of coincidence between trends in injury factors, which generally developed positively, and alleged increase of the LRW imports. A reasoned and adequate explanation also required a plausible explanation for why the increase in imports did not coincidentally lead to a negative trend in so many of the injury factors. Given the absence of coincidence, a very compelling analysis was required. However, none was provided in the USITC Report.

73. In addition, the USITC failed to examine properly the conditions of competition and price-related effects. For example, the USITC's price *depression* analysis was in fact a pure price *decrease* observation. In addition, the USITC's price comparisons categorically carved-out particularly low-priced, agitator-based LRWs, which represented 50% of all domestic sales in the POI. The price comparisons were thus not at all representative of the domestic industry. Moreover, six pricing products exclusively used in the comparisons were defined in an unduly broad manner, each pricing product including multiple models with a range of features and consequent wide variations in price in any specific quarter. The USITC's pricing data was therefore unduly broad and uninformative. To obtain probative information on the actual price competition between models, the USITC should have required price data for each corresponding models within each pricing product category. That data would have allowed the USITC to make price comparisons of closely matching models. Additional flaws vitiated the USITC's price analysis such as its undue reliance in this *global* safeguard investigation on price comparisons undertaken in the *anti-dumping* investigation on *LRWs from China.*

74. Finally, the USITC failed to evaluate properly the known "other factors" causing injury to the industry, including by failing to properly separate and distinguish their effects. As part of its WTO-inconsistent "substantial cause" test, the USITC acknowledged that there were other factors negatively affecting the state of the industry. However, based on a very superficial analysis, it found that these "other factors" were not more important than increased imports. It did not otherwise attempt to separate and distinguish these other factors. In addition, the USITC's assessment of these other factors was not objective.

75. For the reasons set forth below, Korea submits that the U.S. acted inconsistently with its obligations under Articles 2.1, 3.1, 4.2(b), and 4.2(c) of the Safeguards Agreement. Consequently, the U.S. also violated Article 11.1(a) of the Safeguards Agreement.

### VIII.1. USITC FAILED TO EXAMINE PROPERLY THE COINCIDENCE BETWEEN TRENDS IN IMPORTS AND INJURY FACTORS

76. The U.S. argues that the USITC demonstrated a coincidence of trends of how increased imports caused financial losses to the industry. However, the entirety of this "finding" relates to price developments, not to any other of the relevant factors for assessing serious injury. Evaluation of price is only one factor, among many others, when assessing the impact on competition and, relevantly, "price" is not even among the listed factors in Article 4.2 of the Safeguards Agreement. The USITC conducted an isolated (and flawed) price analysis as opposed to the required analysis of the coincidence between the trends in the injury factors with the trends in imports.

77. For example, the USITC did not address the fact that, despite allegedly increasing imports, there was effectively no change in the domestic industry's market share. There was equally no causation-related evaluation of the lack of coincidence between increased imports and the at least 13 positively trending injury factors reflected in the serious injury analysis. This falls short of undertaking the required examination of the coincidence in the increase in imports and the trends in the injury factors.

78. In response to Korea's argument that the USITC failed to examine trends in production, capacity, utilization, revenue, employment, wages, and R&D spending, the U.S. argues that Korea failed to show "how the relevant trends were inconsistent with the finding that the increase in low-priced imports suppressed and depressed prices, causing profits to drop". The U.S.' reply reveals the extent to which its approach is misguided. For the U.S., it is all about price when this factor is not even mentioned in Article 4.2(a). The point Korea is making is that a causation analysis that seeks to establish a coincidence in trends is to examine and explain why in respect of so many injury factors, there is no such coincidence. In fact, when there is no coincidence, a particularly compelling explanation is required. None was offered by the USITC and the U.S.' circular argument only confirms that.

### VIII.2. USITC FAILED TO EXAMINE PROPERLY THE CONDITIONS OF COMPETITION IN THE DOMESTIC INDUSTRY, RELYING INSTEAD ON A FLAWED PRICE ANALYSIS

79. The U.S. has no response to the fact that the USITC did not evaluate non-price factors in its causation analysis, even though it acknowledged that non-price factors were important factors in purchasing decisions for LRWs. The section on conditions of competition in the USITC Report does not provide an analysis of the competitive interaction between imports and domestic products, but rather describes the various pieces of information and concludes that domestically produced LRWs and imported LRWs are "comparable" in terms of non-price factors. This is not the kind of analysis of the conditions of competition with respect to certain trends in the market over the POI that is required as part of a causation analysis. It is not because products may be comparable that non-price factors become irrelevant. Yet, that is effectively how the USITC treated these non-price factors.

80. The USITC's evaluation of causation was primarily driven by its price-related analysis, which was also flawed and distorted. Among others, the USITC deliberately excluded from its pricing analysis the low-priced, agitator-based LRWs that made up about half of the overall shipments by the domestic industry in the POI, while including the same agitator-based LRWs in its injury

analysis in general. To conduct a representative price analysis, the USITC should have appropriately reflected the actual and prevailing product mix in the market.

81. The USITC's exclusion of agitator-based LRWs is particularly problematic given that the USITC's price-effect analysis was principally based on its finding of price undercutting, which could (in fact, most likely would) have turned out differently if agitator-based LRWs had been duly incorporated into the pricing products used in the underlying investigation. This error alone renders the USITC's deeply flawed price-effect analysis beyond redemption.

82. On this point, the U.S. mistakenly contends that including agitator-based LRWs in the pricing products would have "yielded few if any price comparison, given the few import shipments of such LRWs". This misguided argument only reveals the U.S.' and USITC's result-driven approach in the underlying investigation. In fact, agitator-based LRWs could have been easily covered by at least half of the six pricing products, simply by adding "with agitator or without agitator" to the definitions for products 3, 4, and 6, which all are top-load LRWs. This is not to mention that many better and more reasonable ways of reflecting prices of agitator-based LRWs were available if the entire pricing products were to be re-defined. To the extent that the USITC explicitly found that agitator-based LRWs were in competition with imported LRWs, it should have – but failed to – define its pricing products to properly cover and reflect agitator-based LRWs.

83. In fact, the whole notion of price decreases that the USITC found to exist is solely based on the information related to the six specific pricing products that the USITC defined for its price comparisons. It is important to recall that the USITC acknowledged that the total quantity *and value* of U.S. shipments by the domestic industry *increased* annually. Thus, while the value of U.S. LRW sales went up consistently throughout the POI, the price decreases that the USITC gave importance to were merely a construction based on six product categories that did not include half of all LRW product types sold in the U.S.

84. In addition, the U.S. has no response to the fact that the USITC's price depression finding was based on its observation of a mere price decrease. However, Korea pointed out that both import and domestic prices decreased in the POI, in similar ranges. On top of ignoring about half of U.S. domestic sales of low-priced agitator-LRWs in the price analysis, the USITC failed to examine if the imports were truly the reason for the price decline or if prices rather declined because of some other exogenous factor. There is no basis to assume that the imports should be the cause for the drop in domestic prices and not some exogenous factor. In *China – GOES*, the Appellate Body explained that the concept of price depression "refers to a situation in which prices are pushed down, or reduced, *by something*" and that "[a]n examination of price depression, by definition, calls for more than a simple observation of a price decline". The USITC clearly failed to live up to the requisite standard.

85. Finally, Korea has pointed to several other fundamental flaws in the methodology and in the data used by the USITC for the price analysis. For example, the six product categories were unrepresentative of the U.S. LRWs market, and the USITC findings regarding agitator-based models were based almost exclusively on an evaluation that was undertaken in a prior *anti-dumping* investigation on imports from *China*. This China-specific price comparison based on one product category at a particular period of time different from the underlying safeguard POI is obviously not an objective and reliable basis for making findings in this global safeguard investigation. Rather, it serves as yet another strong example of the result-driven nature of the underlying safeguard investigation.

### VIII.3. USITC failed to establish causation with respect to LRW parts

86. The U.S. acknowledges that the entire causation determination was based on an examination of LRW units and not a consideration of the impact of imports of LRW *parts*. The obvious reason is that domestic parts were not in competition with imported parts and thus imported parts could not cause injury to domestic parts. However, this begs the question of why parts were included in the determination of increased imports?

87. Korea is of the view that no measures can be imposed on a product unless a finding of increased imports causing serious injury has been made. In this case, no such findings were

made with respect to LRW parts. It does not suffice to include parts and components in a safeguard measure based solely on a theoretical concern about circumvention. If so, parts would always be included in a measure and it would never be necessary to establish that the conditions for the imposition of a measure are met for parts. That cannot be correct. In this case, the facts affirmatively demonstrate that the conditions have not been met for the imposition of a safeguard measure on LRW parts.

### VIII.4. USITC FAILED TO PROPERLY SEPARATE AND DISTINGUISH THE EFFECTS OF "OTHER FACTORS" CAUSING INJURY

88. The U.S. argues that the USITC ensured compliance with Article 4.2(b) because, while applying the WTO-inconsistent "substantial cause" test as required by the U.S. statute, the USITC somehow *additionally* determined that "increased imports were 'the only explanation' for the domestic industry's serious injury". However, in the absence of any meaningful explanation of the nature and extent of the injurious effects of these other factors, the Panel cannot simply uphold the U.S.' contention. Indeed, the USITC made only a *relative* finding of injury between different known injury factors. It suggests that the "other causes" contributed to the alleged serious injury, but that these were not "more important" than the increased imports. Thus, applying the "substantial cause" test in this way *ipso facto* fails to separate and distinguish the injurious effect of known other factors as is well-established in prior cases.

89. Korea respectfully reminds the Panel that the onus has shifted to the U.S. to rebut Korea's prima *facie* claim of violation. Merely providing alternative interpretations of the USITC's statements, as the U.S. does, is insufficient to rebut Korea's case. Notably, the U.S. has no answer to this point.

90. In direct contradiction with the actual findings by the USITC, the U.S. argues that the USITC found that two specific "other" factors (i.e. "joint pricing" and "deterioration of brand") did not cause any of the injury. But, the USITC's actual finding tells a different story. With respect to "joint pricing", for example, the USITC initially juxtaposed various statements submitted by the petitioner and respondents, and considered that the "record is mixed" as to "whether Whirlpool and GE sell matching pairs of LRWs and dryers for the same net wholesale price". In the causation section of the USITC Report, the USITC expressly found, "[r]egardless of the extent to which the domestic industry sold matching LRWs and dryers for the same net wholesale price, we find that the domestic industry's 'joint pricing' of matching LRWs and dryers was not an important cause of injury to the domestic industry, much less a more important cause than imports". It is not credible for the U.S. to seriously argue that what the USITC actually found was that "joint pricing" had no effect at all for the serious injury allegedly suffered by the domestic industry.

91. The same is true of the USITC's examination of the "deterioration of the U.S. brand". Although the USITC did not leave a "smoking gun" with respect to "deterioration of the U.S. brand" as it did with the "joint pricing", the logical progression of the USITC's causation analysis leaves no doubt that what the USITC did was simply to undermine, rather than to altogether deny, the relevance of the domestic industry's brand deterioration. This is evidenced by the USITC's failure to even attempt to assess the nature of the non-replacement demand, even after being forced to confirm that at least one-third of the overall demand in the U.S. LRW market was served by non-replacement demand, as contended by the respondents.

92. Korea further submits that, in addition to applying the WTO-inconsistent "substantial cause test", USITC failed to properly assess the effect of other factors causing injury. The USITC failed to undertake objective and unbiased examination of the matter by unduly disregarding so many of the empirical evidence and analyses submitted by the respondents, while accepting unsubstantiated statements by the petitioners at face value.

93. As for the "joint pricing" practice, the USITC did not even attempt to request relevant laundry-related information from the petitioners (which would have revealed pricing dynamics between washers and dryers) despite the fact that "joint pricing" was undoubtedly a well-established practice in the market, as expressly noted by the USITC's own Chairman, and despite the clear-cut economic evidence that washers and dryers are complementary goods and thus "joint pricing" is what would likely be adopted by reasonably acting firms in the LRW

market. The USITC simply disregarded all relevant information and analysis, treating them as an issue of "my word against yours" vis-à-vis the petitioners' unsubstantiated statements.

94. As for the "brand deterioration", the respondents argued that domestic consumers usually opt to purchase imported LRWs because of their innovation and brand image, even when the functional life of their existing LRWs had not ended. In response to the respondents' argument that imports served largely a self-created demand that could not be served by the domestic industry, the USITC confirmed that at least one-third of overall U.S. demand consisted of such non-replacement demand. However, this is where the USITC made a full stop. The USITC did not event attempt to examine the nature of this sizeable demand and the supplier of this demand in light of the respondents' arguments and evidence. Although the respondents went as far as to assert that "exclusion of FlexWash and Sidekick reveals that the domestic industry's share of the overall U.S. market for LRWs has slightly increased", the USTIC did not even bother to delve any further into these issues.

95. The USITC's approach to these two highly contested "other factors" certainly fell short of the objective and reasonable investigation as required by the Safeguards Agreement.

### VIII.5. USITC'S CAUSATION ANALYSIS WAS SKEWED BY ITS FLAWED DETERMINATION OF "INCREASED IMPORTS" AND DOMESTIC INDUSTRY DEFINITION

96. The U.S. has no response to this allegation other than to suggest it is purely "derivative" of the domestic industry definition claim. Korea disagrees. Even if one were to assume that, based on a formalistic approach, the definition of the domestic industry may allow for the inclusion of producers of like or directly competitive products, it would still be required to examine whether the injury and causation analysis was objective. That will not be the case if producers of products are included that are excluded from the product scope.

## IX. CLAIM 6: U.S. FAILED TO APPLY THE SAFEGUARD MEASURE ONLY TO THE EXTENT "NECESSARY" TO REMEDY THE ALLEGED SERIOUS INJURY AND TO FACILITATE ADJUSTMENT

97. The U.S. acted inconsistently with Articles 5.1 and 7.1 of the Safeguards Agreement because it failed to apply the safeguard measure "only to the extent necessary to prevent or remedy serious injury" and "only to the extent necessary to facilitate adjustment". In particular, the safeguard measure is inconsistent with these obligations because the U.S. (i) failed to limit the application of the safeguard measure to the alleged serious injury caused by the increased imports alone; (ii) failed to take into account existing import restrictions from AD/CVD measures; (iii) imposed the measure on LRW parts even though these were not in competition with the "like" domestic products and thus caused no injury; (iv) did not limit the level of the measure to what was necessary to remedy the alleged injury; and (v) failed to ensure that the measure was not applied beyond what was necessary to facilitate adjustment.

98. For the reasons set forth below, Korea submits that the U.S. acted inconsistently with its obligations under Articles 5.1 and 7.1 of the Safeguards Agreement. Consequently, the U.S. also violated Article 11.1(a) of the Safeguards Agreement.

### IX.1. U.S. failed to limit the safeguard measure to injury caused by increased imports

99. The only response from the U.S. is that Korea's argument is "derivative" of the claim against the serious injury finding. It incorrectly states that the USITC found that "the serious injury found by the USITC is attributable exclusively to the increased imports". However, as noted, that is not what the USITC found. The USITC acknowledged that some of the serious injury to the domestic industry was caused by other factors, although these factors were found not to be "important causes of serious injury".

100. Therefore, it should be undisputed that there was injury caused by other factors, for which additional analysis was required to separate and distinguish that injury to ensure that the measure was applied only to injury caused by the increased imports. However, the USITC performed no such analysis, and the measure thus exceeded what is necessary to remedy the injury caused by increased imports alone.

### IX.2. U.S. failed to take existing trade remedy measures into account

101. The U.S. argues that there is no legal obligation that requires the USITC to take into account existing restrictions on imports of LRWs when applying the safeguard measure. Korea recalls that three of the main sources of supply were subject to high additional duties based on in total no less than four AD/CVD measures. Article 5.1 expressly limits the application of measures by requiring that the measure is limited "only to the extent necessary" to remedy serious injury. It places the safeguard measure in its specific trade context that includes existing trade remedy measures. Even the U.S. indicates that the trade remedy measures had the effect of significantly decreasing imports from the covered countries, including Korea. Yet, the U.S. made no attempt at calibrating the measures in any way to take account of the existing trade remedies. The U.S. should have taken these facts into account when tailoring the relief "necessary" under the safeguard measure. It did not even try to do so.

102. The U.S. suggests that the USITC took into account the existing trade remedy orders, including in the "partial equilibrium model" used to estimate changes in prices and quantities of imports and domestic LRWs. However, there is no evidence in the USITC Report that trade remedy orders were taken into account in the modelling. The model assumed that "U.S. imports from countries that are FTA partners of the U.S. are not covered by the [safeguard] remedy", which was an incorrect premise since the U.S. decided to *include* 16 FTA partners, including Korea, and only excluding Canada and a number of developing countries. Therefore, whether or not the model reflected existing trade remedy orders is irrelevant since the model was based on assumptions which were not true. In essence, the model was useless, as it reflected a different situation than the reality, and cannot support the U.S.' argument that the USITC took account of existing trade remedy orders when determining the application of the safeguard remedy.

### IX.3. U.S. imposed the measure on LRW parts without having made a proper finding of imports causing injury

103. As noted, the U.S. did not make a finding of injury caused by increased imports of LRW parts and confirms that there was no competition between imported LRW parts and the like domestic products, and that the sole reason for applying the measure to imported parts was to avoid alleged "circumvention". However, a measure can only be "necessary" if it remedies serious injury and facilitates adjustment. If there is no competition between imported and domestic products, then additional import duties will not have any remedial impact. The USITC did not make a threat of serious injury finding with regard to imports of parts and, thus, it is completely baseless of the U.S. to argue that the imposition of the measure on parts was necessary to "prevent" serious injury, as this possibility is limited to findings of threat of serious injury.

104. The U.S. was not justified extending the application of the measure to non-competing imports because of a *potential, theoretical, future risk* of circumvention whereby imported parts *could* circumvent existing duties on LRW units and be converted into LRWs in the U.S. that *could* compete with domestic LRWs and *potentially* cause serious injury. Applying an emergency safeguard measure to potential future and hypothetical threats is an abuse of the instrument, which should not be permitted.

### IX.4. U.S. failed to assess the level and form of the safeguard measure in light of the actual serious injury found to exist

105. The USITC failed to assess the level and form of the safeguard measure in light of the actual serious injury found to exist, which was essentially based on price effects causing financial losses. Financial performance in the form of losses was essentially the only factor found to be negative while over 13 other factors trended positively. These financial losses were said to be "a direct consequence of the declining prices on sales of domestically produced LRWs" and that "the only explanation for the domestic industry's declining prices … is the significant increase in low-priced imports of LRWs during the period of investigation". The USITC found also that the alleged low-priced imports undersold domestic prices on average by 14%.

106. Given these findings, the extent to which imports were alleged to undersell domestic prices was highly relevant in designing the LRW safeguard measure to be *commensurate* to the

serious injury attributed to the increased imports. Thus, counteracting the price differential would have addressed the domestic industry's serious injury, since it was the lower domestic prices that allegedly were "direct[ly]" responsible for the losses.

107. However, by applying (i) in-quota tariffs of 20% up to 1.2 million LRW units and a 50% tariff for any subsequent imports; and (ii) a tariff of 50% on any imports parts exceeding 50,000 units, the U.S. safeguard measure went beyond what was necessary to remedy injury. It was not necessary in light of the USITC's findings that, in particular, the average price underselling was only 14%.

108. The only rebuttal by the U.S. is that Korea's reference to the underselling margin is "invalid", as that considers domestic selling prices, not import prices. Korea fails to see the relevance of this distinction. If the serious injury is linked to the depression and suppression of domestic prices (which resulted in worsening financial losses), the alleged lower price of imports is relevant to use as a basis for determining what is necessary to prevent and remedy the serious injury. In addition, the U.S. seeks to dismiss the fact that at least two USITC Commissioners agreed with Korea that the measure went beyond what was necessary by suggesting that "reasonable minds may differ". Of course, the U.S. wants to downplay this remarkable disagreement among the Commissioners that showed the level of the measure exceeded what was necessary, but is incapable of explaining why, despite these views of two Commissioners, the measure would be in compliance with Article 5.1.

### IX.5. U.S. failed to ensure that the measure is necessary to facilitate adjustment

109. The U.S. argues that the conclusory statement in Proclamation 9694 that the measure would prevent injury and "facilitate a positive adjustment to import competition" was sufficient to comply with the second sentence of Article 5.1. Korea disagrees. The need to ensure that the measure will facilitate adjustment is a substantive obligation, which requires proper analysis of the relevant facts. While adjustment plans do not have to be provided in each case *per se*, submission and consideration of such plans may be desirable as a means of substantiating that a Member complies with Article 5.1. In the underlying investigation, there is zero evidence that any such analysis took place. Even the submitted plans by the domestic industry were weak, largely making commitments to increase investments only. At no point in time did the USITC examine these general commitments in light of its findings operating losses and declining prices.

110. Moreover, any adjustment must clearly relate to the developments that were "unforeseen" and which led to the increased imports causing serious injury. That is why adjustment is necessary, i.e. because something unforeseen happened that the industry previously had not adjusted to. Since the USITC never examined nor identified any unforeseen developments, it could not determine that the measure was necessary to facilitate adjustment either. The sole blanket statement by the U.S. President to which the U.S. refers did not demonstrate that the relevant obligations of the Agreement were respected.

## X. CLAIM 7: U.S. FAILED TO "ENDEAVOR TO MAINTAIN" A SUBSTANTIALLY EQUIVALENT LEVEL OF CONCESSIONS IN VIOLATION OF ARTICLES 8.1 AND 12.3 OF THE SAFEGUARDS AGREEMENT

111. The U.S. acted inconsistently with Articles 8.1 and 12.3 of the Safeguards Agreement because it failed to endeavor to maintain a substantially equivalent level of concessions and other obligations under the GATT 1994 with Korea. In particular, the U.S. failed to provide an adequate opportunity for prior consultation concerning trade compensation, as Korea only learned of the scope and the effective date of the proposed LRW safeguard measure 12 days before it took effect.

112. Indeed, on 23 January 2018, the U.S. took the decision on the proposed nature, level and date of application of the LRW safeguard measure and notified this decision to the WTO on 26 January 2018. The measure was applied on 7 February 2018. It was not feasible for Korea to analyze the final measure and prepare for consultations with the U.S. within a mere 12 days. In *US – Line Pipe*, the Appellate Body faulted the U.S. for failing to meet its obligation under Article 8.1 when information on the scope and date of application of the measure was

provided to interested parties 18 days before it took effect. In the LRW proceeding, there was even less time.

113. The U.S. argues that it complied with Articles 8.1 and 12.3 and refers to a WTO notification of 11 December 2017 as the starting date for consultations. At that time, however, there were not yet the required details of the proposed final safeguard measure in terms of its form, nature and date of application; there was only the USITC Report with its *recommendations* to the U.S. President to take certain actions. There were many significant differences between the USITC's recommendations and the final safeguard measure. Only on 23 January 2018 was the proposed final measure announced by the U.S. President.

114. Finally, the U.S. argues that there was "ample" time to consult since Proclamation 9694 provided "further time" for consultations following the imposition of the measure. The U.S. does not further develop this argument. It knows that the obligation in Article 12.3 is to provide adequate opportunity for "prior" consultations, not opportunities to consult once the measure has entered into force. This argument falls based on the express wording of the Safeguards Agreement.

115. For the foregoing reasons, Korea submits that the U.S. acted inconsistently with its obligations under Articles 8.1 and 12.3 of the Safeguards Agreement. Consequently, the U.S. also violated Article 11.1(a) of the Safeguards Agreement.

## XI. CLAIM 8: U.S.' NOTIFICATIONS OF THE DIFFERENT DECISIONS FAILED TO COMPLY WITH ARTICLES 12.1 AND 12.2 OF THE SAFEGUARDS AGREEMENT

116. The U.S. acted inconsistently with Articles 12.1 and 12.2 of the Safeguards Agreement because it failed to provide immediate notifications of the different decisions to the WTO given the time between the decision and the related notification. In addition, the notifications did not contain all pertinent information, as a result of undue redaction of allegedly confidential information and failure to provide adequate non-confidential summaries.

117. The U.S. agrees that Members must notify the initiation of investigations "at once, without delay, or instantly". The LRW investigation was initiated on 5 June 2017, but the U.S. failed to notify immediately other Members since it took another 7 days to notify to the WTO, i.e. on 12 June 2017. The 7-day delay to notify the LRW investigation to the WTO was inconsistent with Article 12.1(a) of the Safeguards Agreement.

118. In relation to the claim that the U.S. failed to notify immediately other WTO Members of the USITC's finding of serious injury, the U.S. seeks to justify the 7-days delay by suggesting that "the degree of urgency and need for immediacy were not high". However, it is not for the U.S. to decide for itself whether the circumstances were such that immediacy was not "high". The U.S. already acknowledged that the term "immediacy" means that notifications must be made "at once, without delay, or instantly". It failed to do so when it waited 7 days to notify the serious injury finding.

119. The U.S. suggests also that the delay was justified because the notification had to be "tailored" to the WTO and responsible officials were "extremely busy". This may explain why the notification was late, but it does not justify it. Indeed, Korea submits there is no justification why the U.S. could not have acted with the required level of urgency seeing that the notification was merely three pages long, did not require translation, and the U.S. does not ostensibly have any lack of resources to justify a delay.

120. In relation to the claim that the U.S. failed to provide all pertinent information in its notification under Article 12.1(b), the U.S. argues that it was not required to provide evidence on the USITC's finding of "serious injury" because the Commissioners had not finalized their "individual reasoning" and "drafting" their views. The scenario that the U.S. tries to present is a *non-sequitur* because under which scenario can a Member reach a conclusion of serious injury without first having determined that pertinent information supports this conclusion? There would be no basis for such a serious injury finding.

121. In addition, no domestic procedure or other national rule can justify a breach of a WTO obligation. Article 27 of the VCLT provides that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Thus, whether or not the Commissioners were in the process of finalizing the serious injury finding in accordance with internal administrative procedures, Article 12.1(b) clearly requires "all pertinent information" to be provided in the notification and provides that this includes "*evidence* of serious injury or threat thereof caused by increased imports" and not just a *statement* that such a finding was made. The U.S. failed to do so.

122. In fact, the supplemental Article 12.1(b) notification on 9 December 2017 clearly shows that the U.S. sought to correct its obvious violation by providing more information on the serious injury finding. However, given the requirement for an "immediate" notification, Korea submits that this supplemental notification is not compliant since it came more than two months after the finding of serious injury on 5 October 2017.

123. Finally, in relation to the claim that the U.S. failed to provide all pertinent information in its notification under Article 12.1(c), the U.S. argues that the failure to provide non-confidential summaries of redacted information in the notification cannot "establish an inconsistency with Article 12.2". While Korea agrees in principle that confidential information does not have to be revealed in notifications to the WTO, this does not mean that Members can simply redact such information and deny the due process rights of interested parties. That much is clear from Article 3.2 of the Safeguards Agreement that requires "non-confidential summaries" of such information or the "reasons why a summary cannot be provided". The U.S. failed to provide such summaries or reasons for why not "all pertinent information" was provided in the Article 12.1(c) notification.

124. For the foregoing reasons, Korea submits that the U.S. acted inconsistently with its obligation under Articles 12.1 and 12.2 of the Safeguards Agreement. Consequently, the U.S. also violated Article 11.1(a) of the Safeguards Agreement.

## XII. CLAIM 9: THE SAFEGUARD MEASURE AMOUNTED TO A WITHDRAWAL OR MODIFICATION OF THE U.S.' CONCESSIONS WITHOUT JUSTIFICATION

125. The U.S. acted inconsistently with Article II:1 of the GATT 1994 because the safeguard measure amounts to a withdrawal or modification of concessions without justification. The U.S. argues that this consequential claim should not be considered by the Panel. However, Korea respectfully invites the Panel to rule on this claim, as it would assist in positively resolving the dispute between parties.

## ANNEX B-2

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

**EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION**

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

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

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

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

5. Korea does not address the factual question of whether the increased imports were "as a result of unforeseen developments". It mistakenly assumes that all it needs do to establish an inconsistency with Article XIX:1(a) of GATT 1994 is to show that the competent authorities did not make an explicit finding on this point. Korea misunderstands the text and context for Article XIX:1(a) and SGA Articles 1 and 3.1, and by relying on erroneous Appellate Body statements, seeks to read into the text of Article XIX and the SGA an obligation that is not there. In fact, the evidence establishes that foreign producers developed an unforeseen ability to rapidly increase their production of LRWs for the U.S. market and then shift production rapidly among countries to avoid the effects of trade measures, and that the increase in imports was a result of this unforeseen development. Korea also errs in its arguments regarding the "obligations incurred". The USITC Report explicitly described the tariff concessions the United States took on with respect to the LRWs at issue in this investigation, which is sufficient to establish that the increased imports were "a result of ... the obligations incurred by a contracting party under this Agreement, including tariff concessions".

6. The USITC's serious injury determination is WTO-consistent. The USITC properly defined the domestic like product and the domestic industry, and explained its conclusions. The USITC further examined conditions of competition, the injury factors, and alternate causes of injury put forward by the parties before it, and explained its conclusions at great length. The USITC found that the domestic industry was seriously injured. As the Commission explained, the domestic industry invested heavily in the development and production of competitive new LRWs during the period of

investigation, and should have been well positioned to capitalize on the concurrent increase in apparent U.S. consumption. The Commission found that instead "the domestic industry's financial performance declined precipitously during the period of investigation, necessitating cuts to capital investment and R&D spending that imperil{ed} the industry's competitiveness". The Commission found that these factors represented a "significant overall impairment in the position of" the domestic industry. In light of "strong demand growth, rising costs, and the competitiveness of the domestic industry's LRWs", the Commission found that "the only explanation for the domestic industry's declining prices and increasing COGS to net sales ratio is the significant increase in low-priced imports of LRWs during the period of investigation".

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

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

**EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT PANEL'S FIRST VIDEOCONFERENCE WITH THE PARTIES**

9. The GATT 1994 and the Safeguards Agreement establish a Member's right to suspend its obligations under the WTO Agreement if a product is being imported into its territory in such increased quantities and under such conditions as to cause serious injury or threat of serious injury to the Member's domestic industry. The availability of this escape valve is one of the factors that gives Members the comfort to make tariff concessions that could in the future otherwise impede their ability to forestall serious injury to their economies and their stakeholders. Protecting this right is accordingly critical to the continued acceptance of the WTO system in any Member in which government is accountable to its citizens.

10. To be clear, that is exactly what the Safeguards Agreement envisages. Its preamble calls for "multilateral control over safeguards" – not their elimination. Article 1 echoes this point, providing that the Agreement "establishes rules for the application of safeguard measures", and the remainder

of the agreement elaborates on those rules. The assumption throughout is that Members will use safeguard measures in the specified circumstances. Korea's arguments invert this logic, advocating instead a reading of the Agreement's disciplines such that no competent authorities and no Member could meet them in practice. Under this approach, rather than setting guidelines for Members, the Safeguards Agreement lays down a procedural minefield with no viable exit. The United States urges you to reject this view and its supposed grounding in past reports of panels and the Appellate Body, which Korea misreads in large part.

11. First, contrary to Korea's assertions and its misreading of reports interpreting the Safeguards Agreement and Article XIX of the GATT 1994, the United States has acted consistently with the Safeguards Agreement in demonstrating that increased imports were the result of unforeseen developments and obligations incurred, consistent with Article XIX of the GATT 1994. Second, contrary to Korea's arguments, the USITC acted consistently with the Safeguards Agreement in defining the domestic like product and the domestic industry. Third, the Commission's detailed analysis on serious injury thoroughly explained how imports increased significantly "under such conditions" as to cause serious injury to the domestic industry.

**EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT PANEL'S FIRST VIDEOCONFERENCE WITH THE PARTIES**

12. Korea's opening statement underscores its failure to establish any *prima facie* case of inconsistency with the Safeguards Agreement in the USITC's finding that increased imports caused serious injury to the domestic industry. In its statement, Korea asserted, incorrectly, that the United States failed to respond to Korea's first written submission arguments. Korea also continues to urge the Panel to consider the serious injury section of the Commission's report in isolation, as if other sections were irrelevant to the Commission's evaluation of relevant factors. In actuality, the Commission's report must be read as a whole. Finally, Korea impugns the reliability of the Commission's data on import volume and prices even though the two Korean producers LG and Samsung themselves reported these data, and recommended five of the six LRW products for which pricing data were collected.

13. We will next address Korea's incorrect assertion that the Panel should consider the serious injury section of the Commission's report in isolation from all other relevant sections of the Commission's evaluation. There is no basis for Korea's assertion that the Commission somehow failed to evaluate certain relevant factors, including the rate of the increase in import volume, import market share, and other factors showing trends adverse to the domestic industry, simply because the USITC chose to present and organize its analysis differently from the way Korea argues it would have liked.

14. Finally, we will address Korea's incorrect assertion that the Commission's data on import volume and prices were unreliable even though two Korean producers themselves reported these data and agreed with five of the six pricing products recommended for data collection. Contrary to Korea's arguments, the Commission based its analysis on precise and reliable data, including with respect to increased imports and their impact on domestic prices, and pricing comparisons.

15. We will now address some of the remarks offered on unforeseen developments, particularly those by Mexico during the third party session with respect to the meaning of "unforeseen". An obligation based on developments that are "unforeseeable" is different from, and would impose a higher standard on Members, than one based on developments that are "unforeseen". The proper inquiry is not on what negotiators "could have imagined", but what they foresaw. And the fact that they might expect imports to increase in response to tariff concessions does not mean, as Mexico suggests, that "significant increases in a short time", must be accepted as "foreseen". Mexico errs as a matter of fact in that the unforeseen development is not, as Mexico asserts, simply that imports increased, or that certain producers increased capacity by a specific degree. The speed with which LG and Samsung increased both capacity and output, and shifted from country to country in rapid succession, is what was unforeseen. Korea has provided no basis to think otherwise.

16. We will close with a final systemic point. In this case, Korea's unforeseen developments arguments have relied on portions of the Appellate Body's reasoning in *US – Lamb* and *US – Steel* that are not persuasive for the reasons the United States has set out at length in its first written submission. Consequently, the Panel need not, and should not, agree with the faulty reasoning of these reports. The appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is

to apply the "customary rules of interpretation of public international law". Those customary rules of interpretation, as reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties, do not assign any interpretive role to dispute settlement reports. Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". As part of engaging in that interpretive exercise, a WTO panel may consider it appropriate to consider a prior report for the assistance it may give in properly understanding a WTO provision interpreted according to customary rules of interpretation – that is, a prior report may be examined for its persuasive value. Thus, relying on prior reports as "case law" or treating so-called DSB "adopted" interpretations as a "sufficient guide" would constitute serious legal error.

**EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS**

**Question 4**

17. The Commission defined the domestic like product to include domestically produced belt-driven washers because it found them to be like imported LRWs, based upon a thorough examination of the similarities and differences between domestically produced belt-driven washers and imported LRWs in terms of physical properties, customs treatment, manufacturing process, uses, and marketing channels. Having found domestically produced articles, including belt-driven washers, that were like the imported products under investigation, the Commission had no need to evaluate whether any of those products were also "directly competitive" with imports.

**Question 9(a)**

18. The Commission did not rely on a product line approach to define the domestic industry. Consistent with SGA Article 4.1(c), as well as SGA Article 2.1, the Commission defined the domestic industry as "producers ... of the like or directly competitive products". Having defined the like or directly competitive domestic products as "all domestically produced LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts", the Commission defined the domestic industry as "all domestic producers of LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts, including Whirlpool, GE, Alliance, and Staber". On this basis alone, the Commission's definition of the domestic industry fully complied with SGA Article 2.1 and 4.1(c).

**Question 11**

19. While recognizing that imports of covered parts did not compete with domestic covered parts or LRWs, the Commission found that the significant increase in subject imports as a whole, consisting almost entirely of low-priced LRWs, seriously injured domestic producers of LRWs and covered parts, whose shipments consisted almost entirely of LRWs in direct competition with imported LRWs.

**Question 12**

20. Neither the Antidumping Agreement nor the SCM Agreement specifically requires investigating authorities to assess the competitive relation between the imported and domestically produced good as part of their likeness assessment. Article 2.6 of the Antidumping Agreement defines "like product" for purposes of that agreement as "a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration". Footnote 46 of the Agreement on Subsidies and Countervailing Measures contains identical language. Neither provision prescribes any particular methodology for defining a domestic like product or imposes a requirement for investigating authorities to assess the competitive relationship between domestic and subject imported articles. This leaves to investigating authorities the ability to employ appropriate methodologies in defining the domestic like product for purposes of antidumping and countervailing duty investigations.

**Question 14(a)**

21. The Commission recognized that the domestic industry's market share in 2016 was similar to that in 2012 even after imports of LRWs had increased their penetration of the U.S. market to a significant degree. Nevertheless, the Commission found that subject import competition negatively affected the domestic industry's market share during the period of investigation. As the Commission

explained, fluctuations in the domestic industry's market share coincided with LG's and Samsung's movement of LRW production from country to country during the period as imports of LRWs from Korea and Mexico, and then China, became subject to antidumping and countervailing duty disciplines. Specifically, the Commission noted that the imposition of such disciplines on LRWs from Korea and Mexico coincided with an increase in the domestic industry's market share, while LG's and Samsung's subsequent movement of LRW production to China coincided with declines in the domestic industry's market share. The subsequent imposition of an antidumping duty order on LRWs from China coincided with another increase in the domestic industry's market share. Based on these data, the Commission concluded that "import levels appear to have been restrained by serial antidumping and countervailing duty orders during the period of investigation". In other words, the significant increase in subject import volume and market share during the period of investigation occurred despite the imposition of WTO-consistent trade remedies that LG and Samsung had completely evaded by the end of the period by shifting production to Thailand and Vietnam, which were subject to no measures.

**Question 30**

22. The analysis of the conditions of competition is a fact-specific inquiry that by necessity differs from investigation to investigation, so it is not possible to provide a generalized answer to this question. In the Washers report, the Commission recognized that imports of covered parts did not directly compete with domestically produced covered parts. It addressed the role that covered parts played in domestic and foreign producers' sales as part of both the product under consideration and the domestic like product. Virtually all domestic industry shipments and imports consisted of washers, while imports of covered parts were limited to the small volumes necessary to repair specific imported washers models. Respondents made no argument before the Commission that the increase in subject imports during the period of investigation consisted of covered parts rather than washers or that covered parts otherwise severed the causal link between increased imports and serious injury, confirming that covered parts were not an important condition of competition in the U.S. market. The Commission's analysis of covered parts based on increased imports and the domestic like or directly competitive product as a whole was fully consistent with this evidence. For these reasons, the Commission reasonably focused its analysis of conditions of competition and causation on washers, as the locus of competition in the U.S. market.

**Question 34(a)**

23. The Commission's finding that "pricing product data show that imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based TL LRWs", was based upon a comparison of the average unit value of domestic industry shipments for different types of LRWs to importer sales prices for the six pricing products during each quarter of the POI. Specifically, for the price levels of different types of domestically produced LRWs, the Commission relied on the data in Table III-7 of its report, titled "LRWs: U.S. producers' U.S. commercial shipments, by product type, 2012-16, January-March 2016, and January-March 2017", which contained the average unit value of domestic industry shipments of top load LRWs, front load LRWs, top load LRWs with an agitator but without Energy Star certification, and top load LRWs with an agitator and Energy Star certification, among other types of LRWs. For the price levels of subject imports, the Commission relied on the data in Tables V-13-18, containing quarterly sales price data reported by importers on six pricing products representing a representative range of TL and FL LRWs. Based on a comparison of these two sets of data, the Commission found that "imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based TL LRWs", meaning that importers reported sales of pricing products at the same "price points" as domestic producer shipments of agitator-based TL LRWs.

24. In addition to the data particularly collected during the safeguard investigation, the Commission relied on pricing product data from *LRWs from China*, and the Commission's analysis of the data in its determination for *LRWs from China*, which had been placed on the record of the safeguard investigation. Specifically, the Commission noted that "{i}n *LRWs from China*, the Commission found that subject imports of pricing product 9, an impeller-based TL LRW, undersold domestically produced agitator-based top load LRWs with a capacity of 3.6 cubic feet ... even though the subject imported model was more fully featured" and should have therefore commanded a higher price. Based on these data, the Commission made the following finding in *LRWs from China*, which the Commission adopted by reference in its report for the safeguard investigation: "That Samsung sold significant volumes of a more fully featured top load LRW with an impeller and 4.0 cubic feet of

capacity at a lower price that Whirlpool's smaller capacity, agitator-based top load LRWs, provides further evidence that agitator- and impeller-based top load LRW models compete with each other".

**Question 35(c)**

25. Competent authorities should base their price comparisons on product types that are representative of competition in the marketplace, and thus cover an appreciable share of subject imports and domestic producer shipments. For this reason, competent authorities may reasonably forego collecting pricing data on product types that are produced domestically but not imported or imported only in minimal quantities. The collection of such data would impose a reporting burden on responding domestic producers without yielding useful price comparisons. In such a circumstance, the competent authority may examine the extent to which imports of other product types compete with the domestically produced product type. Although pricing data should be collected on product definitions that are narrow enough to permit apples-to-apples price comparisons on directly competitive products, competition between domestically produced articles and subject imported articles need not be limited to such strictly defined product types. In this case, the Commission found that imported LRWs competed with domestically produced LRWs in all segments of the U.S. market, including agitator-based TL LRWs, because the record showed competition across all product types.

**Question 38**

26. The Commission made its injury and causation findings with respect to the products under investigation in the aggregate, including both LRWs and covered parts. And nothing in the Safeguards Agreement obligated the Commission to make separate injury and causation determinations with respect to LRWs on the one hand and covered parts on the other.

**Question 41**

27. The Commission thoroughly explored respondents' joint pricing theory and explicitly found that this theory did not explain any of the injury to the domestic industry. Irrespective of how this analysis is categorized, it is clear that the Commission looked at the proposed alternative cause from every angle before concluding that there was simply no causal relationship between the alleged practice of jointly selling LRWs and matching dryers and the injury suffered by the domestic industry.

**Question 46**

28. As the United States has pointed out elsewhere, the "obligations incurred ... including tariff concessions" language in Article XIX:1(a) sets out a factual circumstance in which a safeguard measure is available. A simple recitation of a relevant tariff concession establishes the existence of that circumstance; no more is needed. The rationale is obvious. Where a concession under GATT 1994 Article II prevents the Member experiencing an injurious increase in imports from taking tariff action to address the problem, the increase is indisputably "the effect of" the concession.

**Question 47**

29. The United States submits that the reasoning in the quoted passages in *Dominican Republic – Safeguards* and *India – Iron and Steel* is unpersuasive insofar as those panels extended to the "obligations incurred" language the flawed logic regarding "unforeseen developments" in the *US – Lamb* and *US – Steel Safeguards* appellate reports. In *Dominican Republic – Safeguard Measures*, the report quotes the Appellate Body's statement in *Argentina – Footwear* that, "we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions". But with no explanation or support, the report next states that: "It then falls to the importing Member to identify those obligations incurred under the GATT 1994 that are linked with the increase in imports causing serious injury to its domestic industry. These findings and conclusions must be reflected in the report of the competent authority". The problem with this statement is that it simply assumes that "identifying" (itself not Agreement text) obligations requires "findings and conclusions", and that these must appear in the report of the competent authorities. The absence from the Safeguards Agreement of an obligation to address "obligations incurred" means that, as with most other WTO obligations, a Member need not demonstrate compliance in a report of its competent authorities.

**Question 50**

30. This question raises two different issues – whether the report of the competent authorities complies with the obligations placed upon the competent authorities and the separate question whether the Member has complied with obligations placed directly on the Member. This second category includes obligations like those in Article 5 of the Safeguards Agreement that do not pertain to the competent authorities' findings and its report. As the United States stated in its first written submission, "[i]n reviewing agency action, the Panel must not conduct a *de novo* evidentiary review". As the United States has explained, unforeseen developments is a factual circumstance of Article XIX, not a condition relevant to Safeguards Agreement Articles 2, 3, or 4, and therefore it is not in the purview of agency findings. Because neither Article XIX nor the Safeguards Agreement charges the competent authorities with making findings as to unforeseen developments, the concept of *de novo* review of agency action does not apply. A panel may properly base its evaluation of such claims on argumentation and evidence presented exclusively in a WTO dispute resolution proceeding. That is, in fact, the way panels address compliance with most WTO obligations.

**Question 51**

31. The USITC report does not contain a finding on unforeseen developments within the meaning of Article XIX:1(a) of the GATT 1994. However, that report does provide explanations of circumstances that qualify as unforeseen developments. As the United States explained in its first written submission, the USITC noted that, "Whirlpool and GE state that they did not foresee that LG and Samsung would move their production of LRWs for the U.S. market first from Korea and Mexico to China, and then from China to Thailand and Vietnam, and escape the disciplining effect of the resulting antidumping and countervailing duty orders, moves that … would have cost hundreds of millions of dollars".

**Question 52**

32. Nothing in Article XIX:1(a) or the Safeguards Agreement requires that the identification of the relevant tariff concession appear in the report of the competent authorities. Article XIX:1(a) itself does not mention the competent authorities, and the provisions of the Safeguards Agreement that set out the duties of the competent authorities do not reference the identification of "obligations incurred ... including tariff concessions". Thus, had the USITC report been silent as to the tariff treatment applicable to washers, the United States would have been free to identify the bound tariff rate and relevant concession for the first time in this dispute. This point, however, is moot, as the USITC Report explicitly describes the U.S. tariff treatment of washers, which is bound in the U.S. Schedule to GATT 1994.

**EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION**

33. Korea's statements during the Panel's videoconference with the parties and written answers to the Panel's questions essentially recapitulate its arguments from earlier submissions. The U.S. first written submission already explained that the text of GATT 1994 Article XIX:1(a) distinguishes between what prior reports have correctly described as the "circumstances" listed in the first clause and the conditions in the second clause. The United States demonstrated that within this framework, the "pertinent issues of fact or law" for purposes of Safeguards Agreement Article 3.1 are those that Articles 2.1 and 3.1 charge the competent authorities to investigate – whether goods are imported in such quantities as to cause serious injury. Those "issues" do not encompass all considerations related to the taking of a safeguard measure, such as whether the measure is taken only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment or whether the circumstances set out in the first clause of Article XIX:1(a) exist. Thus, Article 3.1 cannot permissibly be read to require the competent authorities to make findings as to unforeseen developments and obligations incurred.

34. The United States also demonstrated in its first written submission that the increase in imports observed by the USITC was indeed the result of unforeseen developments in that the negotiators of those tariff concessions did not foresee that a producer would be able to expand from producing zero or low volumes of large residential washers in a country to producing large volumes in a very short time, enabling foreign producers both to penetrate the U.S. market at unexpected speeds, and to shift production among facilities in multiple countries at unexpected speeds. The increase was also the effect of the U.S. concessions, in that tariff bindings undertaken by the United States,

referenced in the USITC Report, prevented it from increasing applied tariffs so as to modulate the increase in imports and provide the domestic industry with an opportunity to adjust to import competition. As a result, imports almost doubled over the five years of the investigation period.

35. Korea argues that the clause "if as a *result* of unforeseen developments and the *effect* of the obligations incurred", mandates a "causation" test, under which a competent authority must demonstrate a *genuine and substantial relationship of cause and effect* between the unforeseen development and the obligation, on the one hand, and the increased imports, on the other. It provides no valid support for this assertion. Likewise, contrary to Korea's assertion that "Korea and the Panel are left guessing what these 'obligations' could be and how they would be linked to the alleged increase in imports", it is beyond dispute that the tariff lines cited by the United States reflect WTO bound rates (concessions), and that those concessions limit the U.S. ability to reduce imports by raising tariffs. More fundamentally, no additional context is needed in the identification of such tariff concessions because the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994.

36. In addition, Korea is wrong in asserting that *ex post* justifications are never admissible in WTO proceedings. Many claims that can be brought at the WTO under the various covered agreements would involve explanations by a Member offered in the course of, or for the purpose of, defending its actions in a WTO dispute. The admonition that a panel must not conduct *de novo* review of *agency action* applies only to the obligations applicable to the agency, and not to other obligations applicable only to the Member. In the safeguards context, obligations on the competent authorities – such as what their report is to contain – are provided under Articles 2, 3, and 4 of the Safeguards Agreement. Other obligations, like those in Article 5 of the Safeguards Agreement, do not pertain to the competent authorities' findings and report. The existence of unforeseen developments, likewise, is a factual circumstance provided under Article XIX that is applicable only to Members, not a requirement that competent authorities must address in their reports pursuant to Safeguards Agreement Articles 2, 3, or 4. As such, Korea's statement that the Panel need not examine the U.S. arguments with respect to Korea's Article XIX claim is without merit. The DSU calls on panels to examine or consider the parties' arguments unless they are outside the panel's terms of reference. As the complaining party, Korea determined which claims to bring and how to frame their argumentation. Nothing the United States has offered in response for the Panel's consideration is outside of the Panel's terms of reference.

37. Regarding the USITC's injury determination, the Commission predicated its affirmative serious injury determination in this case on facts that epitomize the circumstances in which safeguard relief is warranted. Starting in 2011, domestic producers of LRWs sought relief from dumped and subsidized imports of LRWs through antidumping and countervailing duty actions, and the Commission found the industry materially injured by significant and increasing volumes of low-priced imports in April 2013 and January 2017. Based on the expected trade relief from the resulting antidumping and countervailing duty orders and projections of strong demand growth, the domestic industry made substantial investments in the development and production of competitive new LRWs, which independent consumer publications ranked among the very best available. These investments, however, were undermined as LG and Samsung shifted their production of LRWs to facilities in countries not subject to the various AD and CVD orders. With these production shifts, imports of LRWs continued to increase while selling at prices substantially below those of comparable domestic LRWs, in turn leading to mounting financial losses for the U.S. industry.

38. In the ensuing safeguard investigation, the Commission found that imports of LRWs nearly doubled over the period of investigation, significantly increasing their penetration of the U.S. market. It found that pervasive underselling by increasing volumes of imported LRWs, which were substitutable with and comparable to domestically produced LRWs, forced the domestic industry to defend its market share by reducing prices, given the importance of price to purchasers. By significantly depressing and suppressing domestic prices, the Commission explained, the increasing volumes of low-priced imports caused the industry's "dramatically worsening" financial losses and forced draconian cuts to capital and research and development spending that imperiled the industry's competitiveness. LG's and Samsung's only alternative explanations for these trends were the illogical notions that domestic producers purposefully sustained increasing financial losses on sales of LRWs by selling them at the same prices as matching dryers, and that consumers somehow rejected domestically produced LRWs that were viewed as comparable to imported LRWs by retail purchasers and independent reviewers. Rejecting these arguments as unsupported by the record,

the Commission found that increased imports were "the only explanation" for the industry's serious injury.

39. Korea has failed to show that the Commission's determination was in any way inconsistent with the Safeguards Agreement. First, Korea's challenges to the Commission's like product and domestic industry definitions fail. The Commission could not simply ignore covered parts that were included within the scope of the investigation, as Korea argues, when the Commission was required to include domestically produced parts that were "like" the imported parts in the domestic industry definition. Second, the Commission analyzed the rate of increase and market share taken by imports, as noted by the Panel in its questions to Korea, and reasonably found that the near doubling of import volume satisfied the increased imports requirement and coincided with the industry's serious injury. Third, in analyzing serious injury, the Commission reasonably found the domestic industry to be seriously injured, as evinced by the data collected in the investigation that showed declines based on no fewer than six negative factors, including massive financial losses that threated the industry's viability. The Commission also reasonably explained that seemingly positive trends driven by loss-making investments were not consistent with a healthy industry.

40. In analyzing causation, the Commission objectively relied on pricing data collected on the basis of products that were advocated by LG and Samsung and that covered an appreciable share of domestic and import shipments in the U.S. market, including the very products in which the industry invested substantial sums to develop. The Commission also reasonably found that "neither of respondents' alleged alternative causes of injury is supported by the record evidence", notwithstanding references to the statutory "important cause" standard that Korea mistakes for factual findings. The Panel should reject Korea's challenges to these and other aspects of the Commission's affirmative serious injury determination and uphold the determination as fully consistent with the Safeguards Agreement.

41. Korea also continues to insert extraneous concepts into the text of Article 5.1. In its responses to the Panel, Korea repeatedly references Article 3.1, "reasoned and adequate explanation", "the record", and "findings", none of which apply to an Article 5.1 claim. Korea also advocates a *sui generis* but undefined "compelling alternative explanation" standard in light of certain assertions Korea makes on the basis of findings selectively chosen from the USITC record. There also is no support, textual or otherwise, for this so-called standard.

42. Finally, regarding Korea's Articles 8 and 12 claims, the United States notes that Article 12 obligations are ones of transparency. Like all transparency commitments, their function is to ensure that Members provide both adequate notice of any measure taken that affects the interests of other Members and opportunity to express or exchange views on those impacts, so that Members are not unfairly harmed or prejudiced by actions that lack rational basis, process, or predictability. They are not, as mentioned in the U.S. opening statement to the Panel during its videoconference with the parties, part of "a procedural minefield" intended to sabotage a Member's decision to take emergency action when necessary. The U.S. first written submission and subsequent responses to the Panel's questions demonstrated many flaws in Korea's claim that the U.S. efforts were insufficient to satisfy Articles 8 and 12 of the Safeguards Agreement. Korea failed to rehabilitate its claims during the panel's videoconference and in its responses to the Panel's questions. In its responses, Korea mischaracterizes the relevant facts, and otherwise fails to establish that the United States did not immediately notify the Committee on Safeguards or provide an adequate opportunity for prior consultations.

**EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT PANEL'S SECOND VIDEOCONFERENCE WITH THE PARTIES**

43. The United States notes that Korea complains that the United States did not seek a "supplemental report" on unforeseen developments. Just as there is no obligation for the competent authorities to include unforeseen developments in their report, there is no obligation to seek a "supplemental" report containing findings on those issues.

44. Korea's new argument that respondents advocated a completely different pricing methodology, and only endorsed the Commission's pricing product definitions "in the alternative", is unpersuasive. The Safeguards Agreement does not require competent authorities to analyze subject import price effects, much less prescribe a particular price comparison methodology. Competent authorities therefore have the discretion to adopt reasonable methodologies to analyze

the impact of subject imports on a domestic industry's prices. As the United States has pointed out, the Commission's price comparison methodology, based upon pricing data collected on the basis of strictly-defined pricing products, was considered by the panel in *US – Tyres* as "a proper basis for comparing prices". Moreover, the Commission has used the same price comparison methodology in antidumping, countervailing duty, and safeguard investigations for decades. Having participated as respondents in two antidumping/countervailing duty investigations involving LRWs before the Commission, LG and Samsung were aware that the Commission would be utilizing its normal price comparison methodology, as it had in previous investigations of LRWs, when they endorsed four of the six pricing products in their comments on the draft questionnaires. Respondents and petitioners recommended a fifth product in *LRWs from China* that the Commission adopted for the safeguard investigation. The Commission reasonably considered respondents' recommendation of five of the six pricing products, as well as the appreciable coverage afforded by pricing product data, as evidence that the products were representative of competition in the U.S. market.

**EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT PANEL'S SECOND VIDEOCONFERENCE WITH THE PARTIES**

45. Finally, the United States observes that the Commission's thorough analysis of the record evidence in its report for LRWs, with the Views alone spanning 63 pages and 366 footnotes, belies Korea's contention that the Commission somehow neglected to adequately address various issues. Rather than basing its increased imports finding on an end-point to end-point comparison, as Korea mistakenly argues, the Commission thoroughly evaluated subject import volume in each year and interim period, both in absolute terms and relative to consumption, as well as the rate of increase in subject import volume in each year and interim period. Far from overlooking respondents' innovation argument, the Commission fully considered the evidence concerning substitutability and non-price factors and reasonably found a moderate to high degree of substitutability between subject imports and the domestic like product.

**EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS**

**Question 67(b)**

46. No, investigating authorities are not required to consider the competitive relationship between domestic and imported parts as part of their likeness assessment pursuant to Article 4.1(c) of the Safeguards Agreement. As the United States has explained, Articles 2.1 and 4.1(c) permit competent authorities to define the domestic industry to include producers of "like or directly competitive" articles, using the disjunctive "or" to indicate that domestically produced articles that are like the products under investigation need not be directly competitive with them. If "like" meant "directly competitive" to a perfect degree, as Korea argues, competent authorities could always define the domestic industry as producers of directly competitive articles. The term "like" would be rendered superfluous, contrary to the interpretative principle "that interpretation must give meaning and effect to all the terms of a treaty".

**Question 76(b)**

47. The United States would like to clarify that the Commission's finding that "LRWs competed at all price points in the U.S. market" was not based solely upon a comparison of the average unit value of domestic industry shipments for different types of LRWs to importer sales prices for the six pricing products. Nonetheless, those data supported the finding by showing that importers reported sales of pricing products at the same "price points" as domestic producer shipments of different types of LRWs, including agitator-based top load LRWs. As explained by the United States in response to question 34, however, the Commission also cited a range of other evidence in support of the finding.

**Question 81**

48. As the United States explained in its second written submission in detail, "the date the Commission publicly announced institution is the proper date for evaluating whether the United States satisfied the obligation to 'immediately notify ... initiating an investigatory process relating to serious injury or threat thereof and the reasons for it'" under Article 12.1(a) of the Safeguards Agreement. That date was June 8, 2017. The Secretary of the Commission signed the notice of institution on June 7, 2017, and on the next day, June 8, sent it to USTR and entered it on

the Commission's Electronic Document Information System, on June 8, 2017. Therefore, the U.S. Government considers June 8, 2017, to be the date on which the Commission publicly announced the initiation of the investigation.

**EXECUTIVE SUMMARY OF U.S. COMMENTS ON KOREA'S RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS**

**Question 67(b)**

49. In responding to this question, Korea agrees with the United States that investigating authorities need not "always assess the nature and extent of the competitive relationship before defining a 'like product'", and that there is no "separate requirement to assess the nature and extent of competitive relationship" under the Safeguards Agreement. Korea also acknowledges that the "the four traditional criteria for determining 'likeness', as endorsed by the Appellate Body in *Philippines – Distilled Spirits*" do not include a factor concerning the competitive relationship between domestic and imported articles. As the United States has explained, the Commission based its determination that domestically produced covered parts were "like" imported parts on an assessment of similar factors, and reasonably found that domestic and imported covered parts were similar in terms of physical properties, customs treatment, manufacturing process, uses, and marketing channels. Korea's only challenge to this finding – "that the Commission did not properly consider the lack of substitutability" between domestic and imported parts – is directly contradicted by its recognition that the Safeguards Agreement does not require such an assessment. Because the Safeguards Agreement does not prescribe a methodology for assessing likeness, and the Commission's likeness methodology was reasonable, the Commission's finding that domestic covered parts were like imported covered parts complied with Article 4.1(c) of the Safeguards Agreement.

**Question 73**

50. Korea once again seeks to magnify the importance of a small decline in subject imports in January-March 2017 relative to January-March 2016. The Commission found that subject import volume "increased steadily" in every year of the 2012-16 period and "nearly doubled" between 2012 and 2016. In other words, imports of LRWs had peaked in 2016, within three months of the end of the period of investigation, at a level nearly twice that of 2012, after increasing in every year of the investigation period. Korea points to nothing suggesting that the small decline in January-March 2017 outweighs this increase. In fact, as the United States has noted, the increase in imports that the Commission found in this case was greater in percentage terms and more recent than the increase in imports of welded pipe at issue in *US – Steel Safeguard* or the increase in imports of bags and tubular fabric at issue in *Dominican Republic – Safeguard Measures*. In both of those cases, the panels found the increases sufficient to satisfy the increased imports standard under Article 2.1 of the Safeguards Agreement.

**Question 74**

51. Korea agrees with the United States that competent authorities need not rely on data covering all domestic producers comprising a domestic industry so long as the data replied upon is "sufficiently representative to give a true picture of the 'domestic industry'". In this case, the Commission based its analysis of the domestic industry's financial performance on the usable financial data reported by "three firms that are estimated to have accounted for all known U.S. production of LRWs in 2016", namely GE Appliances, Staber, and Whirlpool. As the United States has explained, the exclusion of Alliance's unusable financial data did not undermine the representativeness of these data, because Alliance's production of residential belt-driven washers was "very, very small". Financial data reported by domestic producers accounting for all LRW production, and nearly all production of the domestic like product, are necessarily representative of the financial performance of the domestic industry.

**Question 76(a)**

52. Korea prefaces its response to this question by arguing that no analysis of causation was possible without the collection of pricing data on agitator-based top loading LRWs. As the United States has explained, however, the Commission reasonably limited its collection of quarterly pricing data to six pricing products that were representative of competition in the U.S. market and

likely to yield probative price comparisons. The Commission reasonably found these pricing data representative of competition in the U.S. market because five of the six pricing products were proposed or endorsed by respondents and the data covered an appreciable percentage of domestic producer and importer U.S. shipments. Moreover, the types of LRWs covered by the pricing products, impeller-based top loading LRWs and front loading LRWs, accounted for nearly all imports of LRWs and half of the domestic industry's U.S. shipments of LRWs. These types of LRWs accounted for all direct competition between subject imports and domestically produced LRWs, and were the very types of LRWs in which the domestic industry had invested so heavily during the period of investigation. In light of these considerations, the Commission's pricing data reasonably supported its finding that the large and increasing volume of low-priced imports significantly depressed and suppressed prices for the domestic like product during the period of investigation.

**Question 77**

53. Korea mistakenly claims that the inclusion of a pricing product corresponding to an agitator-based top load LRW would have made a price undercutting finding "far less likely" because such LRWs are, in its view, "particularly low-priced". That is not the case. The Commission only compares domestic producer and importer sales prices on sales of the same pricing product in the same quarters. Had the Commission collected pricing data for a pricing product corresponding to an agitator-based top load LRW, most if not all of the pricing data would have been reported by domestic producers, as there were few import shipments of agitator-based top load LRWs. In the absence of any sales of domestic and imported agitator-based top load LRWs in the same quarters, there would have been no additional quarterly price comparisons, and the pricing product data would still have shown subject import underselling in 76.1 percent of quarterly comparisons. As the United States has explained, the inclusion of such a pricing product would have imposed an additional reporting burden on domestic producers without yielding additional price comparisons.

**Question 82**

54. The United States explained why the "notice of institution in the Federal Register" for purposes of calculating the deadline for filing notices of appearance in the Commission's safeguard investigation was June 13, 2017. The Commission accepted as timely all notices filed within 21 days of June 13, 2017, which in practices meant accepting notices filed as late as July 5, 2017, as July 4th was a U.S. federal holiday. Korea does not challenge or even address these facts.

55. Korea argues that it is irrelevant that interested parties had 23 days after the date of the notification to request to participate in the ITC investigation. The United States made this observation in response to Korea's argument that participants were prejudiced by having the time to request participation curtailed. Korea now appears to have dropped this argument. Instead, Korea again insists that the investigation was "initiated" on June 5, 2017. For the reasons described in the U.S. response to Question 81, the date of initiation was June 8, 2017.

**Question 83**

56. As of early December 2017, Korea had an adequate opportunity for prior consultations under Article 12.3 of the Safeguards Agreement. As the United States has explained in detail, an evaluation of whether a Member provided an adequate opportunity for prior consultations does not depend exclusively on the content and timing of the final notification. It depends on the notifications (plural) as a whole, and whether Members received the information over time in such a way as to permit consultations. Here, Members received most of the relevant information on December 11, 2017, in the Third Notification. Finally, Korea errs in assuming that the February 7, 2018, effective date of the safeguard measure is the last day relevant to its claims. Proclamation 9694 explicitly provides a further 30 days for consultations and an opportunity to modify the safeguard measure in response to the results. This allowed ample time for Korea to evaluate the final safeguard measure and consult with the United States.

57. Next, Korea contends that the United States acted inconsistently with Article 12.3 because consultations occurred on only "recommendations or hypotheticals" and not a final safeguard measure. Korea's own responses show the error in its argument. Korea agrees that the President announced the final proposed measure on January 23, 2018, and that consultations occurred on February 1, 2018. Therefore, the United States provided Korea with an adequate opportunity to hold prior consultations on a final proposed measure. Moreover, the United States explicitly allowed for

further consultations up through February 24, 2018, with the possibility for modification of the final safeguard measure.

**Question 84**

58. The United States provided Korea with an "adequate opportunity for prior consultations" and "exchanging views on the measure" in accordance with Article 12.3. The United States has explained in detail the factual and legal arguments that undermine Korea's assertion but highlights the following facts: (1) Korea had the opportunity to review information provided in the notifications, (2) Korea and its two LRW producers for the U.S. market, Samsung and LG, had both notice and opportunity to meaningfully participate or consult at every stage of the proceedings; (3) communications from Korea in December 2017 and on January 24, 2018, demonstrate the adequate opportunity for prior consultations under Article 12.3 and the actual knowledge Korea had of the measure; and (4) the January 24, 2018, communication shows that Korea had enough time to analyze and form a final legal conclusion on the measure, that it was inconsistent with the Safeguards Agreement – one day after the Presidential Proclamation was signed and before the U.S. notification.

59. Korea contends that the United States had insufficient time to consider the comments after the consultation and that the U.S. representative "was certainly not in a position to give due consideration to any comments received from Korea presumably because in any case the measure was scheduled to enter into force in less than one week". Korea provides no evidence or argument to support this statement but only conclusory speculation that the date of enactment of the measure somehow nullified the "adequate opportunity for prior consultations". To the contrary, Proclamation 9694 explicitly gave the President until February 24, 2018, to consider Korea's views regarding the final measure and "proclaim the corresponding reduction, modification, or termination of the safeguard measure within 40 days".

60. As noted above, there were in fact 30 days for consultations between the date of Proclamation 9694 and the final date for consultations.

**CONCLUSION**

61. For the foregoing reasons set out above, the United States requests that the Panel find that Korea has failed to establish any inconsistency with Article XIX of GATT 1994 or the Safeguards Agreement.

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# ANNEX C

## ARGUMENTS OF THE THIRD PARTIES

## ANNEX C-1

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

**1. KOREA'S CLAIMS WITH REGARD TO IMPORTS INCREASED AS A RESULT OF "UNFORESEEN DEVELOPMENTS" AND AS THE EFFECT OF "OBLIGATIONS INCURRED"**

1. The European Union agrees with the United States that a WTO panel must not conduct a *de novo* evidentiary review. Indeed, a panel must examine whether the explanation given by the competent authorities in their published report is reasoned and adequate without conducting a *de novo* review of the evidence nor substituting the authorities' conclusions; this does not mean that panels must simply accept the conclusions of the competent authorities.[1]

2. The Appellate Body has confirmed that the circumstances of **unforeseen developments** must be demonstrated as a matter of *fact* in the report of the competent authority and before a safeguard measure can be applied.[2]

3. Thus, it is not possible for a panel to evaluate whether an increase in imports was as a result of unforeseen developments based on argumentation and evidence presented exclusively in dispute settlement proceedings without conducting a *de novo* evidentiary review.

4. The European Union invites the Panel to objectively assess whether the brief reference in the USITC Report to the shifting in production from one country in Asia to another meets the required standard in order to amount to a demonstration of "unforeseen developments" and not to a mere allegation.

5. Normally, an investigating authority would clearly show in its findings that the issue of unforeseen developments has been examined and would present a reasoned and adequate explanation to that effect. The European Union recalls that previous panels have considered in numerous cases that there was a lack of adequate identification and explanation of the facts.[3]

6. Should the Panel consider that the brief reference to some individual companies' statements meets the required standard, then it should verify whether the circumstances invoked amount, indeed, to unforeseen developments.

7. A Member may meet its obligations under Article XIX:1(a) with respect to **"the effect of the obligations incurred"** in certain circumstances solely by showing in its published report that it has undertaken tariff obligations with respect to the product at issue. The European Union may imagine, for instance, a situation when a WTO Member has a bound level of 0% for the customs duties on a certain product. The circumstance "of the effect of the obligations" means that the obligation under the GATT 1994 to not impose any tariffs above 0% (or quantitative restrictions) constrained the respective Member's freedom of action to prevent the serious injury or threat thereof caused by the increase in imports.

8. Such obligations are self-evident and do not even require any additional explanation in the competent authority's published report. Unlike "as a result of unforeseen developments", which by definition are circumstances unforeseen when negotiating the obligations under the GATT 1994 and require explanations in the published report, the "of the effect of the obligations" does not necessitate an additional demonstration in the written report of the investigative authority if, as in the mentioned scenario, the safeguard measures go beyond the tariff level permitted according to the existing obligations under the GATT 1994.

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[1] Appellate Body Report, *US – Lamb*, paras. 105-107.
[2] Appellate Body Report, *US – Steel Safeguards*, para. 277.
[3] E.g. Panel Report, *US – Steel Safeguards*, e.g. para. 10.135, Panel Report, *Chile – Price Band System*, paras. 7.136-7.138, Panel Report, *US – Lamb*, paras. 7.29-7.32, Panel Report, *Argentina – Preserved Peaches*, para. 7.29, Panel Report, *Dominican Republic- Safeguard Measures*, paras. 7.131-7.140.

9. By contrast, the circumstances of the *India – Iron and Steel Products* case required further explanations in the written report of the Indian authorities. The rates imposed as safeguard rates from 20% to 10% were below India's tariff bindings on the product concerned, of 40% *ad valorem*.[4]

10. Similarly, in the *Dominican Republic – Safeguard Measures* case, where the Panel found fault with the lack of explanations in relation to "of the effect of the obligations",[5] the Dominican Republic had tariff bindings at the level of 40% ad valorem while the safeguards measures imposed were lower, i.e. between 38% and 14%.[6]

## 2. WITH REGARD TO THE DETERMINATION OF "SUCH INCREASED QUANTITIES"

11. The European Union recalls that both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 refer to "such increased quantities", as also noted by the Appellate Body in *Argentina – Footwear*.[7]

12. The plain meaning of these provisions, as clarified by the Appellate Body, requires authorities to analyze import trends over the entire period of investigation (POI).

13. Safeguard measures are emergency measures, as the very title of Article XIX suggests.[8] The use of the present tense of the verb ("is being imported") reinforces the idea that safeguard measures address situations in the recent past and not those which arose several years ago.[9] Thus, the POI should include data as recent as possible.

14. Accordingly, to impose a safeguard measure, there must be an increase in imports that is "recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'" to the domestic industry.[10]

15. Finally, one of Korea's assertions is that the USITC's report is devoid of any explanation as to why and how the USITC considered it was appropriate to cumulate imports of LRWs and imports of LRW parts. In this respect, the European Union recalls that the determination of "such increased quantities" should concern the product under investigation.

## 3. KOREA'S CLAIMS CONCERNING THE DEFINITION OF THE DOMESTIC INDUSTRY

16. ***Imported product.*** The first step in determining the scope of the domestic industry is the identification of the products which are 'like or directly competitive' with the imported product. Only when those products have been identified is it possible to identify the 'producers' of those products.[11] To the extent that imported products are not "like or directly competitive" with the product(s) that form(s) the domestic industry, they cannot cause injury.[12]

17. The relevant analysis in the context of Article 2.1 takes place at the level of the "like or directly competitive product" with respect to the imported product. While the starting point of the analysis is the imported product, there are no particular disciplines that apply to the definition of the imported product by the investigating authority. Hence the authority has some discretion in determining the scope of the imported product. This was also the position of a previous panel in *Dominican Republic – Safeguard Measures*.[13]

18. The European Union therefore considers that PSC/belt drive TL washers and CIM/belt drive FL washers may be included in the definition of "like or directly competitive" products even if they

[4] Panel Report, *India – Iron and Steel Products*, paras. 2.2 and 2.4; para. 7.121.
[5] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.146-7.147, 7.150.
[6] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 2.11, 2.19 and 7.57.
[7] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
[8] Panel Report, *Ukraine – Passenger Cars*, para. 7.170.
[9] Appellate Body Report, *Argentina – Footwear (EC)*, para. 130:
We believe that the relevant investigation period should not only end in the very recent past, the investigation period should be the recent past.
[10] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.
[11] Appellate Body Report, *US – Lamb*, para. 87.
[12] Appellate Body Report, *US – Lamb*, para. 86.
[13] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.181.

are expressly excluded from the definition of the imported product under investigation. In itself, such "mismatch" with the definition of the domestic industry alleged by Korea would not be inconsistent with the Agreement on Safeguards.

19. ***Inclusion of LRW parts and LRW units in the same domestic market.*** The European Union notes that LRW parts are used to repair LRW units and hence may constitute a so-called aftermarket. Aftermarkets are markets for the supply of products needed for, or in connection with, the use of what is often a relatively long-lasting piece of equipment that has already been acquired. This equipment is referred to as the 'primary product' (and hence its market is called 'primary market'). The complementary product(s) (typically spare parts or consumables) used in connection with the primary product are referred to as 'secondary products' (and their market is called 'secondary market' or 'aftermarket'). It is possible that the interaction between the primary market (LRW units) and the secondary market, or aftermarket (LRW parts), is such that the primary and secondary products form one single "system market" so that competition would take place between the LRW systems as a whole (including units and parts). A relevant question in this regard is whether a significant proportion of buyers make their choice taking into account the lifetime costs of the product in which case there may be one single system market.

20. It would not be sufficient for an authority to conclude that LRW units and LRW parts are "like or directly competitive" with each other by virtue of the fact that they are both imported products. The authority would have to assess whether LRW units are "like or directly competitive" with LRW parts. If one were to come to the conclusion that LRW units and LRW parts are not "like or directly competitive" in the present case (because they do not form an overall market for LRW systems, see above), the mere fact that both products are within the scope of the "imported product" as defined by the investigating authority would not justify their inclusion in one single domestic industry. Instead, separate injury analyses may have to be carried out for LRW units and LRW parts in order to prevent distorted outcomes.

21. ***Domestic and imported LRW parts as like and directly competitive products.*** While the European Union agrees that the terms "like" and "directly competitive" are alternatives, the European Union considers that particular caution should be exercised by an investigating authority before finding "likeness" in a situation where the products in question are found not to be "directly competitive". Artices 2 and 4 are about injury that is caused by increased imports. The EU submits that such causal relationship will normally be based upon a competitive relationship.

22. While the European Union does not conclude on this factual matter, it would seem that spare parts that are specifically manufactured for the respective LRW units of a particular brand may not be usable for LRW units of other brands. If so, this would significantly limit, if not exclude, their demand-side substitutability. This would speak in favour of placing LRW parts in separate domestic markets.

## 4. CONSEQUENTIAL VIOLATIONS

23. ***Relationship between Article 2.1 Agreement on Safeguards / Article XIX:1(a) GATT 1994 and Article 4.2.*** The European Union posits that if the condition of "increased imports" is not fulfilled, necessarily there is no basis for causation in Article 4.2 either. This is confirmed by the text of Article 4.2(a) and (b) which explicitly refers to the term "increased imports" in Article 2.1. This is confirmed by a comparison with the SCM Agreement and the AD Agreement. The requirement of "imports in such increased quantities" under Article 2.1 fulfils a function similar to Article 15.2 of the SCMA / Article 3.2 ADA which refer to a "significant increase" of subsidized or dumped imports. Previous panels have established that a violation of Article 15.2 SCMA leads to a consequential violation of the authority's causation analysis under Article 15.5 SCMA which is the equivalent of Article 4.2(b) of the Agreement on Safeguards.[14]

24. ***Consequential violations of Articles 2.1 and 4.2 due to incorrect definition of the domestic industry.*** If a domestic industry has been wrongly defined this will also render the injury and causation analysis WTO inconsistent. The term "domestic industry" as defined in Article 4.1(c) is used both in the context of Article 2 and Article 4 and hence is used uniformly throughout the authority's injury and causation analysis. An ill-defined domestic market will therefore also distort

[14] Panel Report, China X-Ray Equipment, para. 7.239; Panel Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.191.

the injury and causation analysis since such analysis is premised on a proper definition of the domestic industry. The panel in *US – Lamb* found that an inconsistent industry definition under the Agreement on Safeguards "would appear to compromise the investigation and the determination overall".[15] This is also the position of previous panels under the SCM Agreement and the Anti-Dumping Agreement.[16]

## 5. COMPETITIVE RELATIONSHOP AS REQUIREMENT FOR CAUSATION

25. The European Union considers the case law on the concepts of "like" and "directly competitive" products under the GATT 1994 to be of relevance in this context.[17] It establishes that the determination as to whether products are "like" (a term which is to be interpreted more narrowly than the term "directly competitive or substitutable"[18]) is essentially a determination about the nature and extent of the competitive relationship between these products[19] - and the determination of "direct compeititiveness" clearly also is about the competitive relationship. Case law relating to the AD Agremeent (which only contains the term "like" product) also clarified that a competitive relationship between the imported and domestic product is required for a finding of causation. The Appellate Body found: "[w]e do not see how such a [causation] finding can be made if the relevant imports are not substitutable for the domestic like products."[20] Therefeore, causation requires the existence of a competitive relationship.

26. Since an assessment of "likeness" is about the competitive relationship, the European Union takes the position that Article 2.6 ADA and footnote 46 SCMA do not require a separate assessment of the competitive relationship between imported and domestic products beyond the assessme nt of "likeness". This is supported by previous panels.[21] In case of sub-products the authority may however be required to carry out a competitive assessment for its causation analysis by sub-products.

## 6. OBLIGATION NOT TO DISREGARD EVIDENCE UNDER ARTICLE 4.2(A)

27. The European Union considers that the case law relating to Article 15.2 SCMA / Article 3.2 ADA and Article 15.4 SCMA / Article 3.4 ADA which establishes an obligation for an authority to examine the explanatory force of subject imports for the state of the domestic industry and not to disregard relevant evidence can be transposed to the Agreement on Safeguards.[22] The Appellate Body clarified that under Article 4.2(a) the authority must conduct an evaluation of "impact", notably of increased imports, on the "situation of the domestic industry". This is very similar to the "explanatory force" obligation under Article 15.4 SCMA / Article 3.4 ADA in the relationship between subject imports and the state of the industry.[23] Such explanatory force cannot be provided by the authority in case of evidence calling into question that explanatory force.

## 7. WITH REGARD TO THE WITHDRAWAL OR MODIFICATION OF THE US' CONCESSIONS WITHOUT JUSTIFICATION

28. The European Union considers that safeguard measures in the form of tariffs amounting to a withdrawal or modification of a concession (when the duties imposed exceed the bound levels provided in a schedule of concessions) and inconsistent with the Agreement on Safeguards are then inconsistent with Article II:1 of the GATT 1994.

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[15] Panel Report, *US – Lamb*, para. 7.119.

[16] E.g., Panel Report, *Russia – Commercial Vehicles*, para. 7.16; Panel Report, *EC – Salmon (Norway)*, para. 7.124.

[17] Also see Panel Report, *Indonesia – Autos*, para. 14.174 (for the SCM Agreement).

[18] Appellate Body Report, *Japan – Alcoholic Beverages II*, paras. 112-113.

[19] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 170.

[20] Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.262.

[21] Panel Report, *EC – Salmon (Norway)*, para. 7.55; Panel Report, *EC – Fasteners (China)*, para. 7.267.

[22] Appellate Body Report, *China – GOES*, para. 149.

[23] Appellate Body Report, *US – Lamb*, para. 104; Appellate Body Report, *US – Wheat Gluten Safeguard*, para. 71.

## ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

# I. INTRODUCTION

1. Japan has a systemic interest in ensuring the proper and consistent interpretation of the WTO Agreements, including the provisions of the Agreement on Safeguards (the "Safeguards Agreement") and Article XIX of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994").

# II. UNFORESEEN DEVELOPMENTS

## A. WHETHER THE COMPETENT AUTHORITIES MUST MAKE AN AFFIRMATIVE FINDING THAT THE INCREASE IN IMPORTS IS THE RESULT OF UNFORESEEN DEVELOPMENTS

2. The requirement to determine whether the increase in imports is the result of "unforeseen developments" is an affirmative obligation that is based on the text of the first sentence of Article XIX: 1(a) of the GATT 1994. The phrase "as a result of unforeseen developments" indicates that such developments are "circumstances" that must exist *before* the "increased" imports, because the increased imports are a "result" of the "unforeseen developments". A "result" is "an effect, issue, or outcome from some action, process or design".[1] Thus, logically, the unforeseen developments must precede the increase in imports and are circumstances that must exist before a safeguard measure is applied. Since the "unforeseen developments" must occur *before* a safeguard measure is applied, competent authorities must make affirmative findings as to their existence in their published reports, as required under Articles 3.1 and 4.2(c) of the Safeguards Agreement.[2] A published report which does not discuss or offer any explanation as to why certain factors mentioned in it are to be considered "unforeseen developments" cannot be held to demonstrate that the safeguard measure has been applied "as a result of unforeseen developments".[3]

3. As to the timeframe for assessing the "unforeseen developments", panels and the Appellate Body have considered that such developments had to be unforeseen at the time when the relevant tariff concessions were negotiated, that is, usually the time at which the Member concerned joined the WTO.[4] The importing Member must demonstrate that, at that time, it did not foresee the developments that gave rise to the increased quantity of imports.[5] Thus, in accordance with Articles 3.1 and 4.2(c) of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994, the competent authorities' published report must contain, at a minimum, some discussion as to why the alleged "unforeseen developments" were "unexpected" to the importing Member concerned at the time that Member acceded to the WTO.

4. The panel's role is to examine and confirm if the published report at issue contains "detailed analysis" and "reasoned conclusions" on "pertinent issues" of "unforeseen development" pursuant to Articles 3.1 and 4.2(c) of the Safeguards Agreement. It is not possible for a panel to independently evaluate whether an increase in imports was as a result of unforeseen developments, based on subsequent argumentation and evidence presented exclusively in dispute settlement proceedings, and not contained in the published report.

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[1] Shorter Oxford English Dictionary, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2555 (cited in Appellate Body Report, *US – Steel Safeguards*, para. 315).

[2] Appellate Body Report, *US – Lamb*, para. 72.

[3] Ibid. para. 73.

[4] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.133. See also Appellate Body Reports, *Argentina – Footwear (EC)*, paragraph 96, and *Korea – Dairy*, paragraph 89, citing GATT Working Party Report, *US – Fur Felt Hats*, adopted 22 October 1951.

[5] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.133 and footnote 210. See also Appellate Body Report, *Korea – Dairy*, para. 89, citing GATT Working Party Report, *US – Fur Felt Hats*, adopted 22 October 1951.

### B. LOGICAL CONNECTION BETWEEN THE UNFORESEEN DEVELOPMENTS AND THE INCREASE IN IMPORTS

5. The clause "as a result of unforeseen developments" in Article XIX:1(a) of the GATT 1994 has been interpreted to require a "logical connection" between the "unforeseen developments" and the increase in imports causing or threatening to cause serious injury.[6] In Japan's view, the conclusion that there is a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …" – and the conditions in the second clause of Article XIX:1(a) for the imposition of a safeguard measure is sound and reflects a correct application of the customary rules of interpretation of public international law.

6. Moreover, Japan notes that the increased imports must be found to cause or threaten to cause serious injury to the "domestic industry" of the importing Member in order to substantiate the explanation of the "logical connection". The "domestic industry" is defined under Article 4.1(c) of the Safeguards Agreement as the domestic producers "of the like or directly competitive products". Japan understands this to mean that the competent authorities must show *how* the "unforeseen developments" have modified such competitive relationship between the imported and domestic products to the detriment of the latter and to such a degree as to result in an increase in imports that causes, or threatens to cause, serious injury to the domestic industry. The degree of detail required to explain how "unforeseen developments" resulted in increased imports causing or threatening to cause serious injury will depend on the circumstances of a particular case. When the alleged "unforeseen developments" are considered relating to only specific exporting countries, the competent authorities are required to explain how such "unforeseen developments" relating to a limited subset of Members resulted in increased imports – by, for example, analyzing import data per country.[7]

7. Furthermore, in the light of the ordinary meaning of the phrase "as a result of", the "unforeseen developments" must have occurred before the surge in the relevant imports. Japan observes that a determination to apply a safeguard measure without addressing whether the increased imports were the result of unforeseen developments is likely to violate Article XIX:1(a) as well as Articles 3 and 4.2(c) of the Safeguards Agreement.

### C. THE EFFECT OF THE OBLIGATION INCURRED

8. The text of Article XIX:1(a) of the GATT 1994 establishes that the increase in imports must occur "as a result … of the effect of the obligations incurred by a Member". In the same way as the "unforeseen developments", the "logical connection" between the relevant GATT 1994 obligations and an increase in imports that has caused or is threatening to cause serious injury to the domestic industry is required. Japan further notes that, considering the possible "effect" of the GATT obligations – tariff concessions, in particular – in case of increased imports, the "effect" should mean how such obligations prevented the Member concerned from taking WTO-consistent measures in order to prevent or remedy the change generated by the "unforeseen developments" in the competitive relationship between imports and domestic like or directly competitive products.

9. Although both the "unforeseen development" and the "effect of the obligations" are the prerequisite circumstances referred to in the first clause of Article XIX:1(a) of the GATT 1994, their concrete "effects" to be explained are complementary. The former must have "result[ed]" in the increase in imports causing serious injury to the domestic industry, while the latter must have the "effect" of preventing the importing Member from taking appropriate measures to address such increase in imports.

[6] Appellate Body Report, *Korea – Dairy*, para. 85. See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 92.

[7] Panel Report, *US – Steel Safeguards*, paras. 10.127 and 10.133.

## III. INCREASED IMPORTS

10. An increase in imports is one of the core prerequisites for the application of a safeguard measure.[8] The use of the word "such" which qualifies "increased quantities" in both Article 2.1 of the Safeguards Agreement and Article XIX:1(a) of the GATT 1994 indicates that not any increase in imports is sufficient to satisfy this condition. This language "requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'".[9] Indeed, "the term 'such', which appears in the phrase 'such increased quantities' in both provisions, clearly links the relevant increased imports to their ability to cause serious injury or the threat thereof".[10]

11. Japan agrees with the United States' argument that "whether an increase in imports has been recent, sudden, sharp, and significant enough to cause or threaten serious injury to a domestic industry" "is not strictly a question of the timing and magnitude of the increase in import volume", but necessarily includes "a consideration of the present condition of the industry and the causal relationship between the increase in imports and any serious injury or threat of serious injury sustained by the industry".[11] However, the Panel will need to address whether descriptive statements, without any import data, comply with Articles 2.1 and 3.1 of the Safeguards Agreement. In particular, under Article 3.1, a published report must contain "findings and reasoned conclusions reached on all pertinent issues of fact and law".

## IV. SERIOUS INJURY TO THE DOMESTIC INDUSTRY

12. In order to determine whether the domestic industry suffered serious injury or threat thereof caused by increased imports, the competent authorities must examine "at a minimum, each of the factors listed in Article 4.2(a)".[12] They also have to evaluate "all other factors that are relevant to the situation of the industry concerned".[13] The evaluation under Article 4.2(a) "is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere 'check list'".[14] In fact, "[u]nder Article 4.2(a), competent authorities must conduct a substantive evaluation of 'the '*bearing*', or the '*influence*' or '*effect*' or '*impact*' that the relevant factors have on the 'situation of [the] domestic industry'".[15] It is only "[b]y conducting such a substantive evaluation of the relevant factors, [that] competent authorities are able to make a proper overall determination, *inter alia*, as to whether the domestic industry is seriously injured or is threatened with such injury as defined in the Safeguards Agreement".[16]

13. The part of the U.S. International Trade Commission ("USITC") Report that addresses the "serious injury" requirement is titled "IV. Substantial Cause of Serious Injury or Threat of Serious Injury".[17] However, Japan has doubts that it appropriately explains the USITC's "findings and reasoned conclusions" pursuant to Article 3.1 of the Safeguards Agreement. First, in section "B. Existing Antidumping and Countervailing Duty Orders",[18] if the USITC considered the past AD/CVD measures on the relevant product as a background, it should have explained in more detail how the existence of these other trade remedy measures impacted its analysis and findings. Second, the part of the USITC Report addressing the "serious injury" requirement (section "D. The Domestic Industry is Seriously Injured") does not contain any evaluation on the two of the factors listed in Article 4.2(a) of the Safeguards Agreement ("the rate and amount of the increase in imports of the product concerned in absolute and relative terms", and "the share of the domestic market

[8] Appellate Body Report, *US – Steel Safeguards*, para. 331. See also Panel Report, *Ukraine – Passenger Cars*, para. 7.119.

[9] Appellate Body Report, *Argentina – Footwear (EC)*, para. 131. (underlining added)

[10] Appellate Body Report, *US – Steel Safeguards*, para. 346.

[11] United States' first written submission, para. 189.

[12] Appellate Body Report, *Argentina – Footwear (EC)*, para. 136. See also Panel Report, *Korea – Dairy*, para. 7.55 ("The use of the wording 'in particular' makes it clear to us that, among 'all relevant factors' that the investigating authorities 'shall evaluate', the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry.")

[13] Appellate Body Report, *Argentina – Footwear (EC)*, para. 136.

[14] Appellate Body Report, *US – Lamb*, para. 104. (emphasis original)

[15] Appellate Body Report, *US – Lamb*, para. 104.

[16] Ibid.

[17] USITC Report (KOR-1), pp. 20-51.

[18] Ibid. pp. 22-23.

taken by increased imports"). Third, the key finding of the same section[19] is only that "a significant number of firms were unable to carry out domestic production operations at a reasonable level of profit", which relates to "profits and losses" as enumerated in Article 4.2(a) of the Safeguards Agreement.[20] Given that the domestic producer did not suffer serious injury in terms of the idling of production facilities ("capacity utilization") or "unemployment",[21] the finding on only one factor which showed a negative trend does not seem sufficient to demonstrate "serious injury" pursuant to Article 4.1 of the Safeguards Agreement – a significant "overall" impairment in the position of a domestic industry. Fourth, the short analysis on injury is not well-connected to the causation analysis in section "E. Increased Imports are a Substantial Cause of Serious Injury to the Domestic Industry".[22]

14. Japan additionally notes that, under Articles 4.1(a) and 4.2(a), "serious injury" shall be understood to mean "a significant overall impairment in the position of a domestic industry", which must be determined by evaluating "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry". It would be coherent that a finding of "overall" impairment would require examination of "all relevant factors" of the whole industry, including all sectors and segments. However, these provisions require an investigating authority to "[evaluate] all relevant factors", not to *find "impairment" for all segments* of the domestic industry. Even without taking such data into account, a determination of "serious injury" may still comply with these provisions, if the evaluation of all other "factors" of the other segments (i.e. the remaining part of the domestic industry after USITC excluding the domestic producers of belt driven washers from consideration), on the basis of objective evidence, still supports the "causal link" (Article 4.2(b) of the Safeguards Agreement) between the subject imports and the "serious injury" to the whole domestic industry. It is also necessary that detailed analysis and reasoned conclusion on the causal link is clearly demonstrated in the published report (Article 3.1 of the Safeguards Agreement).

## V. CONDITIONS OF COMPETITION AND THE DETERMINATION OF CAUSATION

15. Article XIX:1 of the GATT 1994 envisages that the subject imported products substitute the domestic products in the market of the importing Member because their competitive relationship has been modified to the detriment of the domestic industry as a result of "unforeseen developments". Although nothing in the text in Articles 4.2(a) and (b) of the Safeguards Agreement provides direct guidance on how to examine the condition of competition, Japan considers that it would be difficult for an investigating authority to reach a "reasoned" affirmative conclusion on causation without having examined the condition of competition between the subject imports and the domestic products.

16. An investigating authority's examination should start with the market interaction between the domestic products and the subject imports. In Japan's view, an investigating authority can make a finding of serious injury to the whole domestic industry on the basis of the negative effect the subject imports can have on part of the domestic industry, depending on the significance of that part in the whole domestic industry. It is unlikely that an affirmative conclusion based upon the negative effect on a part of the domestic industry which is not competitive with the subject imports would be "reasoned". If there is no competition, the negative effect could not have been caused by the subject imports, and thus, should not be counted as part of injury to the domestic industry attributable to the subject imports.

## VI. ONLINE PANEL MEETING AND THIRD PARTY RIGHTS

17. Finally, it is regrettable that the Panel has decided not to pose any questions to the third parties at the third party session even though Japan recognizes the Panel's responsibility for arranging and organizing the process.

[19] Ibid. pp. 33-37.
[20] Ibid. p. 33.
[21] Ibid. p. 37.
[22] Ibid. pp. 38-44.

18. In the light of Article 10.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") which provides that the third parties' interests "shall be fully taken into account during the panel process", the orally posed questions, which have been customarily put to third parties, often help the third parties understand the specific concerns of the Panel to enable them to later submit answers that are more responsive and helpful to the Panel. It also allows third parties to be more effective in communicating their own views to the Panel. Therefore, encouraging substantive discussions among Members, including third parties in this manner, is useful and important, and will ultimately contribute to "high-quality panel reports". Skipping this essential part of the panel process merely because of the mode of the third party session is not productive.

## ANNEX C-3

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO*

1. Mexico is thankful for the opportunity to express its views on this dispute. Before we make our opinions known on certain substantive matters, Mexico considers it necessary to refer to the assessment by the United States that the DSU does not assign precedential value to panel reports adopted by the DSB, or to interpretations contained in those reports.[1]

2. In our opinion, a legal system cannot aspire to become a reliable and predictable basis that evolves in a logical and gradual manner unless it is subjected to certain guidelines that guarantee its predictability. For this reason, in proceedings under the WTO dispute settlement system, consideration of previous findings made by the DSB cannot be discretionary.

3. Precisely in this context, Article 3.2 of the DSU states that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. This is why it is imperative for the Members to have the certainty that the same issue will be resolved in the same way. Thus, the system offers fairly reasonable guidance as to what should be considered appropriate henceforth, on the basis of interpretations already made and adopted by the DSB in similar cases.

4. Mexico does not agree with the United States' interpretation of the term "unforeseen developments". The United States indicates in its written submission that the increase in imports in this case occurred as a result of unforeseen developments due to the fact that "*the negotiators of those tariff concessions did not foresee that a producer would be able to expand from producing zero or low volumes of an LRW model to producing large volumes in a very short time*".[2] A contrario, for the expansion of a producer to be disregarded as an unforeseen development, it must have been foreseen by the negotiators at the time of making tariff concessions. However, it is very difficult to contend that the negotiators of tariff concessions could not have imagined that, once the concessions were made, there would not be increases in import volumes, or even that there would be significant increases in a short time. To contend that the negotiators were hoping that increases would not result is a contradiction in terms because it would imply that concessions were being negotiated in order to avoid sudden increases. Obviously, this is unacceptable.

5. On the other hand, if what the United States is contending is that the negotiators could not foresee that that specific producer could expand by a specific amount in a specific period of time, then what the United States would be contending is that, for the expansion of a given producer in a period to be a foreseen consequence, the negotiators would have had to have known, decades before, specifically that that producer was going to increase its capacity by a specific amount in a determined period. Logically, it is impossible to predict such a thing, and for this reason, absolutely all future events have to be considered as "unforeseen developments", which is also unacceptable.

6. This last possible interpretation by the United States would mean that the condition set forth in Article XIX of the GATT related to "unforeseen developments" would have no practical effect, which runs counter to the principle of "effective treaty interpretation" or the principle of "effectiveness", which is part of the rules for its interpretation.

7. The United States also contends that the determination as to serious injury need not include unforeseen developments.[3] The United States bases its claim on the fact that the phrase "unforeseen developments" does not appear anywhere in the Safeguards Agreement and therefore is not one of the pertinent issues in determining whether the increase in imports has caused or threatened to cause serious injury.

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* Original in Spanish
[1] First written submission of the United States, paragraph 13.
[2] First written submission of the United States, paragraph 18.
[3] First written submission of the United States, paragraph 30.

8. The United States contradicts itself in its arguments as subsequently it states that "the requirements in the first clause of Article XIX:1(a) are not coequal 'prerequisites' with the requirements of the second clause. Rather, 'as a result of unforeseen developments and of the effect of the obligations concurred' are 'circumstances' that must be shown, whereas 'any product is being imported … in such increased quantities and under such conditions as to cause or threat serious injury' are 'conditions' that must be met".[4] (emphasis added).

9. On the one hand, the United States contends that the unforeseen developments are not a *sine qua non* for making a determination of serious injury. However, it does concede that unforeseen developments and the effects of obligations incurred "must be shown". The foregoing is simply devoid of meaning. Furthermore, the United States argues that there is a certain differential weighting in the requirements between the first and second clauses of Article XIX of the GATT. In Mexico's opinion, elements such as "conditions", "requirements" or "developments" established in a provision can only carry a different weight if it is possible to dispense with demonstrating any one of them. The fact that all must be shown confers the same attributes to them, irrespective of where they appear in the text of the provision containing them. In any case, WTO jurisprudence firmly establishes that Article XIX of the GATT forms, together with the Safeguards Agreement, one and the same set of rules that are complementary and must be complied with for the purpose of being able to duly impose a safeguard measure.

10. Along the same lines, the United States affirms that the extracts from *US – Lamb* cited by Korea in its submission regarding the logical connection between the first and second clauses of Article XIX of the GATT, indicate nothing about the considerations for evaluating whether one side of the connection (unforeseen developments) must appear in the report of the investigating authority, since there is simply nothing that would prevent a panel from evaluating the evidence presented in the dispute to demonstrate such a connection.[5]

11. In this regard, we agree that nothing prevents a panel from evaluating whether an increase in imports was a result of unforeseen developments. However, in our opinion, when the Appellate Body asserts that evaluation of compliance with Article XIX of the GATT would be vague and uncertain without a demonstration of the unforeseen developments in the report of the competent authorities, it does not mean that the panel cannot make this evaluation on the basis of elements of information brought in the dispute, but rather that the absence of such a reference in the report of the competent authorities would mean that the elements contained in the report of the authority do not permit an understanding of what the authority took into account and how, or of what it rejected, in issuing its findings. Obviously, this implies the possibility of the authority making a *post-hoc* reasoning to justify its findings, which is unacceptable.

12. Similarly, we disagree with the United States in its assertion that, as the Safeguards Agreement makes no reference to unforeseen developments, it is not necessary to mention it in its report.[6] The foregoing […], since it is clear that Article 3.1 of the Safeguards Agreement provides that the competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law, such as unforeseen developments.

13. Indeed, as the Appellate Body ruled in *US – Steel Safeguards*[7], demonstration of unforeseen developments is one of the issues of law that the investigating authority must include in its report, as it is this body and not the panel that has an obligation to publish in its report the observations and conclusions at which it has arrived.

14. Mexico thanks the panel and the parties for their attention and is available to respond to any questions the panel may consider pertinent.

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[4] First written submission of the United States, paragraph 41.
[5] First written submission of the United States, paragraphs 44 and 46.
[6] First written submission of the United States, paragraphs 49 and 50.
[7] Report of the Appellate Body, *US — Steel Safeguards* (DS248, 249, 251, 252, 253, 254, 258, 259), paragraph 326.