United States –

Safeguard Measure on Imports of Large Residential Washers

(DS546)

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

July 23, 2021

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Argentina – Footwear (EC) (AB)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
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EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti- Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
Korea – Dairy (Panel)	Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
Philippines – Distilled Spirits (AB)	Appellate Body Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012
US – Cotton Yarn (Panel)	Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, adopted 5 November 2001, as modified by Appellate Body Report WT/DS192/AB/R
US – Cotton Yarn (AB)	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001
US – Line Pipe (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Steel Safeguards (Panel)	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R / and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R,

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1 Definition of the Domestic Industry

Question 67

> **In response to Panel question No. 11, the United States submits that imports of subject parts that do not directly compete with either domestic parts or domestic finished products may nevertheless have an indirect impact on domestic producers of parts and finished products if they are assembled into finished products in domestic screwdriver operations that do not change the fundamental character of the parts. The United States adds that through such indirect competition, increased imports of parts could seriously injure a domestic industry producing the finished product.**
>
> **b. To both parties. In the parties' view, would investigating authorities be required to assess the competitive relationship, including direct and/or indirect competition between imported and domestically produced goods, in defining the "like product" pursuant to Article 4.1(c) of the Agreement on Safeguards?**

Comments:

1. 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.[1] 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.[2] 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.[3] 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.[4] Because the Safeguards Agreement does not prescribe a methodology for assessing likeness, and the Commission's likeness methodology was

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[1] Korea's responses (second meeting), paras. 6-7.

[2] Korea's responses (second meeting), para. 6.

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

[4] Korea's responses (second meeting), para. 8. The United States notes that Commissioner Schmidtlein did not suggest that "with parts as a separate like product, a negative injury determination would be necessary given the lack of competition," as Korea mistakenly claims. Korea's responses (second meeting), para. 5. Rather, she asked counsel to Whirlpool "if we did find it was a separate like product . . . would we have to go negative on parts . . . .?" Hearing Tr. at 118 (Schmidtlein) (Addendum to Exhibit KOR-12). Commissioner Schmidtlein was posing a hypothetical in the context of a public hearing at which the Commissioners probed the parties about all aspects of the case, not making any pronouncement about how she would decide the case under her hypothetical. In any event, the question she posed was rendered moot by the Commission's definition of a single domestic like product including covered parts.

reasonable, the Commission's finding that domestic covered parts were like imported covered parts complied with Article 4.1(c) of the Safeguards Agreement.[5]

2. However, having conceded that an evaluation of the competitive relationship between domestic and imported articles, is unnecessary, Korea seeks to reinsert it in the guise of a "rebuttable presumption." In this version of the argument, the competent authorities' finding that products are "like" creates a presumption that they are "directly competitive." However, if "the presumption is called into reasonable doubt based on relevant circumstances, an investigating authority must then assess the nature and extent of the competitive relationship between the domestic and imported products."[6] Korea cites nothing in the text of the Safeguards Agreement creating any such rebuttable presumption. To the contrary, 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.[7] As Korea's cumbersome mechanism of presumption and rebuttal would in substance make the existence of a "competitive relationship" dispositive if raised before the competent authorities, it is directly inconsistent the text of the Agreement.

3. The reasoning in prior dispute settlement reports supports the U.S. interpretation. The panel in *US – Cotton Yarn* expressly recognized that investigating authorities may define a domestic industry to include producers of products like but not directly competitive with the imported product under investigation, under a safeguard provision that defined "domestic industry" in a manner similar to that under Articles 2.1 and 4.1(c) of the Safeguards Agreement.[8] Under Article 6.2 of the Agreement on Textiles and Clothing, Members were required to demonstrate that increased imports caused serious damage, or actual threat thereof, to "the domestic industry producing like and/or directly competitive articles" before imposing a transitional safeguard measure. Based on the term "and/or," the panel found that domestic like products need not be directly competitive with the imports under consideration. The panel explained that "{i}n the case . . . where 'like products' (A) is not a subset of 'directly competitive' products (B), the more logical description of the category 'like and directly competitive products' would be . . . A plus B . . . . i.e., the broader grouping," including products like but not directly competitive, products both like and directly competitive, and products not

[5] *See* U.S. responses (second meeting), paras. 6-7.

[6] Korea's responses (second meeting), para. 7.

[7] *See* U.S. first written submission, para. 177; U.S. second written submission, paras. 45-50.

[8] In its opening statement for the second substantive meeting, Korea overlooked this aspect of the panel report in *US – Cotton Yarn*, and relied on the report solely for the proposition that "GATT Article III is relevant in interpreting the term 'directly competitive products' under Article 6 of the ATC." Korea's opening statement (second meeting), para. 39. Korea also cited the Appellate Body finding from the same dispute that, under GATT Article III, domestic like products must also be directly competitive with imports. Korea's opening statement (second meeting), para. 40. As the United States has explained, the Appellate Body's finding that like products are a subset of directly competitive products under Article III of GATT 1994 in *Philippines – Distilled Spirits* makes no sense in the context of the Safeguards Agreement. *See* U.S. second written submission, paras. 48-50.

like but directly competitive. The panel also noted that cases in which "the like products are found to be a subset of directly competitive products" would be "by far the most common, if not the exclusive case," again acknowledging that not all like products may be directly competitive.[9] Using a Venn diagram to illustrate its finding, the panel confirmed that investigating authorities could define a single domestic industry consisting of producers of articles like but not directly competitive with the imported article (i.e., the portion of A that did not overlap with B) and producers of articles like and directly competitive with the imported article (i.e., the overlapping portions of A and B).[10]

4. The panel's Venn diagram illustrates how the Commission defined the domestic industry in this case. The Commission defined the domestic industry to include domestic producers of all articles "like" the products under investigations, and thus had no need to consider whether any of the domestically produced articles were also "directly competitive" with the imported articles for purposes of defining the domestic industry. It nonetheless also found that there was a moderate to high degree of substitutability between domestically produced LRWs and imported LRWs.[11] Thus, the Commission effectively defined the domestic industry to include producers of like but not directly competitive products, namely covered parts, and producers of like and directly competitive products, namely LRWs and belt driven washers. Using the *US – Cotton Yarn* panel's Venn diagram nomenclature, the directly competitive products (B) (washers) were inside and almost completely overlapping with like products (A), except for the small portion of A corresponding to like but not directly competitive covered parts.[12]

Question 68

> **To Korea. At paragraph 42 of Korea's opening statement at the second substantive meeting with the Panel, Korea stated that "the [USITC] initially determined that the imported and domestic parts were not in competition with each other, as they each**

[9] *US – Cotton Yarn (Panel)*, para. 7.88.

[10] *US – Cotton Yarn (Panel)*, para. 7.88. The Appellate Body did not disturb this panel finding. *US – Cotton Yarn (AB)*, para. 104.

[11] USITC Report, pp. 27-32 (Exhibit KOR-1).

[12] The reasoning of the Appellate Body in *US – Cotton Yarn* further supports the Commission's findings in that domestically produced covered parts were in competition with imported covered parts insofar as they "offer alternative ways of satisfying the same consumer demand in the marketplace." *US – Cotton Yarn (AB)*, para. 96. See USITC Report, p. 17 (Exhibit KOR-1) ("Domestically produced and imported covered parts share the same general functionality when installed in LRWs.").

served respective captive market[s], but nonetheless proceeded to find that they were 'like' solely based on their physical similarity."

Please point to the relevant parts of the USITC's record that support your statement regarding the initial determination by the USITC.

Comments:

5. The United States has no comment on Korea's response.

2 Increase in Imports

Question 69

To Korea. In paragraph 147 of its first written submission, Korea presented a table containing, inter alia, the quantity of imports and rate of change in the quantity of imports over the period of investigation. In paragraph 30 of its opening statement at the first substantive meeting of the Panel, Korea argued that the data presented by Korea in its first written submission were on the record before the USITC. Specifically, Korea argued that the import data were submitted as an annex by Whirlpool in its petition.[1] The Panel takes note of Korea's submission of the annexes to Whirlpool's petition as "Addendum to Exhibit KOR 5".

Please clarify on which specific page of "Addendum to Exhibit KOR 5" the Panel can find the import data presented by Korea in paragraph 147 of its first written submission.

Comments:

6. Korea takes six pages to respond to a question that could have been answered in a single sentence. Korea told the Panel in its opening statement for the first substantive meeting that the import data in paragraph 147 of its first written submission was on the record before the Commission as an annex to the petition, and the Panel asked Korea to identify the specific page of the annex (addendum to Exhibit KOR-5) containing these data. Korea was unable to do so because the import data in paragraph 147 of its first written submission cannot be found in any annex to the petition.

7. In other words, Korea is urging the Panel to base its analysis on extra-record evidence that the Commission did not consider in making its determination.[13] As this was not evidence presented in the USITC investigation or included in the Commission's report, it is irrelevant to the Panel's evaluation of whether the determination complied with Articles 2, 3, or 4 of the Safeguards Agreement. As the panel report in *Korea – Dairy* correctly found, the Panel should

[13] *See also* U.S. first written submission, para. 122; U.S. second written submission, para. 113.

examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it has collected."[14]

8. On this basis, the Panel should disregards Korea's extra-record evidence. For completeness, however, the United States also addresses the flaws in that evidence. In its response, Korea continues to insist that "the data contained in paragraph 147 of Korea's first written submission is probably the most reliable, available data before the Panel in this dispute," all evidence to the contrary.[15] Korea acknowledges that its extra-record import data covers all imports under HSTUS 8450.11.00 and 8450.20.00, which would include substantial volumes of domestically produced LRWs and out-of-scope merchandise.[16] As Whirlpool explained in Exhibit 2B to its petition, official import statistics under HTSUS 8450.20.00 include "entries of LRW parts that are classified as finished LRWs upon withdrawal from Foreign Trade Zones" (i.e., domestically produced LRWs) and "certain out-of-scope washers," including "Extra-Wide Front Loaders," "Low Tech Front Loaders" (i.e., belt-driven front load washers), and "Low Tech Top Loaders" (i.e., belt driven top load washers).[17] By including domestically produced LRWs and several categories of out-of-scope washers, Korea's extra-record import data are unreliable as a measure of subject imports of LRWs. Indeed, the inclusion of out-of-scope belt-driven washers in Korea's extra-record import data explains the smaller increase in import volume shown by these data, as the significant increase in subject import market share between 2012 and 2016 coincided with a decline in out-of-scope import market share.[18]

9. Similarly unfounded is Korea's repeated allegation that the Commission "took for granted the data contained in Exhibit 2A" to the petition, and somehow relied on these data to analyze increased imports.[19] Unlike the extra-record import data in paragraph 147 of Korea's first written submission, Whirlpool estimated the volume of subject LRWs in Exhibit 2A by adjusting official import statistics to exclude estimated volumes of out-of-scope belt-driven washers and domestically-produced LRWs withdrawn from Free Trade Zones that were treated as imported LRWs purely for customs purposes, as explained in Exhibit 2B to the petition.[20] It is therefore unsurprising that the trends shown by the public data in Exhibit 2A are similar to the trends shown by the CBI import data used by the Commission.[21] Nevertheless, the Commission did not rely on the import data in Exhibit 2A as presented by Whirlpool, but instead

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[14] *Korea – Dairy (Panel)*, para. 7.30.

[15] Korea's responses (second meeting), para. 23.

[16] Korea's responses (second meeting), para. 16.

[17] Petition, Exhibit 2B (Addendum to Exhibit KOR-5).

[18] *See* U.S. responses, paras. 23-25.

[19] Korea's responses (second meeting), para. 24.

[20] *See* Addendum to Exhibit KOR-5.

[21] *See* U.S. responses (second meeting), para. 9.

independently collected data directly from all of the market participants, as the United States has explained.[22]

10. As the United States has stressed, the Commission's finding that subject imports "nearly doubled" between 2012 and 2016, a mere three months before the end of the period of investigation, was based upon data reported and certified as accurate by the importers themselves, including LG and Samsung.[23] Contrary to Korea's assertion that the Panel "has no way of knowing" that the Commission relied on data reported by importers, the Commission's report explicitly states that "U.S. import data are based on the questionnaire responses of five firms that are estimated to have accounted for virtually all U.S. imports of LRWs in 2016."[24] Respondents in the Commission's investigation had an opportunity to question the accuracy of these data and never did so.

11. To the extent that Korea is arguing that the Panel should evaluate business confidential information underlying the Commission's finding, the United States notes that the Government of Korea is in as good a position as the United States to submit that information. The Commission's report notes that "U.S. importers LG and Samsung accounted for the vast majority of U.S. imports of LRWs."[25] The Government of Korea is in a position to provide that information, just as it provided the Panel with the confidential pricing data reported by LG and Samsung.[26] Moreover, it does not face the legal constraints identified in the U.S. response to this question.[27]

Question 71

> **To both parties. In question No. 16 posed to the United States after the first meeting, the Panel asked the United States to provide an unredacted version of the parts of the USITC report set out in Annex A of the written questions. The Panel has noted the United States' response and invites the United States to comment on what sort of additional procedures, beyond the existing BCI procedures adopted by the Panel, it considers necessary to provide the information sought in Panel question No.**

[22] *See* U.S. responses, para. 31; U.S. second written submission, paras. 58-61; *see also* USITC Report, p. I-3 (Exhibit KOR-1). Korea has never cited anything in the Commission's report to support its allegation that the Commission relied on Exhibit 2A, and no citation to Exhibit 2A can be found in the report.

[23] *See* USITC Report, pp. 20, 38-39 (citing Tables II-1-2); *see also* U.S. second written submission, paras. 59-61.

[24] USITC Report, p. I-3 (Exhibit KOR-1).

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

[26] *See* Exhibit KOR-29.

[27] *See* U.S. responses (second meeting), paras. 11-12.

16 while safeguarding the confidentiality thereof. The Panel also invites Korea to express its views in this regard.

Comments:

12. The United States has no comment on Korea's response.

Question 73

To Korea. In paragraph 138 of its first written submission, Korea argues that the USITC failed to critically examine and explain its finding of increased imports in light of the decrease in imports in the most recent part of the POI.[2] In paragraph 201 of its first written submission, the United States contends that the USITC explicitly addressed the decline in subject import volume in interim 2017 relative to interim 2016 and explained why the temporary decline did not detract from the overall increase in subject import volume during the 2012-2016 period.[3] In support of its contention, the United States refers to the following part of the USITC report:

Imports of LRWs increased significantly during the period of investigation, in terms of both volume and market share. Between 2012 and 2016, imports of LRWs increased from * units to *** units, for an increase of *** percent. Imports of LRWs remained a substantial *** units in interim 2017, though down from *** units in interim 2016 due to the aforementioned supply disruptions related to LG and Samsung's transfer of production from China to Thailand and Vietnam and Samsung's recall. Similarly, U.S. commercial shipments of imported LRWs increased from *** units in 2012 to *** units in 2016, or *** percent. U.S. commercial shipments of imported LRWs were *** units in interim 2017, up from *** units in interim 2016.[4]**

Please explain Korea's argument in paragraph 138 of its first written submission in light of the United States' reference to the above quoted excerpt from the USITC report.

Comments:

13. Korea once again seeks to magnify the importance of a small decline in subject imports in January-March 2017 relative to January-March 2016.[28] The Commission found that subject import volume "increased steadily" in every year of the 2012-16 period and "nearly doubled" between 2012 and 2016.[29] In other words, imports of LRWs had peaked in 2016, within three

[2] Korea's first written submission, para. 138.

[3] United States' first written submission, para. 201.

[4] USITC Report, (Exhibit KOR-1), p. 38. (emphasis added; redacted original)

[28] The public import data in Exhibit 2A to the petition shows that estimated subject import volume was 7.7 percent lower in January-March 2017 than in January-March 2016. *See* Addendum to Exhibit KOR-5. As the United States has explained, the trends shown by the public import data in Exhibit 2A are consistent with the trends shown by the confidential import data utilized by the Commission. U.S. responses (second meeting), para. 9.

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

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 *U.S. – Steel Safeguard* or the increase in imports of bags and tubular fabric at issue in *Dominican Republic – Safeguard Measures*.[30] 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.[31]

14. Similarly unpersuasive is Korea's repeated assertion that the Commission's analysis of the factors contributing to the lower level of subject import volume in January-March 2017 was somehow inadequate. Contrary to Korea's argument, objective evidence supported the Commission's finding that LG and Samsung "experienced temporary supply disruptions in late 2016 into interim 2017 stemming from their shift in production from China to Thailand and Vietnam, Samsung's recall of 2.8 million TL LRWs, and the bankruptcy of a major shipping company in Asia."[32] As support, the Commission cited evidence that responding domestic producers reported experiencing extended lead times during "a late 2016 recall of 2.8 million Samsung washers that occurred at the same time that Samsung and LG were moving production from China to other parts of Asia," meaning that increased demand for their LRWs caused the time between order and delivery to increase.[33] The Commission also relied on corroborative hearing testimony that retailers requested higher volumes of domestic LRWs in late 2016 through early 2017 to compensate for disruptions in the supply of subject imports. A Whirlpool official stated that:

> {I}n 2016 as both LG and Samsung experienced operational issues as they moved, country-hopped to Vietnam and Thailand, we basically were called upon by our retailers to support much more volume. It was further exacerbated when Samsung had the largest recall on top-load washers ever to supply even more product.[34]

15. Similarly, a GE official stated that:

> We were able to take advantage of the disruptions because of the 2.8 million recall. We talked about utilization of capacity earlier. We did overtime. We put workers in place to

[30] *See* U.S. first written submission, paras. 211-13.

[31] *See* U.S. first written submission, paras. 211-13.

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

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

[34] Hearing Tr. at 123-24 (Liotine) (Addendum 2 to Exhibit KOR-12), cited in USITC Report, p. 26 n.144 (Exhibit KOR-1).

> run that volume but since that point in time we have seen that drop off now that the supply chains have more stabilized for them.[35]

16. Given testimony that these disruptions began in "late 2016" and were only "overcome in 2017,"[36] the disruptions would have continued to restrain subject import volumes in January-March 2017, particularly in light of the necessarily longer lead times for imports of LRWs that were produced-to-order and from foreign inventory.[37] This evidence, coupled with evidence that the bankruptcy of a major shipper in Asia also disrupted subject import supplies, reasonably supported the Commission's finding that the slight decline in subject import volume in January-March 2017 resulted from temporary factors.[38]

17. Nor was there any evidence of a secular decline in subject import volume beginning in 2016, as Korea erroneously claims.[39] To the contrary, the Commission found that subject import volume increased in 2016 to the highest level of the period of investigation.[40] While recognizing that Commerce's imposition of provisional antidumping duty measures on LRWs from China in July 2016 had restrained subject import volume that year, the Commission found that LG and Samsung had shifted virtually all LRW production for the U.S. market from China to Thailand and Vietnam by January-March 2017.[41] Thus, the lower rate of increase in subject import volume in 2015-16 relative to 2014-15 was no more durable than the slight decline in subject import volume in January-March 2017 relative to January-March 2016 caused by temporary factors. In any event, Article 2.1 of the Safeguards Agreement requires only "an absolute increase" in subject import volume, not that "the rate of the increase in imports must accelerate (or be positive) at every moment of the period of investigation or that it is rising and positive . . . ."[42] Therefore, the Commission's finding that subject import volume nearly doubled between 2012 and 2016, after increasing steadily in every year of the 2012-16 period, established the existence of increased imports within the meaning of Article 2 of the Safeguards Agreement.

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[35] Hearing Tr. at 188-189 (Pepe) (Addendum 2 to Exhibit KOR-12), cited in USITC Report, p. 26 n.144 (Exhibit KOR-1).

[36] Hearing Tr. at 187-88 (Levy) (Addendum 2 to Exhibit KOR-12), cited in USITC Report, p. 26 n.144 (Exhibit KOR-1).

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

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

[39] *See* Korea's responses (second meeting), para. 39.

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

[41] *See* U.S. responses (second meeting), para. 19; USITC Report, pp. 39-40 (Exhibit KOR-1).

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

3 Serious Injury

Question 74

> **To Korea. In response to question No. 28(a) after the first substantive meeting concerning the profitability data of producers of belt driven washers, the United States submitted that when a domestic producer reports unreliable financial data, the competent authority may make inferences based on the available information on the domestic industry's financial performance, which in this case consisted of the financial data reported by other responding domestic producers.[5] The United States submits that the USITC based its analysis of the industry's financial performance on financial data reported by three producers that accounted for the vast majority of domestic sales of the like product, and these objective data were therefore "sufficiently representative" for the USITC's analysis of the domestic industry's worsening financial losses during the period of investigation.**
>
> **Does Korea agree that the USITC's financial data were sufficiently representative in this regard? Please explain.**

Comments:

18. 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.'"[43] 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.[44] 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."[45] 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.

19. There is no factual basis for Korea's argument that these data were unrepresentative because the Commission "chose" to exclude Alliance's financial data, or because Alliance was somehow outperforming other domestic producers. First, the Commission did not "choose" to investigate data concerning only a portion of the domestic industry, as the European Commission did in *EC – Fasteners*.[46] Rather, as the United States explained in response to question 75(a), Alliance submitted its domestic producers' questionnaire response two months late, and seven days before the Commission's injury vote, leaving Commission staff with insufficient time to

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[5] United States' response to Panel question No. 28(a), para. 45.

[43] *See* Korea responses (second meeting), para. 56; U.S. first written submission, para. 273.

[44] USITC Report, pp. I-3, III-8 (Exhibit KOR-1).

[45] U.S. responses, paras. 46-47; *see also* U.S. first written submission, paras. 272, 273.

[46] *See EC – Fasteners (AB)*, para. 427.

work with Alliance to resolve the deficiencies identified in its reported financial data.[47] Under the circumstances, the Commission reasonably excluded the unusable financial data reported by Alliance, consistent with the Article 3.1 requirement that its determination be based on "reasoned conclusions," and relied on the usable financial data reported by producers accounting for the vast majority of domestic sales of the like product.[48]

20. Nor could the Commission's exclusion of Alliance's unusable financial results have biased the data in favor of an affirmative serious injury determination, as Korea suggests. As an initial matter, competent authorities may not rely on data that are known to be unreliable because doing so would preclude the drawing of "reasoned conclusions" from "factors of an objective and quantifiable nature," inconsistent with Articles 3.1 and 4.2(a) of the Safeguards Agreement. Accordingly, the exclusion of unreliable data could never bias a competent authority's serious injury determination.

21. Furthermore, evidence that Alliance was doing "extremely well"[49] does not, as Korea alleges, mean that Alliance's sales of belt-driven washers were more profitable than sales of LRWs made by other domestic producers. As the United States has explained, the cited evidence relates to Alliance's overall operations, which focused predominantly on out-of-scope commercial washers, and is therefore not an accurate reflection of the performance of its belt-driven washer operations, which were small.[50] Other record evidence suggested that Alliance's sales of belt-driven washers were unlikely to be especially profitable, including Whirlpool's assessment that belt-driven washers were "an obsolescing dinosaur" and the displacement of imported belt-driven washers from the U.S. market by increasing volumes of low-priced imported LRWs during the period of investigation.[51] In the absence of usable financial data reported by Alliance, the Commission had no way of knowing whether Alliance's sales of belt-driven washers were profitable or loss-making.

22. Finally, Alliance's belt-driven washer operations were simply too small relative to the LRW operations of GE and Whirlpool to have any effect on the financial performance of the domestic industry in the aggregate. Indeed, domestic production of belt-driven washers was

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[47] U.S. responses (second meeting), paras. 22-27.

[48] *See* U.S. first written submission, paras. 269-74; U.S. responses, paras. 42-47; U.S. second written submission, para. 88 & n.169.

[49] Korea's responses (second meeting), para. 56. Nor was Alliance's inclusion in the domestic industry a "hotly contested issue," as Korea mistakenly claims. Korea's responses (second meeting), para. 56. Whirlpool argued that the Commission should define the domestic like product to include belt-driven washers, and respondents did not disagree. USITC Report, p. 15 & n.68 (Exhibit KOR-1).

[50] United States closing statement, second meeting, para. 11; USITC Report, p. I-25 (Exhibit KOR-1) (Stating that Alliance "is a leader in the global commercial laundry market and produces washers and dryers for coin-operated laundries, multi-housing laundries, but also residential washers.").

[51] *See* Hearing Transcript at 90 (Levy) (Exhibit US-12); U.S. responses, paras. 23-25.

"very, very small,"[52] and Korea acknowledges "that the domestic industry is largely defined by a single U.S. producer, Whirlpool."[53] Even after excluding Alliance's unusable financial data, the Commission was able to base its analysis of the domestic industry's financial performance on financial data reported by three producers that accounted for the vast majority of domestic sales of the like product. Because these data were representative of the domestic industry's performance, the Panel should reject Korea's argument and sustain this aspect of the Commission's analysis.

4 Causal Link

Question 76

In response to Panel question No. 34(a) (and specifically in paragraph 51 of its response), the United States explained that based on a "comparison" of the following two sets of data, the USITC 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[8]:

> **(I) For price levels of different types of domestically produced LRWs, the USITC 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.**
>
> **(II) For the price levels of subject imports, the USITC 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.**

a. To Korea. Please comment on the United States' explanation regarding the comparison made by the USITC.

Comments:

23. 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.[54] 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.

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[52] Hearing Tr. at 98-99 (Levy) (Exhibit US-2).

[53] Korea first written submission, para. 294.

[8] United States' response to Panel question No. 34(a), para. 51.

[54] Korea's response (second meeting), para. 59.

market and likely to yield probative price comparisons.[55] 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.[56] 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.[57] 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.[58] 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.[59]

24. Furthermore, the Commission's collection of quarterly pricing data on an agitator-based top loading LRW product from domestic producers alone would not have been instructive for the Commission's causation analysis, and Korea has never explained how the Commission could have possibly used such data in comparing domestic and import prices. As the Commission explained, "in defining pricing products, the Commission must strike a balance between product definitions that are narrow enough to permit apples-to-apples comparisons of directly competitive products but broad enough to yield reasonable coverage of domestic producer and importer shipments."[60] Because there were few imports of agitator-based top loading LRWs, the Commission's collection of pricing data on such LRWs would have imposed a reporting burden on domestic producers while yielding few if any quarterly price comparisons. Nor could the Commission draw any conclusions from comparisons between the quarterly pricing data on sales of domestic agitator-based top loading LRWs and the quarterly pricing data on sales of imported impeller-based top loading LRWs because the two types of LRWs are not comparable; impeller-based top loading LRWs for which pricing data were collected were higher-capacity, more fully featured models that would be expected to command higher prices.[61] Rejecting an argument similar to Korea's, the U.S. Court of International Trade held that it was reasonable for the Commission "to have only collected data for the specific models for which there were imports to

[55] *See* U.S. responses, para. 67; U.S. second written submission, paras. 98-99.

[56] *See* U.S. second written submission, para. 98.

[57] *See* U.S. second written submission, para. 98.

[58] USITC Report, pp. 24-25, 32 (Exhibit KOR-1); *see also* U.S. second written submission, para. 98.

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

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

[61] The Commission noted that LRWs possessing "features and innovations favored by consumers . . . should command a price premium." USITC Report, p. 42 (Exhibit KOR-1).

compare."[62] The Panel should likewise find that the Commission acted reasonably in this respect.[63]

25. Korea's response to the Panel's actual question, which concerned the Commission's comparison of the average unit value data in Table III-7 to the pricing data in Tables V-13-18, is based upon a mischaracterization of the United States' position. The United States has never argued that the Commission's finding that "imported LRWs competed at nearly all price points, including those of domestically produced agitator-based TL LRWs" somehow constituted "a fully-fledged price effect analysis."[64] Nor has the United States asserted that the Commission used the average unit value data in Table III-7 for "price comparisons" with the importer sales prices in Tables V-13-18. Rather, the Commission's quarterly price comparisons were based entirely on pricing data collected for the six strictly defined pricing products.[65] In response to Panel question 34, the United States identified the wide range of objective evidence supporting the Commission's finding that subject imports competed at the same price points as domestically produced agitator-based top load LRWs, including but not limited to importer sales prices in Tables V-13-18 at the same "price points" as the average unit values of domestic producer shipments of agitator-based top load LRWs in Table III-7.[66] Indeed, Korea "does not take issue with the USITC's finding that agitator-based LRWs and other LRWs are generally in competition over various price points."[67] Thus, there is no dispute that differences in product mix, including the domestic industry's sales of agitator-based top load LRWs that were generally not imported, did not attenuate import competition to a significant degree, as the Commission found.[68]

26. Similarly unpersuasive is Korea's contention that the pricing data from the antidumping duty investigation of LRWs from China, which were placed on the record of the safeguard investigation and subject to party comment, "cannot form the basis for any price-related finding pertaining to agitator-based LRWs in the underlying investigation."[69] As the United States has explained, the scope of the products in the *LRWs from China* proceeding was identical to the scope of the safeguard investigation. The period of investigation for *LRWs from China*, January 2013 to June 2016, fully overlapped with the period of investigation for the safeguard

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[62] *LG Electronics, Inc. v. U.S. Int'l Trade Comm'n*, 26 F.Supp.3d 1338, 1343, 1350 (Ct. Int'l Trade 2014) (Exhibit US-15).

[63] *See* U.S. responses, para. 67.

[64] Korea's responses (second meeting), para. 69.

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

[66] *See* U.S. responses, paras. 51-56; *see* also U.S. responses (second meeting), paras. 32-42.

[67] *See* Korea's responses (second meeting), para. 68.

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

[69] Korea's responses (second meeting), para. 74.

investigation, which was January 2012 to March 2017.[70] Although *LRWs from China* was not a global safeguard investigation, as Korea correctly points out, China became the primary source of imports of LRWs after LG and Samsung shifted production there to avoid the antidumping and countervailing duty orders imposed on LRWs from Korea and Mexico in February 2013, and remained the primary source of imports of LRWs until Commerce's imposition of provisional antidumping duty measures on LRWs from China in July 2016 prompted LG and Samsung to shift production to Thailand and Vietnam.[71] In light of these considerations, the pricing product data from *LRWs from China* showing that importer sales of product 9, an impeller-based top load LRW within the scope of the safeguard investigation, undersold domestically produced agitator-based top load LRWs was clearly relevant to the Commission's analysis.[72] These pricing data conclusively established that imports of within-scope LRWs competed for sales at the same price points with domestically produced agitator-based top load LRWs during the period of investigation.

27. Although the Commission necessarily based its price comparisons on types of LRWs for which there was direct competition, the Commission's finding that subject imports competed with domestically produced agitator-based top load LRWs meant that increased volumes of low-priced subject imports would have adversely affected the industry's sales of such LRWs. The record showed that subject imports competed at the same price points, and undersold, domestic agitator-based top load LRWs.[73] It also showed that consumers cross shopped subject imported LRWs against domestic agitator-based top load LRWs, and that lower prices on more fully featured subject imports adversely affected the sales volumes and prices of less fully featured domestic LRWs.[74] Consequently, the Commission reasonably found that the domestic industry's sales of agitator-based top load LRWs were not insulated from subject import competition, and

[70] *See* U.S. responses, para. 57; U.S. responses (second meeting), para. 33; USITC Report, pp. 20 n.98, I-9 (Exhibit KOR-1).

[71] USITC Report, pp. 25, 39 (Exhibit KOR-1).

[72] USITC Report, p. 32 n.202 (Exhibit KOR-1). Korea stresses that imports of product 9 in *LRWs from China* were not Energy Star rated, *see* Korea's responses (second meeting), para. 76, but this does not make the pricing data concerning product 9 any less probative. As the Commission explained in *LRWs from China*, "{t}hat 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." *LRWs from China*, USITC Pub. 4666 at 24-25 (Exhibit US-5). Indeed, the Commission found that "Samsung introduced an impeller-based top load LRW with a capacity of 4.0 cubic feet, the Samsung 3000, that was priced to compete directly with domestically produced agitator-based top load LRWs." *Id.* The Commission cited the page of the confidential views from *LRWs from China* that contained these findings, in noting that subject imports of product 9 undersold domestic agitator-based top load LRWs. *See* USITC Report, p. 32 n. 202 (Exhibit KOR-1) (citing Confidential Views, LRWs from China, at 35) (Exhibit KOR-1).

[73] USITC Report, p. 32 & n.202 (Exhibit KOR-1).

[74] USITC Report, p. 32 & n.202 (Exhibit KOR-1).

hence did not detract from the causal link between increased imports and the industry's serious injury.

Question 77

To Korea. In paragraph 33 of its second written submission, Korea contends that if a finding of priced undercutting, price suppression, or price suppression is made without the facts supporting the findings made, the authorities fail to make an objective assessment of the facts and the findings lack the required adequate and reasonable explanation. Korea states that the error in this case is "particularly alarming" in that the excluded group of products, i.e. agitator-based models, was particularly low-priced among all of the like products.

Please explain why in Korea's view the fact that agitator-based models were in the low-priced segment made the exclusion of these models "particularly alarming".

Comments:

28. 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."[75] 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.[76] 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.[77] 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.[78] 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 78

To Korea. The Panel has reviewed Korea's response to Panel question No. 40 after the first substantive meeting. Please clarify whether Korea is requesting a finding

[75] Korea responses (second meeting), para. 83.

[76] *See* USITC Report, Table V-20 (Exhibit KOR-1).

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

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

that the substantial cause test, as applied in the underlying investigation, did not comply with the Agreement on Safeguards.

Comments:

29. Korea argues that the substantial cause test, as applied in the underlying investigation, did not comply with the Safeguards Agreement. As previously described in detail, the United States showed how the application of the substantial cause test here was consistent with U.S. law and the Safeguards Agreement.[79] The remainder of Korea's response also consists of reiteration of arguments it has previously made, to which the United States has already fully responded. As the United States has explained, the Commission provided a reasoned and adequate explanation for its finding that the alternative causes of injury argued by respondents were unsupported by the record, and accounted for none of the serious injury sustained by the domestic industry.[80]

6 Claims under articles 12.1 and 12.2 of the Agreement on Safeguards

Question 81

To both parties. In paragraph 133 of the United States' second written submission, the United States asserts that for purposes of US law, the "initiation" was deemed to have occurred on 5 June 2017.

Please confirm whether both parties agree that 5 June 2017 should be treated as the relevant date of initiation for the purpose of addressing Korea's claim under Article 12.1(a) of the Agreement on Safeguards.

Comments:

30. As the United States explained in its response to this question, June 8, 2017, is the date of initiation for purposes of addressing Korea's claim under Article 12.1(a) because that was the date on which the Commission publicly announced the initiation of the investigation.[81] This is different than the date of initiation for purposes U.S. domestic law, which the United States reported in the portion of the notification cited by Korea.

Question 82

To both parties. In paragraph 552 of its first written submission, Korea stated that, as notified to the WTO, parties that wished to participate in the USITC's safeguard investigation had to file an entry of appearance "not later than 21 days after publication of the notice of institution in the Federal Register".

Korea submits that failing to notify immediately to the WTO will prejudice interested parties that seek to defend actively their rights in the investigation. In the present

[79] *See* U.S. first written submission, paras. 313-16; U.S. second written submission, paras. 106-08.

[80] *See* U.S. first written submission, paras. 311-37; U.S. responses, paras. 75-80; U.S. second written submission, paras. 103-14.

[81] U.S. responses (second meeting), para. 51. *See* (Exhibits US-29 and US-34).

case, per Korea, the period to register participation rights was cut by one-third given the late notification to the WTO.

Please confirm the relevant date of publication of the "notice of institution in the Federal Register" in the USITC's safeguard investigations on LRWs. Is it 13 June, which is the date of publication of the USITC's initiation notification in the Federal Register, or some other date?

If it is 13 June, did the 21-day period "after publication of the notice of institution in the Federal Register" start from 13 June?

Comments:

31. 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.[82] 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.[83] Korea does not challenge or even address these facts.[84]

32. 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.

7 Claims under articles 8.1 and 12.3 of the Agreement on Safeguards

Question 83

To Korea. Please provide your comments on the following submission made by the United States in paragraph 141 of its second written submission:

> **With respect to prior consultations, Korea's own course of conduct only underscores that from early December 2017 (no later than December 11 of that year, when the United States' third notification was circulated), there was a meaningful opportunity to consult under Article 12.3. For example, on December 27, 2017, the Korean Embassy requested by email a meeting with the United States "based on Article 12.3 of the WTO Safeguard Agreement." Korea followed up with a formal letter on January 24, 2018 – the day after Proclamation 9694 was released to the public and two days before the WTO circulated the United States' fifth notification – requesting consultations under Article 12.3 and expressing its already formed opinion that the**

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[82] U.S. responses (second meeting), para. 52. *See* (Exhibits US-1 and US-36-39).

[83] U.S. responses (second meeting), para. 52. *See* (Exhibits US-1 and US-36-39).

[84] *See* Korea responses (second meeting), paras. 105-06.

measure was inconsistent with Articles I, II, X, XI, XIII, and XIX of the GATT 1994 and Articles 2, 3, 4, 5, 7, and 12 of the Safeguards Agreement.[12]

Comments:

33. 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,[85] 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.

34. 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.[86] Korea's own responses show the error in its argument. Korea agrees that the President announced the final proposed measure on January 23, 2018,[87] and that consultations occurred on February 1, 2018.[88] 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.

35. Finally, Korea argues that it had insufficient time to prepare for consultations before February 1, 2018. As described in the U.S. comment to Question 84 below, the facts show Korea had an "adequate opportunity" to prepare for prior consultations consistent with Article 12.3.

Question 84

To both parties. The Panel refers to Exhibit USA-20, which contains a joint communication of Korea and the United States and refers to the "Immediate notification to the Council for Trade in Goods of the results of the consultations under Article 12.3".

[12] Fns omitted.

[85] U.S. first written Submission, paras. 415-17.

[86] *See* Korea responses (second meeting), para. 111.

[87] *See* Korea responses (second meeting), para. 108.

[88] *See* Korea responses (second meeting), para. 111.

The communication states as follows:

> **On 1 February 2018, Korea and the United States conducted consultations with a view to discuss the information provided in the above-mentioned documents related to the safeguard measure on large residential washers, exchange views on the safeguard measure, and reach an understanding on ways to achieve the objective set out in paragraph 1 of Article 8 of the Safeguards Agreement. Korea and the United States discussed the relevant information and exchanged views on the measure. However, the two countries had not reached an agreement.**

The above-mentioned documents, as identified in this communication, include G/SG/N/8/USA/10/Suppl.3–G/SG/N/10/USA/8–G/SG/N/11/USA/7 (dated 26 January 2018), which is contained in Exhibit US-18.

Please confirm that the parties had consultations on 1 February 2018 pursuant to Article 12.3 of the Agreement on Safeguards to discuss the notifications contained in Exhibit US-18.

Comments:

36. Korea agrees that the parties held consultations on February 1, 2018, pursuant to Article 12.3 of the Safeguards Agreement.[89] Korea, however, again asserts that those consultations provided insufficient time for Korea to review the measure prior to the consultations and for the United States to consider the comments.[90] Korea is incorrect.

37. 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[91] 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.[92]

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[89] *See* Korea responses (second meeting), para. 111.

[90] *See* Korea responses (second meeting), paras. 112-14.

[91] U.S. second written submission, paras. 140-42.

[92] U.S. second written submission, paras. 139-45.

38. Finally, Korea contends that the United States had insufficient time to consider the comments after the consultation[93] 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."[94] 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."[95]

39. Korea argues that the Appellate Body found in *US – Line Pipe* that it was inconsistent with Article 8.1 of the Safeguards Agreement "when information on the scope and date of application of the measure was provided to the interested parties 18 days before it took effect."[96] It contends incorrectly that "[i]n the LRW proceeding, there was even less time."[97] As noted above, there were in fact 30 days for consultations between the date of Proclamation 9694 and the final date for consultations.

Question 85

> **To Korea. Exhibit USA-33 submitted by the United States, which refers to Korea's request for consultations with the US Government pursuant to Article 12.3 of the Agreement on Safeguards on the United States' proposed safeguard "measures" on large residential washers, identifies one of the measures in question as the US Presidential Proclamation signed on 23 January 2018. The request from Korea is dated 24 January 2018.**
>
> **Please confirm that Korea had access to, and was aware of the content of, the US Presidential Proclamation contained in Exhibit KOR-3 as of 24 January 2018, when Korea requested consultations on, *inter alia*, this proclamation. If no, please explain why Korea takes that view considering Korea's request for consultations contained in Exhibit USA-33 refers to this proclamation as one of the measures on which Korea requested consultations.**

Comments:

40. Korea confirms that it had access to the U.S. Presidential Proclamation and was aware of it prior to the February 1, 2018 consultations[98] but again complains that it did not have an "adequate opportunity for prior consultations" because of the allegedly insufficient time to

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[93] *See* Korea responses (second meeting), paras. 112-14.

[94] *See* Korea responses (second meeting), para. 113.

[95] Proclamation 9694, recital 11 (Exhibit KOR-3).

[96] Korea responses (second meeeting), para. 114.

[97] Korea responses (second meeting), para. 114.

[98] *See* Korea responses (second meeting), para. 115.

prepare for consultations or for the parties to consider the comments from the consultations. That argument is meritless for the reasons described above in the U.S. comments on Korea's responses to Questions 83-84.

Question 86

To both parties. Article 12.2 provides that in "making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include", inter alia, the "proposed date of introduction" of the safeguard measure.

a. Does the Agreement on Safeguards permit a Member, that has not decided on the "proposed date of introduction" of the safeguard measure at the time it makes its notification under Article 12.1(b), to provide the proposed date of introduction of the measure when it makes its notification under Article 12.1(c) of the Agreement on Safeguards?

Comments:

41. The United States has no comment on Korea's response.

b. In providing your response, please explain what significance, if any, should be attached to the fact that Article 12.2 refers to the provision of all pertinent information in "notifications referred to in paragraphs 1(b) and 1(c)" and not just paragraph 1(b) alone.

Comments:

42. The United States has no comment on Korea's response.