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

**U.S. RESPONSES TO THE SECOND SET OF QUESTIONS FROM THE PANEL TO THE PARTIES**

July 9, 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 |
| *Dominican Republic – Safeguard Measures (Panel)* | Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012 |
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| *US – Lamb (AB)* | Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001 |
| *US – Steel Safeguards (Panel)* | Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R / and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R |

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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.**
>
> **a. To the United States. Did the USITC consider "indirect competition" between domestically produced and imported parts as part of its likeness assessment? If yes, please point to, and quote, the relevant parts of the USITC report that support your view.**

1. To the extent this question concerns actual "indirect competition" between domestically produced and assembly-ready imported parts, the U.S. International Trade Commission ("Commission") could not have undertaken such an analysis as part of its likeness assessment because LG and Samsung had not yet commenced production of LRWs at their planned U.S. LRW production facilities as of the date of the Commission's vote on injury, which was October 5, 2017.[1] The Commission found that LG planned to open its new plant in 2019 and that Samsung planned to open its new plant in early 2018.[2] Because neither LG nor Samsung had operating plants in the United States as of October, 2017, they were not yet importing, and had no reason to import as of that time, covered parts for assembly into LRWs in domestic screwdriver operations.

2. As the United States has explained, however, the Commission reasonably considered the likelihood of indirect competition from imports of covered parts in recommending that a safeguard remedy be imposed on covered parts. Specifically, the Commission found that the inclusion of covered parts in the safeguard measure was necessary to both remedy the serious injury and facilitate adjustment:

> LG and Samsung's proposal that the Commission impose no import restrictions on covered parts would make it possible for LG and Samsung partially to circumvent the safeguard remedy by importing covered parts for simple assembly into finished LRWs at their new U.S. plants and could alter their business decision regarding the specific operations to conduct at those plants.[3]

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

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

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

3. In other words, excluding covered parts could have undermined the remedial effect of the safeguard measure by encouraging LG and Samsung to replace injurious imports of low-priced LRWs with injurious imports of low-priced covered parts for simple assembly into low-priced LRWs at their new U.S. plants. It could have also undermined the domestic industry's positive adjustment by encouraging LG and Samsung to reduce the scope of the operations at their new U.S. plants from the production of covered parts for assembly into LRWs to the simple assembly of imported kits in screwdriver operations.[4] As the Commission explained, "{i}n the absence of safeguard relief . . . LG and Samsung would have less of an economic incentive to follow through fully on their planned investments, particularly in light of their substantial recent investments in LRW production for the U.S. market in Thailand and Vietnam."[5]

**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?**

4. 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.[6] 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."[7]

5. As the United States explained in its second written submission, the meaning of the term "like" from the context of Article III:2 of GATT 1994, on which Korea relies, makes no sense in the context of the Safeguards Agreement.[8] If "like" products were a subset of "directly competitive" products under Article 4.1(c), as they are under Article III:2 of the GATT 1994, then competent authorities could always define the domestic industry as producers of "directly competitive" products, and the term "like" would be superfluous.

6. Competent authorities could only choose between defining the domestic industry as producers of "like" products or as producers of "directly competitive" products, as contemplated

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Report, p. 74 (Exhibit KOR-1). The President adopted the Commission's recommendation with respect to covered parts.

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

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

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

[7] *US – Gasoline (AB),* p. 23.

[8] U.S. second written submission, paras. 48-50.

by Article 4.1(c) of the Safeguards Agreement, if "like" products were not necessarily "directly competitive" products. For this reason, competent authorities could not be required to assess the competitive relationship between a domestic article and an imported product under investigation before determining that the products are "like" one another within the meaning of Article 4.1(c). Rather, in the absence of specific obligations concerning the definition of the domestic articles "like" the imported products under investigation,[9] competent authorities have the discretion to apply reasonable methodologies in defining the domestic like product, as with other aspects of their serious injury analyses.[10]

7. In this case, the Commission defined the domestic like product to include domestically produced covered parts based on its finding that they were like imported covered parts within the product under consideration, not directly competitive with them.[11] Specifically, the Commission found that domestic and imported covered parts were "substantially identical in inherent or intrinsic characteristics" with respect to their physical properties, customs treatment, manufacturing process, uses, and marketing channels.[12] The Commission's finding that domestic covered parts were like imported covered parts was based on an analysis of factors that are consistent with the dictionary definition of the word "like" to mean "the same or nearly the same (as in nature, appearance, or quantity)." For example, we have pointed to the U.S. Congress's understanding of the term to mean "substantially identical in inherent or intrinsic characteristics (*i.e.*, materials from which made, appearance, quality, texture, etc.)."[13] The Appellate Body, likewise for example, has also recognized these factors to be relevant to an assessment of likeness.[14] Korea has not challenged the factual basis of the Commission's finding that domestically produced covered parts were like imported covered parts. Having analyzed the record facts using a reasonable methodology, the Commission's finding that domestic covered parts were like imported covered parts was consistent with Article 4.1(c) of the Safeguards Agreement.

## 2 Increase in Imports

**Question 70:**

> **To the United States. Please clarify what was the percentage year-on-year increase or decrease in imports over the entire period of investigation. In answering this question, you may treat import volumes in 2012 as 100 (indexed) and map the percentage changes in imports over the rest of the period of investigation.**

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

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

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

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

[13] *See* U.S. second written submission, paras. 39-41.

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

8. As explained by the United States in response to question 16, the Commission may not disclose the actual volumes of subject imports reported by responding importers because doing so would reveal the confidential business information ("CBI") reported by individual importers.[15] Because there were only two major importers, LG and Samsung, and each importer knows its own data, disclosure of aggregated import data, even on an indexed basis, would enable each importer to calculate the other importer's data by simply backing out their own data. Moreover, because the question calls for import values, Korea could obtain this information directly from LG and Samsung.

9. In lieu of the CBI that the Commission relied upon to find a significant increase in subject import volume, the Panel may consider the public data in exhibit 2A to the Petition, reflecting Whirlpool's best estimate of subject import volumes based on public sources, which showed similar trends.[16] As the United States has explained, Whirlpool adjusted the raw import data contained in Exhibit 2D to produce an estimate of subject imports of LRWs in Exhibit 2A by excluding 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.[17] Although the Commission did not "accept" or otherwise rely on the adjusted data in Exhibit 2A, as Korea mistakenly contends,[18] the data showed that imports of LRWs increased in every year of the period of investigation and doubled between 2012 and 2016, consistent with the Commission's analysis.[19]

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

10. The United States thanks the Panel for this opportunity to explore alternative means to protect the CBI implicated by the Panel's question.[20] The Commission has a statutory obligation to protect CBI, and providing such information in this dispute would raise significant legal and regulatory concerns and could impact the Commission's ability to collect this type of

[15] *See* U.S. responses, para. 26.

[16] *See* U.S. responses, paras. 28, 30.

[17] *See* Korea's second written submission, para. 18; *see also* U.S. second written submission, paras. 59-61.

[18] Korea's second written submission, para. 98.

[19] *See* Petition, Exhibits 2A & 2B (Addendum to Exhibit KOR-5).

[20] "Confidential business information" is a term used in the U.S. statute governing the Commission's conduct of safeguard investigations. The United States considers that all of the CBI at issue in this investigation would be BCI for purposes of the Panel's BCI procedures. In discussing U.S. law, we will use the statutory term "CBI" for purposes of clarity.

information from companies in future investigations. While the United States has given this much thought, we unfortunately are not able at this time to offer alternative procedures that would adequately preserve the Commission's institutional ability to collect and protect CBI in its numerous safeguards, antidumping, and countervailing duty investigations.

11. The United States notes that the Safeguards Agreement requires competent authorities to protect confidential information.[21] Protection of CBI is also strictly required under U.S. law.[22] The Commission's implementing regulations likewise require it to afford protection to CBI submitted in the course of its safeguard investigations and provide that such information may only be disclosed pursuant to an administrative protective order ("APO").[23] Similarly, in antidumping and countervailing duty investigations, as well as in appeals from those investigations, the disclosure of business proprietary information to litigants is restricted to counsel who have agreed to be bound by the terms and potential sanctions of a Commission APO.

12. Under an APO, the Commission allows certain representatives of interested parties to have access to CBI submitted by other participants in the investigation, subject to the requirements of the APO. Access to such information is limited to individuals who do not participate in competitive decision-making of the businesses involved in the investigation and who agree to be bound by the Commission's rules forbidding disclosure of such information outside of the proceeding in which it is submitted. Notably, as authorized by the statute, the Commission's regulations recognize that the Commission has the authority to issue sanctions for any breaches of the APO.[24] Indeed, violations of the APO can be subject to a range of sanctions, including disbarment from practice before the agency or other serious penalties. In the WTO dispute settlement context, however, there is no comparable recourse mechanism available to a submitting Member in the event that a recipient of the CBI failed to protect it or used it for a purpose other than the dispute for which the information was provided.

13. In the USITC's Report published at the end of the investigation, the Commission redacted information that was CBI or would otherwise reveal confidential information. Where possible, the Commission provided narrative descriptions of CBI relevant to its conclusions. However, as explained in the U.S. response to Panel Question 16, aggregated data obtained from the confidential questionnaire responses of the importers and domestic producers were necessarily redacted in order to mask the individual firms' CBI. There were two major importers, active in a small number of countries, and two major U.S. producers. Thus, because each foreign producer knew its own data, the aggregate data on imports would provide each of them with the knowledge of the others' data by simply backing out their own data. Likewise, the two major domestic producers could closely approximate the data for each other since they together accounted for the vast majority of domestic production. We note that the United States

[21] Safeguards Agreement, Article 3.2.

[22] 19 U.S.C. §§ 2252(i) (Exhibit US-43), 1677f(b) (Exhibit US-44).

[23] 19 CFR § 206.17 (Exhibit US-45). *See* 19 U.S.C. § 1677f(c) (Exhibit US-44).

[24] 19 U.S.C. § 1677f(c)(1)(B) (Exhibit US-44); 19 CFR § 206.17(d)-(e) (Exhibit US-45).

has endeavored to provide the Panel with as much public information as possible, including through the introduction of directional versions of the relevant tables from the Report.[25] The United States has also explained that, although the Commission collected and relied on import information directly from questionnaire responses, the trends shown in public exhibit 2A to Whirlpool's petition are consistent with the Commission's analysis of increased imports.[26]

14. The United States submits that there are advantages to using these summaries rather than the actual confidential data. We think that providing more detailed nonconfidential summaries rather than the unredacted tables will help improve the WTO dispute resolution process. The Panel can include in its report the information provided in nonconfidential summaries, which will make the report more understandable to those not the parties to the dispute. There is no risk of inadvertent disclosure of confidential data.

**Question 72:**

> **To the United States. The Panel refers to question No. 17(b)(ii) posed in writing to the United States after the first meeting. The Panel has reviewed the United States' response to that question, but it is not clear on whether the United States agrees or disagrees as a factual matter that the rate of increase in imports decelerated from 2015.**
>
> **a. Please clarify whether the United States agrees or disagrees that the rate of increase in imports decelerated since 2015.**

15. As the United States explained in response to questions 16 and 17, the public data in exhibit 2A to the Petition, reflecting Whirlpool's best estimate of subject import volumes based on public sources, showed trends similar to those of the CBI import data reported by importers that the Commission relied upon.[27] These public data show that the percentage increase in the estimated volume of subject imports between 2015 and 2016 was lower than the percentage increase between 2014 and 2015.[28] Nevertheless, the data also show that the estimated volume of subject import volume doubled between 2012 and 2016 after increasing in every year of the period, consistent with the Commission's analysis.[29]

> **b. In paragraph 30 of its response to Panel question No. 17 the United States submitted that the data in exhibit 2A of the petition, reflecting petitioner's best estimate based on public sources, showed that imports of LRWs increased in every year of the period of investigation and doubled between 2012 and 2016, consistent with the USITC's analysis of increased imports.**

[25] Exhibits US-13 and US-14.

[26] *See* United States Response to Panel Questions 16 and 17, citing Petition Exhibits 2A & 2B (Addendum to Exhibit KOR-5).

[27] *See* U.S. responses, paras. 28, 30.

[28] *See* Petition, Exhibits 2A & 2B (Addendum to Exhibit KOR-5).

[29] *See* Petition, Exhibits 2A & 2B (Addendum to Exhibit KOR-5).

**Is the rate of change in imports since 2015 in the data presented in exhibit 2A consistent with the data forming the basis of the USITC's analysis of increased imports?**

16. Please see the U.S. response to question 72(a).

**c. Please clarify, by pointing to the relevant parts of the USITC report, whether the USITC examined the effect of any deceleration of the rate of increase in imports since 2015 as part of the USITC's increased imports analysis.**

17. Yes, as the United States has explained, the Commission fully evaluated the rate of increase in subject import volume over the period of investigation, including between 2015 and 2016.[30] Specifically, the Commission considered the absolute volume of subject imports in each year of the 2012-16 period and found that imports of LRWs had "increased steadily" during the period.[31] The Commission also considered the percent changes in imports of LRWs from 2012 to 2013, from 2013 to 2014, from 2013 to 2014, from 2014 to 2015, from 2015 to 2016, and from interim 2016 to interim 2017, as provided in Table C-2 of the staff report, and the overall percentage increase in subject import volume between 2012 and 2016,[32] which showed that subject import volume had "nearly doubled during the period of investigation."[33] Thus, the Commission evaluated the rate of increase in subject import volume, characterizing it as "steady," and the amount of the increase, including the increase in each year of the period of investigation and the overall increase.

18. The Commission also evaluated the effect of the significant increase in subject import volume and market share, necessarily including the rate of increase in subject import volume, on the domestic industry in the causation section of its report. Because neither Article 3.1 nor Article 4.2(c) dictates the organization of the reports that competent authorities are required to publish under those articles, the Commission could act consistently with Article 4.2(a) by incorporating its evaluation of these factors into the causation section of its report, where their analysis was most logical.[34]

19. In that section, the Commission specifically considered the effect of subject import volume on the domestic industry's market share and found that "import levels appear to have been restrained by serial antidumping and countervailing duty orders during the period of investigation."[35] Specifically addressing the trend between 2015 and 2016, the Commission found that Commerce's imposition of provisional antidumping duty measures on LRWs from

[30] *See* U.S. first written submission, paras. 207-13; U.S. second written submission, paras. 79-84.

[31] USITC Report, p. 20 (Exhibit KOR-1). The rate of increase in imports of LRWs was clear from the evolution of the absolute volume of imports of LRWs during the period of investigation, which the Commission expressly discussed. USITC Report, p. 20 (Exhibit KOR-1).

[32] USITC Report, p. 20, Table C-2 (Exhibits KOR-1); *see also* Public Version of Table C-2 (Exhibit US-13).

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

[34] *See* U.S. first written submission, paras. 232-36.

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

China in July 2016 coincided with an increase in the domestic industry's market share between 2015 and 2016.[36] Thus, the Commission expressly recognized that the level of imports in 2016 was restrained by the imposition of provisional measures on imports of LRWs from China in July of that year, though LG and Samsung subsequently evaded the order on LRWs from China by shifting virtually all LRW production for the U.S. market from China to Thailand and Vietnam by interim 2017.[37]

20. Furthermore, there is no requirement under the Safeguards Agreement that "imports . . . have a positive rate of increase – that is, an acceleration," as Korea claims.[38] As the panel explained in *Dominican Republic – Safeguard Measures*, "{t}here is nothing in the text of Article XIX:1(a) of the GATT 1994 or the Agreement on Safeguards to indicate that the rate of the increase in imports must accelerate (or be positive) at every moment of the period of investigation or that it is *rising* and *positive* only if every percentage increase is greater than the preceding increase."[39] Rather, "an absolute increase . . . is sufficient" for purposes of satisfying the increased imports requirement under Article 2.1 of the Safeguards Agreement,[40] which is what the Commission found here. As the United States has pointed out, the absolute increase in imports of LRWs found by the Commission in this case was of a greater magnitude and steadier than the increase in imports that panels found to be consistent with respect to welded pipe in *US – Steel Safeguards* and plastic bags in *Dominican Republic – Safeguard Measures*.[41] The Panel should likewise find that the Commission satisfied the increased imports requirement under Article 2.1 of the Safeguards Agreement, notwithstanding any deceleration in the rate of increase in imports since 2015.

21. Finally, the United States notes that the Commission did not find the rate of increase in subject import volume particularly illuminating because the significant increase in subject import volume and market share seriously injured the domestic industry not by capturing market share from the industry but by depressing and suppressing the industry's prices. Specifically, the Commission explained that the domestic industry had defended its market share, in part, "by reducing its sales prices in response to competition from the increasing volume of low-priced imports of LRWs."[42] Based on the moderate to high degree of substitutability and the importance of price to purchasers, the Commission found that "the significant and growing quantity of low-priced imports depressed and suppressed prices for the domestic like product" by forcing domestic producers to either lower their own prices or else lose retailer floor spots and

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

[37] USITC Report, pp39-30 (Exhibit KOR-1).

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

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

[40] *US – Steel Safeguards (Panel)*, para. 10.233-34.

[41] *See* U.S. first written submission, paras. 211-13; *US – Steel Safeguards (Panel)*, para. 10.233-34; *Dominican Republic – Safeguard Measures (Panel)*, para. 7.231.

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

sales.[43] While the domestic industry's market share in 2016 remained similar to that in 2012, the industry's sales prices declined on all six pricing products during the period of investigation, by between 6.2 and 43.7 percent, despite increasing demand and production costs.[44] The Commission found that the domestic industry's declining sales prices and increasing COGS-to-net-sales ratio directly resulted in worsening operating and net losses during the period of investigation.[45] Thus, any deceleration in the rate of increase in subject import volume between 2015 and 2016, due to the restraining effect of the provisional measure on imports of LRWs from China, did not prevent the significant and growing volume of low-priced imports from seriously injuring the domestic industry in 2016, as the Commission reasonably explained.

### 3 Serious Injury

**Question 75:**

> **To the United States. In response to Panel question No. 27 following the first substantive meeting, the United States submitted that the financial results for the very small amounts of belt driven washers were not included in the aggregate industry data because Alliance – the only US producer of the included belt driven washers – was unable to provide accurate financial results for its production of covered washers. The United States adds that this is reflected in footnote 205, page 33 of the USITC report.**[6]
>
> **a. Please explain by pointing to, and quoting, the relevant parts of the USITC report, why specifically the USITC considered the financial data relating to Alliance to be flawed, and therefore unusable.**

22. As an initial matter, the United States urges the Panel to recognize that Korea exaggerates the significance of the absence of Alliance's financial data. The unequivocal data representing almost all domestic production of the like product showed that the industry suffered dramatically increasing financial losses.[46] To be clear, staff's inability to include the financial data for Alliance in the aggregate industry data was essentially a timing issue – Alliance submitted its questionnaire response far too late in the investigation to allow the ITC to ensure that the financial data were reliable.

23. The Commission's report states on page III-8 that "{t}hree U.S. producers reported usable financial results on their LRWs operations: GE Appliances, Staber, and Whirlpool."[47] Given the absence of Alliance from this list of domestic producers that reported "usable" financial results, and the explanation in footnote 205 on page 33 that "the domestic industry's financial results do not include PSC/belt drive TL LRWs and CIM/belt drive FL LRWs produced

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

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

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

[6] United States' response to Panel question No. 27, para. 42.

[46] USITC Report, p.p.33-34, 37 (Exhibit KOR-1).

[47] USITC Report, p. III-8 (Exhibit KOR-1).

domestically," it can be ascertained that Alliance's reported financial results were unusable due to deficiencies identified by Commission staff.[48]

24. Although the specific reasons Commission staff found Alliance's financial data as submitted to be unusable absent modifications in response to staff's requests are CBI, the circumstances surrounding Alliance's domestic producer questionnaire response are highly instructive. The first page of the questionnaire required domestic producers to submit their responses by July 18, 2017.[49] The Commission chose this deadline to provide sufficient time to address any deficiencies in the responses and to incorporate the reported data into the staff report. In this regard, the Commission's accountant/auditor, listed on the inside cover of the report, carefully reviewed the financial data reported in each domestic producers' questionnaire response to ensure that these data were internally consistent, reconciled with trade data (*i.e.*, U.S. shipments and exports) reported elsewhere in the questionnaire response, and were limited to the domestic like product. Upon finding any deficiencies or anomalies—which is not unusual – the accountant/auditor typically requests that the responding domestic producer either explain them or revise its questionnaire response to resolve them.

25. Alliance submitted its domestic producers' questionnaire response on September 27, 2017, two months late and a mere seven days before the Commission's injury vote on October 5, 2017.[50] Based on a draft questionnaire response submitted earlier, the accountant/auditor contacted Alliance to request that certain information be more fully explained or cured.[51] However, Alliance was unable to make these corrections in the very limited time remaining.

26. The Appellate Body has recognized that requiring competent authorities to "actually have before them data pertaining to *all* those domestic producers whose production, taken together, constitutes a major proportion of the domestic industry . . . would be both impractical and unrealistic."[52] Clearly, requiring Commission staff to rectify the deficiencies in Alliance's questionnaire response submitted two months late, and days before the Commission's vote, would have been "both impractical and unrealistic." Under the circumstances, Commission staff reasonably excluded Alliance's unusable financial data, noting the reasons for doing so, and finalized the staff report based on the usable financial results reported by three domestic producers accounting for nearly all domestic production of LRWs. The Commission reasonably relied on these financial results in making its serious injury determination.

27. As the United States has previously explained, the Commission's exclusion of unusable financial data from its analysis of the domestic industry's financial performance, and its reliance on the financial data reported by producers accounting for the vast majority of domestic sales of

[48] USITC Report, p. 33 n.205 (Exhibit KOR-1).

[49] *See* (Exhibit US-40).

[50] *See* (Exhibit US-41).

[51] *See* (Exhibit US-42).

[52] *US – Lamb (AB)*, para. 132.

the like product, was entirely reasonable.[53] In relying on objective data that were "sufficiently representative" of the domestic industry's performance, the Commission's analysis of the domestic industry's financial performance was fully consistent with the Safeguards Agreement.[54]

**b. The Panel recalls that in question No. 27, the Panel requested the United States to provide the unredacted version of the USITC report where the USITC provides all of its reasons regarding why it did not use the financial data in this regard, including that set out in footnote 205 of page 33 of the USITC report (Exhibit KOR 1). The Panel notes that the United States did not provide the unredacted version of the USITC report in Panel question No. 27 after the first substantive meeting. Please provide the unredacted version of footnote 205 of page 33 of the USITC report.**

**The Panel notes that it has invited the parties to comment on what sort of additional procedures, beyond the existing BCI procedures adopted by the Panel, may be necessary to provide the information sought by the Panel, while safeguarding the confidentiality thereof.**[7]

28. As the United States has explained in response to Panel Question 71, it is unable at this time to propose alternative procedures for disclosure of CBI that would assure adequate protection for such data in this and future matters.

29. Nonetheless, the Commission has taken a closer look at the content of footnote 205 on page 33 of its public report (Exhibit KOR-1) and ascertained that providing the Panel with an unredacted version of the footnote would not disclose any CBI. Accordingly, we provide the full text of footnote 205 below:

> CR/PR at Tables III-11, C-2. We note that the domestic industry's financial results do not include PSC/belt drive TL LRWs and CIM/belt drive FL LRWs produced domestically because Alliance was unable to provide usable financial results. *Id.* at C-2 n.4.

30. The specific reasons the Commission was unable to use the financial data reported by Alliance are provided in footnote 12 on page III-8 (Exhibit KOR-1), and fully redacted. The Commission may not disclose the redacted information in this footnote because doing so would reveal specific information about the data provided in Alliance's questionnaire response, and the U.S. statute and Commission regulations and the APO strictly prohibit disclosure of company-specific information provided by individual firms.

31. On the very same page, however, the Commission's report states that aggregate financial data for the domestic industry incorporated the "usable financial results" reported by "GE

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

[54] *US – Lamb (AB)*, para. 132; *see also EU – Fasteners (AB)*, para. 436 ("In our view, as long as the domestic industry is defined consistently with the Anti-Dumping Agreement, and that the sample selected is representative of the domestic industry, an investigating authority has discretion in deciding the method with which it selects a sample.").

[7] Panel question No. 71 above.

Appliances, Staber, and Whirlpool,"[55] which together accounted for "all known U.S. production of LRWs in 2016."[56] As the United States has explained, these data were no less representative of the domestic industry's performance for the exclusion of Alliance's unusable financial data, because Alliance's production of residential belt-driven washers was "very, very small."[57] Thus, objective evidence supported the Commission's reliance on these data as representative of the domestic industry's performance.

## 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.**

**b. To the United States. Please explain where in its report the USITC discussed the results of the price "comparison" that the United States refers to in paragraph 51 of its response to Panel question No. 34(a). In providing the explanation please point to, and quote, the relevant parts of the USITC report.**

32. 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.[58] As explained

[55] USITC Report, p. III-8 (Exhibit KOR-1).

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

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

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

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

by the United States in response to question 34, however, the Commission also cited a range of other evidence in support of the finding.[59]

33. First, 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.[60] As the Commission noted, "{i}n *LRWs from China*, the Commission found that subject imports of pricing product 9, an impeller-based [top load] 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.[61] Given that *LRWs from China* had the same scope as the safeguard investigation and a period of investigation that overlapped with the period examined in the safeguard investigation, these data showed that imports of LRWs competed at the same price points as domestically produced agitator-based top load LRWs during the period of investigation.[62]

34. Second, the Commission relied on Petitioner's Confidential Hearing Exhibit 1,[63] which counsel to petitioner described at the hearing as "a consolidation of proprietary information from the quarterly pricing products" collected in *LRWs from China* and the safeguard investigation, dividing these data into "pricing buckets for front-load and top-load washers by essentially ranges of wholesale prices."[64] These data showed "imports and domestics competing head-to-head up and down the product line" across all pricing buckets.[65]

35. Third, the Commission noted that "there is some evidence that lower prices on more fully featured subject imports adversely affected the sales volumes and prices of less fully featured domestically produced LRWs," including agitator-based top load LRWs.[66] Specifically, the vast majority of responding purchasers had reported that price reductions on imported highly featured top load impeller and front load LRWs affected the price of U.S.-produced top load LRWs with

[59] *See* U.S. responses, paras. 51-56; USITC Report, p. 32 & n.202 (Exhibit KOR-1).

[60] U.S. responses, para. 53.

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

[62] *See* USITC Report, p. 20 n.98, I-9 (Exhibit KOR-1). The Commission noted that the period of investigation in the safeguard investigation, January 2012 to March 2017, overlapped with the period of investigation in *LRWs from China*, which was January 2013 to June 2016. *Id.* at 20 n.98. The Commission's report observed that the "product coverage in the Commission's current safeguard investigation is the same as the scope in the most recent antidumping duty investigation and subsequent antidumping order in LRWs from China." *Id.* at I-9.

[63] USITC Report, p. 32 & n.202 (Exhibit KOR-1). The Commission also relied on confidential information in Alliance's domestic producers' questionnaire response, but this information is incapable of public summary. *Id.*

[64] Hearing Tr. at 142 (Levy) (Exhibit US-12).

[65] Hearing Tr. at 142 (Levy) (Exhibit US-12).

[66] USITC Report, p. 32-33 n.202 (Exhibit KOR-1).

agitators either always, usually, or sometimes.[67] The Commission also relied on its finding from *LRWs from China* that "lower prices on more fully featured subject imports adversely affected the sales volumes and prices of less fully featured domestically produced LRWs," including domestically produced agitator-based top load LRWs.[68]

36. Based on all of this evidence, as set forth in the Commission's report, the Commission provided a reasoned and adequate explanation for its finding that "pricing data show that imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based [top load] LRWs."[69] In addition to citing a broad array of evidence supporting the finding, the Commission explained that subject imports of impeller-based top load LRWs undersold domestically produced top load LRWs during the period of investigation and that more fully featured subject imported LRWs affected the sales volumes and prices of less fully featured domestically produced LRWs, according to responding purchasers.[70] Thus, "the evidence and explanation relied on" by the Commission "reasonably support{ed} its conclusion" that subject imports competed with domestically produced agitator-based top load LRWs, even though there were few import shipments of such LRWs.[71]

**c. <u>To the United States</u>. Please provide an unredacted version of table III 7 and tables V 13 V 18 referred to by the United States, as well as the results of any price comparison made by the USITC based on these tables. The Panel notes that it has invited the parties to comment on what sort of additional procedures, beyond the existing BCI procedures adopted by the Panel, may be necessary to provide the information sought by the Panel, while safeguarding the confidentiality thereof.**[9]

37. The Commission is unable to provide an unredacted version of table III-7 and tables V-13-V-18 because doing so would disclose the CBI of individual domestic producers and importers, for the reasons discussed by the United States in response to question 16 after the first

[67] USITC Report, p. V-14-15 (Exhibit KOR-1). Specifically, 16 of 20 responding purchasers reported that price reduction on imported highly-featured top load impeller LRWs affected the price of U.S.-produced top load LRWs always (2), usually (4), or sometimes (10). *Id.* Fourteen of 20 responding purchasers reported that price reduction on imported highly-featured front load LRWs affected the price of U.S.-produced top load LRWs always (1), usually (3), or sometimes (10). USITC Report, p. V-14-15 (Exhibit KOR-1).

[68] Confidential Views, *LRWs from China*, at 35-36, cited in USITC Report, pp. 32-33 n.202 (Exhibit KOR-1); *LRWs from China*, USITC Pub. 4666 at 24-25 (Exhibit US-5) (containing the public version of pages 35-36 of the confidential views). As support for this finding in *LRWs from China*, the Commission noted that 17 of 30 responding purchasers reported that price reductions on highly featured top load LRWs from China always or usually put downward pressure on the prices of less featured top load washers with agitators produced in the United States. *LRWs from China*, USITC Pub. 4666 at 25 (Exhibit US-5). The Commission also relied on sworn testimony from Whirlpool officials at the hearing that "{d}iscount prices at the high end of the washer line are compressing prices in the mid-range and low end of the product line" and that "discounting highly featured washers forces prices to be compressed down throughout the entire product line up." *LRWs from China*, USITC Pub. 4666 at 25 (Exhibit US-5)

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

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

[71] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 188.

[9] Panel question No. 71 above.

substantive meeting.[72] Specifically, the data in table III-7, concerning the volume and value of the domestic industry's U.S. shipments of different types of LRWs in each year and interim period of the period of investigation, largely reflect data reported by the two largest domestic producers of LRWs, Whirlpool and GE. Consequently, each of these producers could approximate the data reported by its competitor by simply subtracting its own data from the aggregate data. Similarly, the quarterly pricing data reported in tables V-13-V-18, with separate aggregations for domestic producers and importers, largely reflect data reported by the two largest domestic producers, Whirlpool and GE, and the two largest U.S. importers of LRWs, LG and Samsung. Each of these producers and importers could approximate the pricing data reported by its competitor by subtracting its own data from the aggregate data.

38. The United States would stress that counsel to all parties, including counsel to LG and Samsung, were provided with all CBI collected in the investigation, including unredacted versions of table III-7 and tables V-13-V-18, subject to the APO. Thus, LG and Samsung were given a full opportunity to address these data directly in their confidential briefs and indirectly, in more general terms so as not to disclose CBI, at the Commission's public injury hearing.

39. Nor does Korea challenge the veracity of the data contained in table III-7 and tables V-13-V-18, which were reported and certified as accurate by responding domestic producers and importers.[73] Rather, Korea's challenge is limited to the Commission's selection of the six pricing products for which the pricing data in tables V-13-V-18 were collected.[74] As the United States has explained, the Commission reasonably considered these pricing data to be representative of competition in the U.S. market, particularly given that respondents endorsed five of the six pricing products and the data covered an appreciable percentage of domestic industry and importer U.S. shipments.[75] Disclosure of the actual confidential quarterly pricing data in tables V-13-V-18 would add little to an understanding of the Commission's analysis of these data as set out in the public version of its report, including the Commission's finding that subject imports were priced lower than domestically produced LRWs in 70 of 92 quarterly comparisons, corresponding to 3,860,937 of 4,474,504 reported sales, by a weighted average margin of 14.2 percent.[76]

40. The United States would also emphasize, as discussed in response to question 76(b) above, that a wide range of evidence supported the Commission's finding that "LRWs competed at all price points in the U.S. market," including but not limited to the data in table III-7 and tables V-13-V-18.[77] Indeed, the Commission's finding that imported LRWs competed at the same price points as domestically produced agitator-based TL LRWs was fully supported by

[72] *See* U.S. responses, para. 26.

[73] See USITC Report, pp. III-6, V-26 (Exhibit KOR-1).

[74] *See* Korea's second written submission, paras. 244-46.

[75] See *See* U.S. first written submission, paras. 300-05; U.S. responses, paras. 51, 59-64; United States second written submission, paras. 97-102.

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

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

objective evidence from *LRWs from China*, placed on the record of the safeguard investigation, 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."[78] These pricing data conclusively established that imports of LRWs competed at the same price points as domestically produced agitator-based TL LRWs during the January 2013 to June 2016 period examined in *LRWs from China*, which overlapped fully with the January 2012 to March 2017 period examined in the safeguard investigation.[79]

41. The Commission also found that subject imports competed with domestically produced agitator-based TL LRWs based in part on "some evidence that lower prices on more fully featured subject imports adversely affected the sales volumes and prices of less fully featured domestically produced LRWs."[80] Based on similar evidence, in *LG Electronics, Inc. v. U.S. International Trade Commission*, the U.S Court of International Trade rejected the argument by plaintiffs LG and Samsung that the domestic industry's production of smaller capacity LRWs, including agitator-based TL LRWs (referred to as "conventional top loads" or "CTLs"), insulated the industry from competition from larger capacity, more fully featured subject imports.[81] In particular, the court held that substantial evidence supported the Commission's finding "that the higher priced, but more fully featured {subject imported} HEFLs {*i.e.*, high efficiency front load LRWs} and HETLs {*i.e.*, high efficiency top load LRWs} nevertheless suppressed and depressed CTL sales and prices."[82]

42. Given this and the other objective evidence discussed in response to question 76(b), domestic producers of agitator-based TL LRWs were not insulated from subject import competition, as Korea maintains, but rather competed directly with imported LRWs that offered purchasers more features for similar, or in many cases lower, prices.

**d. <u>To the United States</u>. In response to Panel question No. 34(b), as to whether, inter alia, there was any price comparison on the USITC's record with respect to imported LRWs and domestically produced agitator-based TL LRWs, the United States responded as follows[10]:**

> **Yes, as discussed in response to the previous question, the record contained price comparisons between subject imports of impeller-based TL LRWs and otherwise comparable domestically produced agitator-based TL LRWs from the recent antidumping duty investigation of LRWs from China.**

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

[79] USITC Report, p.20 n.98 (Exhibit KOR-1).

[80] USITC Report, p. 32 n.202 (Exhibit KOR-1); *see also* response to Question 76(b), above.

[81] *LG Electronics, Inc. v. U.S. Int'l Trade Comm'n*, 26 F. Supp. 3d 1338, 1359 (Ct. Int'l Trade 2014) (Exhibit US-15).

[82] *LG*, 26 F. Supp. 3d at 1359-61.

[10] United States' response to Panel question No. 34(b), para. 57.

**i. Please clarify whether the USITC's price comparisons involving domestically produced agitator-based TL LRWs were based on (i) price comparisons made in the anti-dumping investigation on LRWs from China, or (ii) a "comparison" of data in table III-7 of its report and table V-13-18 of the USITC report.**

43. The Commission's price comparisons showing that subject imports of impeller-based top load LRWs undersold domestically produced agitator-based top load LRWs were from the antidumping duty investigation of *LRWs from China*, as noted by the Commission.[83] The confidential views and staff report from *LRWs from China* were placed on the record of the safeguard investigation, and counsel for the parties in the safeguard investigation who had signed APOs -- including counsel for LG and Samsung -- had access to, and were given the full opportunity to comment on and make arguments based on, all CBI disclosed in the China report.

**ii. Please confirm whether the data in table III-7 and table V-13-18 were based on data specifically collected for the underlying safeguard investigation, or were collected for some other investigation and placed on the record of the underlying safeguard investigation.**

44. The United States confirms that the data in table III-7 and tables V-13-18 of the Commission's report were specifically collected from domestic producers, in the case of table III-7, and from domestic producers and importers, in the case of tables V-13-18, for the underlying safeguard investigation.[84]

**e. <u>To the United States</u>. If the United States is contending in paragraph 51 of its response that the USITC did compare prices of domestically produced agitator based TL LRWs with imported LRWs, how does this contention reconcile with its submission in paragraph 301 of its first written submission that defining a product category for agitator based TL LRWs would "have imposed an unnecessary reporting burden on domestic producers without yielding price comparisons"? In answering this question, please also clarify:**

**i. Did the USITC ask the domestic industry petitioners to provide data on agitator based TL LRWs?**

45. No, as the United States explained in response to question 36, the Commission did not ask domestic producers to provide quarterly pricing data on an agitator-based top load LRW product because such a product would have yielded few if any price comparisons, given the few import shipments of such LRWs.[85] As support for its finding that "imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based top load LRWs," the Commission relied on a comparison of the average unit value of

[83] USITC Report, p. 32 n. 202 (citing Confidential Views, *LRWs from China*, at 35 (EDIS Doc. No. 617959) (Exhibit KOR-1).

[84] *See* USITC Report, pp. III-6 ("U.S. producers were asked to provide data on commercial U.S. shipments of LRWs by product type."), V-25 ("The Commission requested U.S. producers and importers to provide quarterly data for the total quantity and f.o.b. value of the following LRW products shipped to unrelated U.S. customers during January 2012-March 2017.") (Exhibit KOR-1).

[85] *See* U.S. responses, paras. 65-67; USITC Report, p. V-26 (Exhibit KOR-1).

domestic industry shipments of agitator-based top load LRWs in table III-7 to importer sales prices for the six pricing products in tables V-13-18, among other things.[86]

**ii. If no, where was the price data for agitator based TL LRW referred in table III 7 sourced from?**

46. The average unit value data on domestic industry shipments of agitator-based top load LRWs in table III-7 was reported by responding domestic producers, and provided a reasonable basis for comparing the "price points" of such LRWs to the "price points" of subject imported LRWs.[87] Specifically, the data in Table III-7, titled "LRWs: U.S. producers' U.S. commercial shipments, by product type, 2012-16, January-March 2016, and January-March 2017," contained the average unit value of domestic industry shipments of 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, in each year and interim period of the period of investigation.[88] These average unit value data were calculated by dividing the total value of domestic industry shipments of agitator-based top load LRWs by the total quantity of such shipments in each year and interim period. The average unit value of the domestic industry's shipments of agitator-based top load LRWs in each year and interim period represented the "price points" at which such shipments competed, just as the quarterly sales prices reported by importers for each pricing product represented the "price points" at which such sales competed. The Commission reasonably compared these two sets of data as support for its finding that "imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based [top load] LRWs."[89]

## 5 Unforeseen developments and effect of obligations undertaken under the GATT

**Question 79:**

**To the United States. In paragraph 89 of its response to Panel question No. 48, the United States argues that pages 44, I-4-5, and F-4-F-5 and footnote 291 of the USITC report note the likely or reported impact of tariff lines above the bound rate on the quantity of imports, such as when certain LRW imports have faced the imposition of trade remedies.**[11]

**Please quote the specific text on pages 44, I-4-5, and F-4-F-5 of the USITC report which the United States considers as relevant for the Panel's assessment of the United States' compliance with the second prerequisite under Article XIX:1(a) of the GATT 1994.**

[86] *See* U.S. response to question 74, above; U.S. responses, para. 51; USITC Report, p. 32 & n.202 (Exhibit KOR-1).

[87] *See* USITC Report, pp. III-6 ("U.S. producers were asked to provide data on commercial U.S. shipments of LRWs by product type.").

[88] USITC Report, p. 32 & n.202, III-6 (Exhibit KOR-1).

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

[11] United States' response to Panel question No. 48, para. 89.

47. In response to Panel Question 48, the United States noted text from the USITC Report, pp. 36 &n.219, 44, I-4-5 and F-4-F-5, to highlight "the likely or reported impact of tariff rates above the bound rates on the quantity of imports, such as when certain LRW imports have faced the imposition of trade remedies."[90] That specific text includes:

> From page 36 of the USITC report: "During the 2012-15 period, the domestic industry increased its capital expenditures and R&D spending on the expectation of strong demand growth and trade relief from the antidumping and countervailing duty actions filed against imports from Korea and Mexico, and the subsequent antidumping duty action against imports from China."
>
> From page 36, n.219 of the USITC report: "Whirlpool and GE state that they did not foresee that LG and Samsung would move their production of LRWs for the U.S. market first from Korea and Mexico to China, and then from China to Thailand and Vietnam, and escape the disciplining effect of the resulting antidumping and countervailing duty orders, moves that in Whirlpool's view would have cost hundreds of millions of dollars."
>
> From page 44 of the USITC report: "The record shows that the domestic industry's declining sales prices during the period of investigation resulted from low-priced import competition, as increasing quantities of low priced imports depressed and suppressed prices for the domestic like product."
>
> From page I-4-5 of the USITC report: "In January 2017, the Commission determined that an industry in the United States was materially injured by reason of imports of LRWs from China that Commerce found were sold in the U.S. market at LTFV. This investigation resulted from an antidumping duty petition filed by Whirlpool on December 16, 2015. Effective February 6, 2017, Commerce issued an antidumping duty order on those imports from China" and the accompanying margin and countervailing ad valorem net subsidy rates.
>
> From pages F-4-5 of the USITC report shows: "LRW: Effect of AD/CVD orders on U.S. purchasers' purchases of LRWs, by number of responding firms" and the impact of those AD/CVD orders on importer behavior.

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

**Question 80**

> **To the United States. In paragraph 135 of its second written submission, the United States submits that it also explained the administrative complexities it faced in preparing and publishing notifications under Articles 12.1(b) and (c) notifications. It notes that its initial responses to Korea's arguments on Article 12.1(a) focused on Korea's misidentification of the relevant date of initiation, but the administrative difficulties of filing Articles 12(b) and 12(c) notifications apply equally to an Article 12.1(a) notification. Please refer to the relevant parts of the United States' initial**

[90] U.S. response to Panel question No. 48, para. 89.

**responses concerning any administrative difficulties of filing Articles 12(b) and 12(c) notifications that apply equally to an Article 12.1(a) notification.**

48. According to Article 12.1(a) of the Safeguards Agreement: "A Member shall immediately notify the Committee on Safeguards upon: (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it . . . ."

49. The U.S. first written submission identified the administrative burden related to the notification process for Article 12.1(b) and 12.1(c) as including: (1) "USITC and Executive Branch officials needed to coordinate with respect to this activity, which was being conducted pursuant to statutory authority that had not been exercised for 15 years,"[91] (2) that the notification did not merely reproduce the text of a previously published notice,[92] (3) that review was required by the Commission investigative team and required exchanges between two separate United States agencies (the Commission and the Office of the U.S. Trade Representative USTR),[93] and (4) that the Executive Branch officials responsible for safeguard proceedings were involved in two concurrent proceedings (solar and washers).[94]

50. These administrative burdens were equally applicable during the U.S. effort to meet the obligation under Article 12.1(a) "to immediately notify the Committee on Safeguards upon initiating an investigatory process . . . ."

**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.**

51. 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.[95] That date was June 8, 2017.[96] 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

[91] U.S. second written submission, para. 393.

[92] U.S. second written submission, para. 394.

[93] U.S. second written submission, para. 394.

[94] U.S. second written submission, para. 400.

[95] U.S. second written submission, paras. 132-33; U.S. response to Panel questions No. 57, para. 100.

[96] *See* Notice of Institution (Exhibit US-29); U.S. second written submission, paras. 132-33; U.S. response to Panel questions No. 57, para. 100.

entered it on the Commission's Electronic Document Information System, on June 8, 2017.[97] Therefore, the U.S. Government considers June 8, 2017, to be the date on which the Commission publicly announced the initiation of the investigation.

**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 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?**

52. The United States confirms that the relevant date of publication of the "notice of institution in the Federal Register," for purposes of calculating the deadline for filing notices of appearance in the Commission's safeguard investigations on LRWs, was June 13, 2017.[98] The Commission's institution notice for the safeguard investigation of LRWs was published in the Federal Register on June 13, 2017.[99] The notice provided that "{p}ersons (other than petitioner) wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, not later than 21 days after publication of this notice in the Federal Register."[100] Accordingly, parties were required to file their notices of appearance within 21 days of June 13, 2017, or no later than July 5, 2017, given that July 4, 2017 was a U.S. federal holiday.[101] The Commission accepted as timely all notices filed up to and including that date, including notices filed by counsel for Samsung, LG, and the Government of Korea.[102]

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[97] (Exhibit US-34).

[98] *See* 19 C.F.R. § 201.11(b) (Exhibit US-35).

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

[100] Institution Notice, 82 Fed. Reg. at 27077 (Exhibit US-1).

[101] Under section 201.14 of the Commission's rules, the last day of a time period prescribed by the Commission's rules "is to be included, unless it is a Saturday, Sunday, or Federal legal holiday, in which event the period runs until the end of the next business day." 19 C.F.R. § 201.14 (Exhibit US-36).

[102] *See* (Exhibit US 37-39).

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

**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".**
>
> **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.**

53. The United States confirms that the parties held consultations on February 1, 2018, pursuant to Article 12.3 of the Safeguards Agreement.

**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?**

54. Providing the proposed date of introduction of a safeguard measure for the first time in an Article 12.1(c) notification is consistent with the Safeguards Agreement. Article 12.1 of the Safeguards Agreement provides that "a Member shall immediately notify the Committee on Safeguards upon . . . (b) making a finding of serious injury or threat thereof caused by increased imports; and (c) taking a decision to apply or extend a safeguard measure. Article 12.2 provides further that "in making the notifications referred to in paragraphs 1(b) and 1(c)," a Member "shall provide the Committee on Safeguards with all pertinent information." The Article then specifies that this "pertinent information" includes: evidence of serious injury or threat thereof

caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization.

55. It is telling that Article 12.2 applies collectively for notifications under Article 12.1(b) *and* 12.1(c). Thus, if some of the information does not appear in one of the notifications, a Member will still satisfy Article 12.2 if the missing pertinent information appears in the other notification. It is also telling that Article 12.2 covers information that may in the ordinary course become available over time. For example, while a Member could find a "serious injury or threat thereof caused by increased imports," (Article 12.1(b)) it may need time to decide whether to apply a safeguard measure at all, the nature of the safeguard measure, or the date of application.

56. In that situation, the notifying Member would make the notification triggered by Article 12.1(b) upon reaching a determination of serious injury and provide all of the "pertinent information" known to the Member at that time. If additional pertinent information became available afterward, the Member could provide it in a supplement to the Article 12.1(b) notification or in a subsequent Article 12.1(c) notification. That is exactly what the United States did in this dispute.[103] Indeed, it is common practice for Members to supplement notifications under Articles 12.1(b) and 12.1(c) as new information becomes available or they take additional procedural steps.[104] Korea is well aware of this practice. When Korea modified its own safeguard measure on garlic after it took effect, it submitted an Article 12.1(c) notification entitled "Supplement" to provide information on the changes.[105]

**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.**

57. The reference to "all pertinent information" in notifications regarding "paragraphs 1(b) and 1(c)" supports the U.S. response to Question 86(a). By including both 1(b) and 1(c), the text of Article 12.2 shows that the proposed date of introduction may be notified to the Safeguards Committee as late as the notification triggered under Article 12.1(c).

[103] G/SG/N/8/USA/10/Suppl.3 and G/SG/N/10/USA/8 and G/SG/N/11/USA/7 Exhibit (KOR-4); G/SG/N/8/USA/10 Exhibit (KOR-6).

[104] *See, e.g.*, G/SG/N/8/THA/3/Suppl.3 and G/SG/N/10/THA/3/Suppl.3 and G/SG/N/11/THA/6 (Thailand); G/SG/N/8/PHL/11/Suppl.3 and G/SG/N/10/PHL/9/Suppl.2 and G/SG/N/11/PHL/11/Suppl.3 (Philippines); G/SG/N/10/EU/1/Suppl.9 and G/SG/N/11/EU/1/Suppl.6 (European Union); G/SG/N/8/IDN/26/Suppl.1 and G/SG/N/10/IDN/26/Suppl.1 and G/SG/N/11/IDN/23 (Indonesia); G/SG/N/8/IND/31/Suppl.4 and G/SG/N/10/IND/22/Suppl.3 and G/SG/N/11/IND/17/Suppl.4 (India).

[105] G/SG/N/10/KOR/2/Suppl.1 and G/SG/N/11/KOR/2/Suppl.1.