UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF LARGE RESIDENTIAL WASHERS

(DS546)

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

June 18, 2021

TABLE OF REPORTS

Short Form	Full Citation
Ukraine – Passenger Cars	Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R, adopted 20 July 2015
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

Mr. Chairperson, Members of the Panel:

1. The United States would like to thank you again for serving on this Panel and to thank the Secretariat staff assisting you.

2. Korea's opening statement repeats the same arguments regarding the alleged inconsistencies of the U.S. safeguard measure on large residential washers (washers safeguard measure) with GATT 1994[1] and the Safeguards Agreement.[2] Our submissions rebut each of these arguments in detail. Therefore, we will focus the Panel's attention in closing on the errors in certain points Korea has raised.

I. UNFORESEEN DEVELOPMENTS

3. Korea points to WTO panel and appellate body reports that Korea views as supporting a reading that under Article 3.1 of the Safeguard Agreement, the "report setting forth [the competent authorities'] findings and reasoned conclusions reached on all pertinent issues of fact and law" must address both unforeseen developments and obligations incurred. This argument is without merit.

4. The United States has shown that the GATT 1994 and the Safeguards Agreement, when interpreted in accordance with customary rules of interpretation of international law, do not support Korea's view.[3] As described in detail in the U.S. closing argument at the first videoconference with the parties,[4] "a WTO dispute settlement panel has no authority under the

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[1] General Agreement on Tariffs and Trade 1994.

[2] Agreement on Safeguards.

[3] U.S. first written submission, paras. 22-32, 52-54; U.S. second written submission, paras. 11-15.

[4] U.S. Closing Statement, First Videoconference with the Parties, paras. 23-28.

DSU or the WTO Agreement simply to follow or apply a panel or Appellate Body interpretation from a prior dispute."[5] Therefore, this Panel is not bound by any so-called "WTO jurisprudence" as Korea repeatedly alleges.[6]

5. Next, Korea points to a reference to unforeseen developments in a U.S. third-party submission from 2014 in the *Ukraine – Passenger Cars*[7] dispute. Korea contends that this language in the U.S. third-party submission supports Korea's assertion that the United States now endorses the position that the Safeguards Agreement obligates the competent authorities' report to address unforeseen developments.[8] A closer examination of the U.S. third-party submission in *Ukraine – Passenger Cars* shows the United States noting that an Appellate Body report had found such an obligation.[9] For the reasons discussed throughout our submissions, the United States has explained that no such obligation exists nor, as described above, may a panel or the Appellate Body create such an obligation where none is found in the text of the Safeguards Agreement or the GATT 1994.

6. Therefore, the United States respectfully requests that the Panel find that Korea has not met its burden to demonstrate that the washers safeguard measure is inconsistent with GATT

[5] U.S. Closing Statement, First Videoconference with the Parties, para. 27.

[6] Korea Opening Statement, Second Videoconference with the Parties, para. 9.

[7] *Ukraine – Passenger Cars (Panel).*

[8] Korea Opening Statement, Second Videoconference with the Parties, para. 17.

[9] U.S. third party submission, *Ukraine – Passenger Cars (Panel)*, para. 4.

Article XIX:1 and the Safeguards Agreement regarding unforeseen developments and of the effect of the obligations incurred.

II. SERIOUS INJURY DETERMINATION

7. We turn next to the U.S. International Trade Commission's (Commission) serious injury determination. Again, Korea largely repeats mistaken arguments from its previous submissions to which the United States has already responded. The United States will therefore focus on four particularly unpersuasive arguments advanced by Korea at the second videoconference with the parties and one general observation.

8. First, Korea is mistaken that "like" as a subset of "directly competitive" under Article 4.1(c) would not read the word "like" out of the Safeguards Agreement. The disjunctive "or" as used in Article 4.1(c) could only mean that competent authorities may choose to define the domestic industry as either domestic producers of articles "like" the products under consideration "or" as domestic producers of articles "directly competitive" with the products under consideration. Korea's argument that competent authorities have no choice but to define the domestic industry as producers of "directly competitive" products would not only read the term "like" out of the statute, but also the term "or."[10]

9. As the United States has explained, the Commission employed a reasonable methodology in finding that domestically produced parts were like subject imported parts, and Korea does not

[10] Korea Opening Statement, Second Videoconference with the Parties, para. 44.

challenge the Commission's factual findings.[11] Nor has Korea shown that the Commission, having defined the like product a certain way (*i.e.*, as including the domestic parts equivalent to the imported parts within the scope) acted inconsistently with Article 4.1(c) in defining the domestic industry to include the domestic producers of those parts. Accordingly, the United States respectfully requests that the Panel find the Commission's inclusion of covered parts production in the domestic industry consistent with the Safeguards Agreement.

10. Second, Korea relies on raw import data, both in its opening statement and in its responses to the Panel's advance questions, to argue that subject import volume did not nearly double during the period of investigation.[12] In relying on raw import data from paragraph 147 of its first written submission and Exhibit 2D to the petition, Korea continues to ignore, as the United States has explained, that these data include 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.[13] These data do not accurately depict the volume of subject imported LRWs reported by importers. As the United States explained in response to question 69, Whirlpool adjusted the raw data in Exhibit 2D to produce an estimate of subject imports of LRWs in Exhibit 2A, which show the same trends as the data reported by importers, but the Commission did not "accept" or otherwise rely on these data as Korea has claimed.[14] The

[11] *See* U.S. second written submission, paras. 39-43; U.S. Opening Statement, Second Videoconference with the Parties, paras.11-13.

[12] *See, e.g.*, Korea Opening Statement, Second Videoconference with the Parties, para. 20; Korea's response to question 68.

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

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

Commission affirmatively relied solely on data reported and certified as accurate by importers, including LG and Samsung, and these data showed that subject imports nearly doubled between 2012 and 2016 after increasing steadily in every year of the period.[15] Based on these data, and in light of the conditions of competition set out by the Commission in its Report, the Commission's determination is consistent with the increased imports provision under Article 2.1 of the Safeguards Agreement.

11. Third, Korea mistakenly relies on information concerning Alliance's overall operations, not limited to its belt-driven residential washer business, to argue that the Commission's exclusion of Alliance's financial data somehow distorted the Commission's analysis of the domestic industry's performance.[16] As explained in the Commission's report, however, Alliance produced not only belt-driven residential washers but also coin-operated laundries and multi-housing laundries, which were outside the scope of the investigation.[17] Thus, Korea's information concerning Alliance's overall operations is not an accurate reflection of the performance of Alliance's belt-driven washer operations, which were small.[18] Although Alliance attempted to report financial data on its belt-driven washer operations in response to the Commission's domestic producers' questionnaire, these data were determined to be unreliable and thus unusable.[19] The Commission reasonably excluded Alliance's unreliable financial data

[15] USITC Report, p. I-3 (Exhibit KOR-1); *see also* U.S. second written submission, paras. 59-61.

[16] *See* Korea Opening Statement, Second Videoconference with the Parties, para. 68.; Korea's second written submission, para. 216.

[17] USITC Report, p. I-25 (Exhibit KOR-1).

[18] *See* U.S. responses to written questions, para. 47.

[19] *See* USITC's Report, p. III-8 (Exhibit KOR-1).

and based its serious injury analysis on the reliable data reported by three domestic producers that accounted for the vast majority of domestic industry sales of the like product.[20]

12. Fourth, in its response to question 75, Korea mischaracterizes both the Appellate Body finding concerning the substantial cause test in *U.S. – Lamb* and the Commission's non-attribution analysis. As explained in our first written submission, the Appellate Body report in that dispute did not find the Commission's use of the substantial cause test to be inconsistent with the Safeguards Agreement, as Korea suggests. Rather, the Appellate Body report emphasized that "the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the Agreement on Safeguards."[21] Thus, contrary to Korea's argument, the application of the "substantial cause" standard is not, in any way *per se* inconsistent with Article 4.2(b) of the Safeguards Agreement.

13. Nor was there any ambiguity in the Commission's conclusion that "{n}either of respondents' alleged alternative causes of injury is supported by the record evidence."[22] Korea's repeated efforts to show otherwise are based on its continued attack upon the unchallenged U.S. statutory provisions and on isolated findings taken out of context. Based on a thorough examination of the evidence, the Commission found that "the record does not support

[20] *See* U.S. second written submission, para. 88 n.169; U.S. responses to written questions, paras. 42-47; U.S. first written submission, paras. 272-73.

[21] *US – Lamb (AB)*, para. 181; *see* U.S. first written submission, paras. 313-16.

[22] USITC Report, p. 51 (Exhibit KOR-1).

respondents' assertion that Whirlpool and GE purposefully priced their LRWs to sell at a loss on the expectation that profitable sales of matching dryers would compensate."[23] The Commission also found – based on objective evidence and economic logic – that the domestic industry could not have compensated for its increasing losses on sales of LRWs with increasing profits on sales of matching dryers "when dryer prices would have declined with matching LRW prices during the period of investigation under {respondents'} 'joint pricing' theory."[24]

14. Similarly reasonable and supported by objective evidence were other Commission findings. These finding include 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," and that "the record {does not} support respondents' contention that consumers, and by extension retailers, increasingly favored imported LRWs over domestically produced LRWs during the period of investigation for non-price reasons."[25] Consistent with the objective evidence supporting the Commission's rejection of respondents' alternative causes of injury, the Commission reasonably found that "the only explanation for the domestic industry's declining prices and increasing COGS to net sales ratio is the significant increase in low-priced imports of LRWs during the period of investigation."[26] Thus, the Commission found, in a

[23] USITC Report, p. 45 (Exhibit KOR-1).

[24] USITC Report, pp. 46-47 (Exhibit KOR-1).

[25] USITC Report, p. 48 (Exhibit KOR-1).

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

manner consistent with its WTO obligations, that the two alternative causes of injury argued by respondents explained none of the domestic industry's serious injury.[27]

15. Finally, the United States observes that the Commission's thorough analysis of the record evidence in its report for LRWs, with the Views alone spanning 63 pages and 366 footnotes, belies Korea's contention that the Commission somehow neglected to adequately address various issues. Rather than basing its increased imports finding on an end-point to end-point comparison, as Korea mistakenly argues,[28] the Commission thoroughly evaluated subject import volume in each year and interim period, both in absolute terms and relative to consumption, as well as the rate of increase in subject import volume in each year and interim period.[29] Far from overlooking respondents' innovation argument, the Commission fully considered the evidence concerning substitutability and non-price factors and reasonably found a moderate to high degree of substitutability between subject imports and the domestic like product.[30]

16. The Commission also found the record evidence inconsistent with respondents' argument that superior innovation accounted for the significant increase in subject import volume. [31] Rather than overlooking seemingly positive trends in the domestic industry's performance, as

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

[28] *See* Korea Opening Statement, Second Videoconference with the Parties, paras. 25-26.

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

[30] *See* USITC Report, pp. 27-32 (Exhibit KOR-1).

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

Korea contends,[32] the Commission expressly evaluated the factors and explained that they were consistent with the industry's substantial capital expenditures, which yielded increasing losses, and the industry's defense of its market share by lowering prices to uneconomic levels.[33]

17. In the causation section of its report, the Commission thoroughly explained how the increase in low-priced imports was sufficiently recent, sudden, sharp, and significant, quantitatively and qualitatively, to cause serious injury,[34] contrary to Korea's assertion that "there was no analysis of any kind."[35] And the Commission provided a thorough analysis of all the evidence pertaining to respondents' two alternative causes of injury and explained in detail why neither was supported by the record.[36] Thus, the Commission provided a reasoned and adequate explanation for its determination that the significant increase in low-priced subject imports was the only explanation for the industry's serious injury.[37]

18. Accordingly, the United States respectfully requests that the Panel reject Korea's arguments and find the Commission's determination fully consistent with the Safeguards Agreement.

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[32] Korea Opening Statement, Second Videoconference with the Parties, para. 58.

[33] *See* USITC Report, pp. 37, 39-40 (Exhibit KOR-1).

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

[35] Korea Opening Statement, Second Videoconference with the Parties, para. 23.

[36] USITC Report, pp. 45-51 (Exhibit KOR-1).

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

III. CONCLUSION

19. 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.