UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF LARGE RESIDENTIAL WASHERS

(DS546)

CLOSING STATEMENT OF THE UNITED STATES OF AMERICA AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

February 26, 2021

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Short Form	Full Citation
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

Mr. Chairperson, Members of the Panel:

1. Thank you again for your efforts to run a smooth and orderly process this week in the midst of challenging times.

2. Korea's opening statement sets out a list of alleged problems with the USITC's investigation, findings, and report that it raised in its first written submission. Our opening statement addressed what we consider to be the most significant areas of disagreement. We have not sought, and will not seek in this statement, to provide an item-by-item rebuttal. You have read the parties' submissions and therefore know that, contrary to what Korea asserts, the United States has not failed to respond, with specificity, as to how the USITC's findings are consistent with the GATT 1994 and Safeguards Agreement, and how and where its report provides a reasoned and adequate explanation of the USITC's findings. In that vein, our closing will focus on the most significant problems with Korea's arguments.

I. KOREA ASSERTS OBLIGATIONS WITH RESPECT TO A SERIOUS INJURY DETERMINATION THAT DO NOT EXIST UNDER THE SAFEGUARDS AGREEMENT

3. Korea's opening statement underscores its failure to establish any *prima facie* case of inconsistency with the Safeguards Agreement in the USITC's finding that increased imports caused serious injury to the domestic industry. In its statement, Korea asserted, incorrectly, that the United States failed to respond to Korea's first written submission arguments.[1] Korea also continues to urge the Panel to consider the serious injury section of the Commission's report in isolation, as if other sections were irrelevant to the Commission's evaluation of relevant factors.[2]

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[1] *See* Korea's opening statement, paras. 40, 52-54, 72-74, 81,83.

[2] *See* Korea's opening statement, paras. 54, 56.

In actuality, the Commission's report must be read as a whole. Finally, Korea impugns the reliability of the Commission's data on import volume and prices even though the two Korean producers LG and Samsung themselves reported these data, and recommended five of the six LRW products for which pricing data were collected.[3]

A. The United States Has Refuted All Arguments and Identified Relevant Support in Its Report

4. We will first address Korea's incorrect assertion that the United States failed to respond to certain of Korea's arguments. As the Panel is aware, the United States addressed and refuted each and every argument advanced by Korea in its first written submission, including the specific arguments that Korea now argues went unanswered on domestic like product and scope, increased imports, and causation.

5. As the United States explained in our written submission and with further detail in our responses to the Panel's questions this morning, there was no "mismatch" between the domestic like product and subject imports. This is because all domestically produced products included within the like product, including belt driven washers, were like the imported products subject to investigation.[4] We also want to emphasize that the "parts" included in the scope consisted solely of the three essential components that give LWRs their characteristics—cabinets, tubs, and baskets.

[3] *See* Kora's opening statement, paras. 30-31, 77.

[4] United States' first written submission, paras. 158-169; *see* USITC Report, pp. 15-16 (Exhibit KOR-1).

6. The United States also explained that the Commission specifically evaluated both the rate of the increase in import volume and the increased market share taken by imports, in the increased imports and causation sections of its report.[5] The Commission also thoroughly evaluated the non-price factors influencing competition in the U.S. market, finding that domestic and imported LRWs were comparable in terms of such factors.[6]

7. Furthermore, the United States explained that the Commission did not predicate its finding that imports depressed and suppressed domestic prices on "a mere price decrease," as Korea continues to insist, but on a wide range of evidence showing that increasing volumes of low-priced imports caused significant price depression and suppression.[7] Based on the moderate to high degree of substitutability between domestic and imported LRWs, and the importance of price to purchasers choosing between domestic and imported LRWs, the Commission explained that pervasive underselling by increasing volumes of subject imports had forced domestic producers to defend their market share by reducing their prices.[8] The United States also explained how the Commission's finding that increased imports suppressed domestic prices was supported by the industry's increasing ratio of cost of goods sold to net sales, and consistent with the other trends highlighted by Korea.[9]

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[5] United States' first written submission, paras. 204-213; *see* USITC Report, pp. 20, 38-39 (Exhibit KOR-1).

[6] United States' first written submission, paras. 217, 264-268, 292, 333-334; USITC Report, pp. 27-32, 47-51 (Exhibit KOR-1).

[7] *See* United States' first written submission, paras. 219-297; USITC Report, pp. 40-44 (Exhibit KOR-1).

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

[9] United States' first written submission, paras. 288-290; USITC Report, p. 42-44 (Exhibit KOR-1).

8. Finally, the United States explained that the Commission provided a reasoned and adequate explanation for its rejection of the alternative causes of injury argued by respondents. The Commission did not base its rejection of respondent's "joint pricing" theory solely on the testimony of Whirlpool's Chairman and CEO, as Korea contends, but on a thorough examination of all record evidence pertaining to the theory, including the evidence presented by respondents.[10] The Commission also provided a reasoned and adequate explanation for its finding that there was no shift in demand from domestic to imported LRWs driven by the allegedly superior innovation of imported LRWs. Indeed, the record showed that domestic and imported LRWs were comparable in terms of non-price factors, including innovation.[11] And contrary to Korea's selective reading of the Commission's report,[12] the Commission made abundantly clear that neither alternative cause of injury argued by respondents could account for any of the domestic industry's injury.[13]

[10] United States' first written submission, paras. 321-322; *see* USITC Report, p. 46 & nn.277-278 (Exhibit KOR-1).

[11] United States' first written submission, paras. 330-337; *see* USITC Report, pp. 47-51 (Exhibit KOR-1).

[12] *See* Korea's opening statement, para. 80.

[13] *See* USITC Report, pp. 45 (finding "the record does not support respondents' assertion that Whirlpool and GE purposely priced their LRWs to sell at a loss on the expectation that profitable sales of matching dryers would compensate"), 46 (finding that "even if the domestic industry's sales of dryers were more profitable than its sales of LRWs, the greater profitability of dryers could not explain the domestic industry's . . . worsening operating and net losses on sales of LRWs during the period of investigation . . . ."), 48 (finding that "respondents' 'brand deterioration theory does not explain the domestic industry's declining sales prices during the period of investigation, or any of the resulting injury.") (Exhibit KOR-1).

B. The USITC's Explanation and Report Are Not Deficient Merely Because It Chose to Order Its Findings in a Certain Way

9. We will next address Korea's incorrect assertion that the Panel should consider the serious injury section of the Commission's report in isolation from all other relevant sections of the Commission's evaluation.[14] There is no basis for Korea's assertion that the Commission somehow failed to evaluate certain relevant factors, including the rate of the increase in import volume, import market share, and other factors showing trends adverse to the domestic industry, simply because the USITC chose to present and organize its analysis differently from the way Korea argues it would have liked.

10. With respect to these factors, Korea's complaint does not seem to be that the Commission did not discuss these factors *anywhere* in its Report; rather, it appears that Korea objects to the fact that the discussion of these factors was not in section IV.D of the Commission's report, titled "The Domestic Industry Is Seriously Injured."[15] As the United States explained in its first written submission, the Commission expressly evaluated the rate of increase in subject import volume in the "Increased Imports" section of its report, and the increased market share taken by subject imports in the causation section of its report.[16] Based on this evaluation, the Commission found that imports of LRWs increased "steadily" during the period of investigation, nearly

[14] *See* Korea's opening statement, paras. 54, 56.

[15] Korea's opening statement, paras. 53-54.

[16] United States' first written submission, para. 235; USITC Report, pp. 20, 38-39 (Exhibit KOR-1).

doubling over the period, and that subject imports "increased their penetration of the U.S. market to a significant degree."[17]

11. As for the other factors that Korea argues the Commission did not consider, this assertion is belied by the Commission's report. The Commission collected information about and expressly evaluated all of the relevant factors, including those set out in Article 4.2(a) of the Safeguards Agreement. These included six factors that exhibited trends adverse to the domestic industry: the doubling of import volume, the significant increase in import market share, the industry's "precipitously" declining financial performance, the industry's declining sales prices, the industry's increased cost of goods sold to net sales ratio, and the industry's reduced capital and research and development expenditures.[18] That the Commission evaluated several of these factors in sections of its report where the evaluations were most relevant, rather than in the serious injury section, does not negate its evaluation of the factors. Nor does it mean that the Panel must "cobble" together disparate parts of the Commission's report to understand how the Commission evaluated the factors, as Korea argues.

12. As the United States noted in its first written submission, neither Article 3.1 nor Article 4.2(c) of the Safeguards Agreement dictate the structure of the competent authorities' evaluation of the relevant factors or the organization of their report, leaving discretion with respect to both.[19] Accordingly, "competent authorities 'may choose any structure, any order of analysis,

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

[18] United States' first written submission, paras. 247-248; *see* USITC Report, pp. 20, 33, 36-37, 39, 42-43, V-28 (Exhibit KOR-1).

[19] *US – Steel Safeguards (AB)*, para. 295.

and any format for {the} explanation that they see fit, as long as the report complies' with Article 3.1."[20] Indeed, Article 4.2(a) nowhere stipulates that competent authorities must evaluate "all relevant factors" in a section of their reports addressing whether a domestic industry is seriously injured, as Korea suggests, or in any particular section of their reports. Rather, Article 4.2(a) provides that competent authorities shall evaluate such factors "{i}n the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement." Thus, Article 4.2(a) of the Safeguards Agreement does not dictate the order in which a competent authority must evaluate relevant factors, or the sections of a competent authority's report in which the factors must appear. By evaluating relevant factors in sections of its report where doing so was most logical, rather than arbitrarily confining them to one section of the report or pointlessly repeating them in each section, the Commission enhanced the clarity of its analysis. Thus, the Commission's report, read as a whole, evaluated all relevant factors in a manner consistent with Article 4.2(a) of the Safeguards Agreement.

13. Another relevant factor evaluated by the Commission that is worth highlighting was LG's and Samsung's movement of LRW production from country to country during the period of investigation as imports of LRWs from Korea and Mexico, and then China, became subject to antidumping and countervailing duty disciplines.[21] Noting that the imposition of such disciplines coincided with increases in the domestic industry's market share, the Commission explained that

[20] *Id.*

[21] *See* USITC Report, pp. 25-26, 39-40 (Exhibit KOR-1).

"import levels appear to have been restrained by serial antidumping and countervailing duty orders during the period of investigation."[22] In other words, the significant increase in subject import volume and market share during the period of investigation occurred despite the imposition of WTO-consistent trade remedies that LG and Samsung had completely evaded by the end of the period by shifting production to countries subject to no measures.

C. Korea's Ex Post *Criticism of Information the Respondents in the Investigation Provided or Approved Is Unreasonable*

14. Finally, we will address Korea's incorrect assertion that the Commission's data on import volume and prices were unreliable even though two Korean producers themselves reported these data and agreed with five of the six pricing products recommended for data collection.[23] Contrary to Korea's arguments, the Commission based its analysis on precise and reliable data, including with respect to increased imports and their impact on domestic prices, and pricing comparisons.

15. Indeed, the Commission based its analysis of increased imports on the exact questionnaire responses of five importers – including the two largest importers, LG and Samsung – that accounted for virtually all imports of LRWs.[24] Responding importers certified the accuracy of the data reported in their questionnaire responses, and no party (not even the

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

[23] *See* Kora's opening statement, paras. 30-31, 77.

[24] USITC Report, pp. 5, II-1-3 (Exhibit KOR-1).

Government of Korea) contested the accuracy of these data. The Commission reasonably relied on these data for its analysis of increased imports.[25]

16. To the extent Korea suggests the Commission should have relied on a different set of import data, such as the pre-investigation estimates provided in the petition,[26] there is no basis for that assertion. Petitioner submitted those data in their petition as the best estimate available to them at that time based on public sources.[27] Once the Commission obtained more precise data, covering the exact goods subject to the petition, no party suggested that it even consider the petition data, let alone rely on the petition data. There is no reason for the Panel to second-guess the investigating authority and parties now.

17. Just as the Commission based its analysis of increased imports on questionnaire data primarily reported by LG and Samsung, the Commission based its analysis of import price effects on pricing data collected for six pricing products that LG and Samsung largely endorsed as representative of competition in the U.S. market.[28] Respondents raised no objection to the import coverage of these data during the investigation. Therefore, the Commission reasonably found that its pricing data provided "a reliable basis for apples-to-apples price comparison" based on respondents' recommendation of five of the six pricing products and "the appreciable percentage of domestic producer and importer U.S. shipments covered by the data, which {was}

[25] USITC Report, pp. 28-29, II-1 (Exhibit KOR-1).

[26] *See, e.g.*, Korea's opening statement, para. 31-32.

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

[28] USITC Report, 40-41 & n.255 (Exhibit KOR-1).

well within the range . . . considered reliable in previous investigations," among other things.[29] The Commission also reasonably rejected respondents' specific criticisms of the pricing product definitions, which were only raised *after* respondents saw that the collected pricing data were unhelpful to them.[30] These criticisms provided no basis for the Commission to reject these data. The Panel should find that this conclusion is one an unbiased and objective investigating authority could have reached.

II. KOREA'S AND CERTAIN THIRD PARTIES' FLAWED APPROACH TO UNFORESEEN DEVELOPMENTS

18. We will now address some of the remarks offered on unforeseen developments, particularly those by Mexico during the third party session with respect to the meaning of "unforeseen."

19. Mexico's approach to defining unforeseen developments stands the concept on its head. Mexico argues that the unforeseen developments identified by the United States in its first written submission – the rapid shifts of production and production capacity from country to country – would not qualify as unforeseen by negotiators during the Uruguay Round because virtually any commercial development or change could be unforeseen. Mexico views this position as rendering the unforeseen developments text a nullity, which it cannot envisage as the intent of negotiators when they agreed to the provisions of the GATT 1994 and Safeguards Agreement.

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

[30] *See* United States' first written submission, paras. 298-305; USITC Report, p. 41 n.255 (Exhibit KOR-1).

20. Mexico is mistaken, both as a matter of fact and a matter of law. As a matter of law, Mexico frames the unforeseen developments analysis in terms of whether the negotiators "could not have imagined" such developments.[31]

21. This framing reveals that Mexico is asking the Panel to focus not on what was "unforeseen," but rather what was "unforeseeable." As we discussed in our first written submission, an obligation based on developments that are "unforeseeable" is different from, and would impose a higher standard on Members, than one based on developments that are "unforeseen." The proper inquiry is not on what negotiators "could have imagined," but what they foresaw. And the fact that they might expect imports to increase in response to tariff concessions does not mean, as Mexico suggests, that ""significant increases in a short time",[32] must be accepted as "foreseen."

22. Mexico errs as a matter of fact in that the unforeseen development is not, as Mexico asserts, simply that imports increased, or that certain producers increased capacity by a specific degree.[33] The speed with which LG and Samsung increased both capacity and output, and shifted from country to country in rapid succession, is what was unforeseen. Korea has provided no basis to think otherwise.

23. We will close with a final systemic point. In this case, Korea's unforeseen developments arguments have relied on portions of the Appellate Body's reasoning in *US – Lamb* and *US –*

[31] Mexico's opening statement, para. 4 ("no podrían haber imaginado").

[32] Mexico's opening statement, para. 5 ("aumentos importantes en poco tiempo").

[33] Mexico's opening statement, para. 5.

Steel that are *not* persuasive for the reasons the United States has set out at length in its first written submission.[34] Consequently, the Panel need not, and should not, agree with the faulty reasoning of these reports.

24. In its opening statement, Mexico takes issue with the U.S. view, arguing that the dispute settlement system "offers a quite reasonable guide as to what should be considered as sufficient going forward, based on the interpretations already made and adopted by the DSB in analogous cases."[35]

25. In a similar vein, the EU refers repeatedly to the findings in adopted panel and appellate reports as "case law." The term, or the concept of, "case law" does not appear in the DSU. And the implied reference to precedent or reliance on prior reports is directly contrary to the function of a panel as set out in the DSU.

26. The role of a WTO dispute settlement panel established by the DSB[36] is to examine the matter referred to the DSB by the complaining party and to make such findings as will assist the DSB in making a recommendation to bring a measure into conformity under Article 19.1 of the DSU. In undertaking that examination, the DSU further specifies that a panel is to make an "objective assessment of the matter before it," including an objective assessment of "the applicability of and conformity with the covered agreements."[37] That assessment is one of

[34] U.S. first written submission, paras. 20-21, 39-51.

[35] Mexico's Opening Statement, para. 3 ("ofrece una guía bastante razonable de lo que debe considerarse como adecuado en lo sucesivo, con base en las interpretaciones ya realizadas y adoptadas por el OSD en casos análogos").

[36] DSU, Art. 7.1.

[37] DSU, Art. 11 (second sentence).

conformity with the covered agreements – not prior reports adopted by the DSB. The DSU provides that this objective assessment of the applicability of the covered agreements occurs through an interpretive analysis of the terms of the applicable covered agreements "in accordance with the customary rules of interpretation of public international law".[38]

27. Under the DSU, the DSB has no authority to adopt an authoritative interpretation of the covered agreements that is binding on WTO Members – and, therefore, neither the Appellate Body nor any panel can issue such an authoritative interpretation that amounts to "case law," as stated by the EU, or as a "guide as to what should be considered as sufficient going forward, based on the interpretations already made and adopted by the DSB," as Mexico asserts. In fact, Article 3.9 of the DSU explicitly states that "the provisions of [the DSU] are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement." Per Article IX:2 of the WTO Agreement, that "exclusive authority" is reserved to the Ministerial Conference or the General Council acting under a special procedure. Accordingly, a WTO dispute settlement panel has no authority under the DSU or the WTO Agreement simply to follow or apply a panel or Appellate Body interpretation from a prior dispute.

28. The appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is to apply the "customary rules of interpretation of public international law." Those customary rules of interpretation, as reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties, do not assign any interpretive role to dispute settlement reports. Article 31 of the Vienna

[38] DSU, Art. 3.2 (second sentence). *See also* AD Agreement, Art. 17.6(ii).

Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." As part of engaging in that interpretive exercise, a WTO panel may consider it appropriate to consider a prior report for the assistance it may give in properly understanding a WTO provision interpreted according to customary rules of interpretation – that is, a prior report may be examined for its persuasive value. Thus, relying on prior reports as "case law" or treating so-called DSB "adopted" interpretations as a "sufficient guide" would constitute serious legal error.

III. CONCLUSION

29. We appreciate the Panel's consideration of these views and its reflection on the significance of the current dispute. This concludes the U.S. closing statement. Thank you.