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

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

March 19, 2021

## TABLE OF REPORTS

| SHORT FORM | FULL CITATION |
|---|---|
| *Argentina – Footwear (EC) (AB)* | Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000 |
| *China – Broiler Products (Panel)* | Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013 |
| *China – GOES (AB)* | Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012 |
| *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 |
| *EC – Asbestos (AB)* | Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001 |
| *India – Iron and Steel Products (Panel)* | Panel Report, *India – Certain Measures on Imports of Iron and Steel Products*, WT/DS518/R, circulated 6 November 2018 |
| *Korea – Dairy (AB)* | Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R |
| *Ukraine – Passenger Cars (Panel)* | 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 |
| *US – Steel Safeguards (AB)* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, |

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|---|---|
| | WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003 |
| *US – Tyres (AB)* | Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011 |
| *US – Wheat Gluten (AB)* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001 |

## TABLE OF EXHIBITS

| Number | Exhibit |
|---|---|
| **U.S. First Written Submission** | |
| Exhibit US-1 | *Large Residential Washers; Institution and Scheduling of Safeguard Investigations and Determinations That the Investigation is Extraordinarily Complicated*, 82 Fed. Reg. 27075 (June 13, 2017) |
| Exhibit US-2 | Hearing Transcript, pp. 4-7, 56-57, 85-86, 98-99, 157, 160-62, 205, 227-28 |
| Exhibit US-3 | Petition, pp. 5-9, 40-41 |
| Exhibit US-4 | *Large Residential Washers from China*, Inv. No. 731-TA-1306 (Preliminary), USITC Pub. 4591 (Feb. 2016), pp. 8-9 |
| Exhibit US-5 | *Large Residential Washers from China*, Inv. No. 731-TA-1306 (Final), USITC Pub. 4666 (Jan. 2017), pp. 7-9 |
| Exhibit US-6 | Petitioner's Comments on the Draft Questionnaires, pp. 4-6 |
| Exhibit US-7 | LG's Comments on the Draft Questionnaires, pp. 24-26 |
| Exhibit US-8 | Samsung's Comments on the Draft Questionnaires, p. 22 |
| Exhibit US-9 | Trade Act of 1974, §§ 201-205 |
| Exhibit US-10 | Proclamation 9694 Annex |
| Exhibit US-11 | USITC Regulation, 19 C.F.R. §206.14 |
| **U.S. Responses to Panel's First Set of Questions** | |
| Exhibit US-12 | Hearing Transcript, pp. 90, 142 |
| Exhibit US-13 | Table C-2 from December 2017 USITC Report (Directional Version) |
| Exhibit US-14 | Table II-1 from December 2017 USITC Report (Directional Version) |
| Exhibit US-15 | *LG Electronics, Inc. v. U.S. Int'l Trade Comm'n*, 26 F.Supp.3d 1338, 1343, 1350 (Ct. Int'l Trade 2014) |
| Exhibit US-16 | G/SG/N/8/USA/10/Suppl.2 |

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|---|---|
| Exhibit US-17 | G/SG/N/8/USA/10/Suppl.1 |
| Exhibit US-18 | G/SG/N/10/USA/8 |
| Exhibit US-19 | G/SG/201 |
| Exhibit US-20 | G/SG/174 |
| Exhibit US-21 | G/SG/171 |
| Exhibit US-22 | G/SG/164/Suppl.1 |

## 1 Definition of the Domestic Industry

**Question 4:**

> **To the United States. In its first written submission, the United States submits that the USITC appropriately defined the industry to include producers of belt driven washers based on its determination that domestically produced belt driven washers were like imported LRWs.[1] On page 16 of its report (Exhibit KOR-1), the USITC stated that "[b]ased on the preponderance of similarities between PSC/belt drive TL washers and CIM/belt drive FL washers and other LRWs, we find that domestically produced PSC/belt drive TL washers and CIM/belt drive FL washers are like imported LRWs". However, on page 15 of its report (Exhibit KOR-1), the USITC stated that "domestically produced 'out-of-scope' PSC/belt drive TL washers and CIM/belt drive FL washers, produced by Alliance Laundry Systems ('Alliance'), are like, or at least directly competitive with, imports of LRWs described by the scope of the investigation".**
>
> **Please confirm whether the USITC found belt-driven washers to be "like" as well as "directly competitive" with the imported LRWs, or only "like". If the USITC also found belt-driven washers to be "directly competitive" with the imported LRWs, please point to the relevant parts of the report containing the analysis supporting the USITC's finding that belt-driven washers were directly competitive with imported LRWs.**

1. The Commission defined the domestic like product to include domestically produced belt-driven washers because it found them to be like imported LRWs, based upon a thorough examination of the similarities and differences between domestically produced belt-driven washers and imported LRWs in terms of physical properties, customs treatment, manufacturing process, uses, and marketing channels.[2] Having found domestically produced articles, including belt-driven washers, that were like the imported products under investigation, the Commission had no need to evaluate whether any of those products were also "directly competitive" with imports.[3]

**Question 8:**

> **To the United States. Please explain whether, through the application of the USITC's product line approach, the USITC found that domestically produced parts were like or directly competitive with the PUC. If yes, please point to the specific parts of the report where the USITC made such a finding. If no, please explain how the product line approach complies with Article 4.1(c) of the Agreement on Safeguards.**

2. The Commission did not apply a product line approach to find that domestically produced parts were like subject imported parts. Rather, the Commission applied the like product factors it generally uses to define which domestically produced products are like or directly competitive with the products within the scope of the investigation.[4] Here, the Commission found that domestic covered parts were like imported covered parts based on the

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[1] *See, e.g.,* United States' first written submission, para. 157.

[2] USITC Report, pp.15-16 (Exhibit KOR-1).

[3] United States' First Written Submission, para. 125.

[4] USITC Report, pp. 5, 16-17 (Exhibit KOR-1).

preponderance of similarities between them in terms of their physical properties, customs treatment, manufacturing process, uses, and marketing channels.[5] Specifically, the Commission found that the parts within the scope – dedicated-for-LRW-use cabinets, tubs, and assembled baskets – were like domestically produced cabinets, tubs and assembled baskets dedicated for use in LRWs. The Commission noted the physical similarities, uses, functionality, likely manufacturing similarities of such imported and domestic parts, as week as the sale of both through the same types of marketing channels (to authorized service centers and distributors for the repair of LRWs.[6] The Commission therefore defined the domestic like product to include domestically produced dedicated-for-LRW-use cabinets, tubs and assembled baskets.[7]

3. Nor did the Commission rely on a product line approach for purposes of defining the domestic industry. Nonetheless, as discussed in the United States' response to question 9, the Commission's reference to the product line analysis as supporting its definition was consistent with Article 4.1(c) of the Safeguards Agreement.

**Question 9:**

> **To the United States. In paragraph 182 of its first written submission, the United States submits that the USITC's "reference to a product line approach as support for its definition of the domestic industry to include parts production" was consistent with Article 4.1(c) of the Agreement on Safeguards.[8] In paragraph 181 of that submission, the United States notes that the USITC cited the product line approach as "an additional basis" to define the domestic industry to include covered parts production. However, in response to Panel advance question No. 3 at the first substantive meeting, the United States asserted that the USITC "did not apply the product line approach" and "did not rely on the product line approach to define the domestic industry".**
>
> **a. Please clarify if the USITC (i) relied on the product line approach as an "additional basis" to define the domestic industry to include covered parts production, or (ii) did not apply, or rely on, the product line approach at all to define the domestic industry.**

4. The Commission did not rely on a product line approach to define the domestic industry. Consistent with SGA Article 4.1(c), as well as SGA Article 2.1, the Commission defined the domestic industry as "producers . . . of the like or directly competitive products."[9] Having defined the like or directly competitive domestic products as "all domestically produced LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts,"[10] the Commission defined the domestic industry as "all domestic producers of LRWs, PSC/belt drive TL washers,

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

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

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

[8] Emphasis added.

[9] USITC Report, pp. 17-19 (Exhibit KOR-1).

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

CIM/belt drive FL washers, and covered parts, including Whirlpool, GE, Alliance, and Staber."[11] On this basis alone, the Commission's definition of the domestic industry fully complied with SGA Article 2.1 and 4.1(c).

5. Because the Commission did not rely on a product line approach to define the domestic industry, the Panel need not reach Korea's arguments concerning such an approach. Only after defining the domestic industry did the Commission explain that its product line approach also supported its definition of the domestic industry to include covered parts.[12] This additional explanation was fully consistent with SGA Article 4.1(c).[13] As the Commission explained, a "product line approach" has been used to define a domestic industry by including within the industry definition "all domestic facilities and workers producing a product like or directly competitive with the imported article" and "the various stages that might be involved in such production."[14]

6. In this light, the Commission made the logical observation that there was no separate domestic industry producing covered parts, but rather a single domestic industry producing covered parts primarily for assembly into LRWs in vertically integrated production facilities.[15] Where, as here, domestic producers of an article manufacture various components internally for assembly into the article, nothing in the SGA requires competent authorities to limit their definition of the domestic industry to only the final assembly operations of those producers. On the contrary, to define a domestic industry as "producers as a whole of the like or directly competitive products," as provided for in SGA Article 4.1(c), competent authorities certainly have the discretion to include all stages of production undertaken by such producers in the definition, particularly when the like product includes intermediate products.[16] Thus, it was fully consistent with SGA Article 4.1(c) for the Commission to cite as additional support for defining the domestic industry to include covered parts production the fact that domestic producers of covered parts used those parts primarily for the production of LRWs.

**b. Did the USITC define the domestic industry to include parts production solely based on its finding that imported parts were like domestically produced parts?**

[11] USITC Report, p. 19 (Exhibit KOR-1).

[12] USITC Report, p. 19 (Exhibit KOR-1).

[13] *See* United States' first written submission, paras. 181-184.

[14] USITC Report, p. 19 (Exhibit KOR-1).

[15] USITC Report, p. 19 (Exhibit KOR-1) (Noting that "virtually all domestically produced LRWs are assembled from covered parts produced domestically in the same facilities as the LRWs," the Commission reasoned that "the production facilities producing assembled LRWs necessarily include the facilities for producing covered parts.").

[16] *See Dominican Republic – Safeguard Measures (Panel)*, para. 7.191 (finding that "{i}f a product is like or directly competitive with respect to the imported product, that product must be considered for the purposes of defining the domestic industry" because "nothing in the text of {Article 4.1(c)} allows the domestic industry to be defined on the basis of a limited portion of these products").

**If no, please identify each of the other bases on which the USITC relied to include parts in its definition of the domestic industry. In doing so, please point to, and quote, the relevant parts of the USITC report where such bases were identified and explained.**

7. Yes, based alone on its definition of the like product, the USITC defined the domestic industry to include producers of covered parts. Rather than quote the Commission's lengthy analysis in full, the United States refers the Panel to the relevant pages of the report.[17] As discussed above, the Commission supplementally explained that inclusion of covered parts also was justified because of the vertically integrated nature of domestic parts and LRW production.[18]

**Question 10: To both parties.**

**Under what circumstances could an imported product that does not compete with the good produced by the domestic industry cause injury, within the meaning of Article 4.2(a) and Article 4.2(b) of the Agreement on Safeguards, to the domestic producers of that good?**

8. As a legal matter, the Safeguards Agreement calls upon the competent authorities to determine whether increased imports of "a product" cause or threaten to cause serious injury to the domestic industry that produces "like or directly competitive products." On its face, the language indicates that there may be variety within the imported "product," in that it may cause injury to (plural) domestically produced product**s**, which may be either "like" or "directly competitive" with it. The disjunctive "or" indicates that an imported product may be "like" a domestic product but not "directly competitive," or "directly competitive" but not "like." (Logic would also indicate that, possibly in many instances, the products are both "like" and "directly competitive.") Korea appears to accept that a degree of variety within the imported product and domestic product is permissible, as it does not challenge the inclusion within the USITC analysis of multiple different imported and domestic models with different price points. Nor does it contest that, for purposes of price comparisons, a subset of particular imported models is most appropriately compared with a particular subset of domestically produced models, and not other models.

9. The Safeguards Agreement calls upon the competent authorities to render a determination as to the effect that the imported product as a whole, with all of its internal variety, has on the "producers as a whole of the like or directly competitive product," with all of the internal variety of those producers and their products. The Safeguards Agreement does not require separate determinations for (or even separate analyses of) each discernible subset of the imported product and of the like or directly competitive domestic product. As the Safeguards Agreement calls for a determination as to the imported product and domestic industry as a whole, what matters is the overall effect. Thus, while differences in the degree to which each subset of the imported product competes with subsets of the domestic good are potentially relevant to the competent

[17] USITC Report, pp. 17-19 (Exhibit KOR-1).

[18] USITC Report, p. 19 (Exhibit KOR-1).

authorities' analysis, they are not dispositive, but must be considered in the context of the imported product and domestic industry as a whole.

10. Given this, it is possible, as a factual matter, for increased imports of merchandise subject to investigation to seriously injure a domestic industry producing the like or directly competitive products even though a subset of subject imports does not compete head-to-head with a subset of domestic industry shipments. The Commission made such a finding in this case, in finding that some of the products (*e.g.*, Whirlpool's and GE's covered parts) falling within the range of the domestic like product were like but did not compete directly with imported parts destined for the repair of LG and Samsung LRWs. Yet, virtually all domestic industry shipments of the like product consisted of finished washers that competed directly with virtually all subject imports, which consisted almost entirely of LRWs. Although the Commission considered the increase in imports of all products within the scope, including LRWs and covered parts,[19] it made clear throughout the report that the increase consisted of LRWs that competed directly with the domestically produced washers, not covered parts.

11. The Commission found a moderate to high degree of substitutability between imports and domestically produced LRWs based on an exhaustive examination of the record evidence.[20] It found further that imports of LRWs increased significantly during the period of investigation, in terms of both volume and market share.[21] The Commission found that imports of LRWs pervasively undersold the domestic like product, thereby depressing and suppressing domestic prices to a significant degree, based on pricing data collected from domestic producers and importers on sales of six strictly-defined LRW products representing a range of typical LRW products sold in the U.S. market.[22] It concluded that subject imports seriously injured the domestic industry because the industry's worsening financial losses and cuts to capital and R&D expenditures resulted directly from a cost-price squeeze caused by increasing volumes of low-priced subject imports.[23] Thus, the increase in subject imports as a whole, consisting almost entirely of LRWs and only very small volumes (by both quantity and value) of covered parts, seriously injured the domestic industry even though imports of covered parts did not directly compete with domestically produced covered parts or LRWs.

12. The United States notes additionally that the respondents in the USITC proceeding made no argument before the Commission that the increase in subject imports during the period of investigation consisted in whole or part of covered parts rather than LRWs or that covered parts otherwise severed the causal link between increased imports and serious injury. The absence of

[19] *See* USITC Report, pp. 20, II-1-2, and Tables II-1, C-2 (Exhibit KOR-1).

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

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

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

[23] *See* USITC Report, pp 38-44 (Exhibit KOR-1).

any such arguments or facts confirms that covered parts were not an important condition of competition in the U.S. market.

13. Thus, where determinations covered by the Safeguards Agreement address groups of imported and domestic products, a particular product within the group of imported products may be found to cause serious injury without engaging into a separate inquiry as to whether that particular product itself competes with any domestic product.

**Question 11: To both parties.**

> **In response to the Panel's advance question No. 4 at the first substantive meeting, the United States stated that "it is possible that as a factual matter for increased imports of merchandise subject to the investigation to seriously injure a domestic industry producing the like or directly competitive product even though a subset of subject imports does not compete head-to-head with a subset of domestic industry shipments". Considering this statement, please respond to the following hypothetical.**
>
> **Let us consider that the product under consideration defined by a safeguard authority comprises "X" and "Y". "X" and "Y" are not like or directly competitive with each other. The domestic industry is defined as "X1" and "Z".**
>
> **X competes with X1. "Y" does not compete with either "X1" or "Z".**
>
> **Would it follow from the United States' statements in response to the Panel's question, set out above, that increased imports of "Y" could cause serious injury to the domestic producers of X1 and Z? Please explain your view.**

14. In a case involving a range of imported products within the scope, a competent authority could determine that increased imports have seriously injured the domestic industry even though a subset of imported products within the scope do not compete with a subset of products produced by the domestic industry. When certain types of subject imports increase while other types do not, a competent authority must consider the pertinent conditions of competition in assessing whether increased imports seriously injured the domestic industry. Such conditions of competition might include the degree of substitutability between each type of imported product and each type of domestic product, the product mix of imported products versus the product mix of domestic products, and the effects of any indirect competition between increased subject imports and domestically produced products that are not otherwise directly competitive with the imports. For example, 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. Through such indirect competition, increased imports of parts could seriously injury a domestic industry producing the finished product.

15. Under the Panel's hypothetical, whether increased imports of product Y can seriously injure domestic producers of X1 and Z would depend upon the conditions of competition distinctive to the industry at issue. As an initial matter, we note that, even if imported products

X and Y do not compete with each other, they could be interdependent or related in utility to one another. If no such relationship exists, and product Y has only a distinct use completely separate from and unrelated to product X and there is absolutely no competition, either direct or indirect, between imports of product Y and domestically produced X1 and Z, then increased imports of product Y alone likely would not seriously injure domestic producers of X1 and Z.

16. Under the realities of various conditions of competition, however, increased imports of product Y, alone or in combination with increased imports of product X, could cause serious injury to the domestic industry producing products X1 and Z. For example, if increased imports of product Y are assembled in "screwdriver operations" in the importing country into product X, a competent authority could find that increased imports of product Y seriously injured domestic producers of X1 and Z. Or, if product Y could only be used in combination with product X, then increased imports of product Y would likely accompany or spur increased imports of product X, and a competent authority could find that increased imports of products X and Y, as a whole, seriously injured domestic producers of X1 and Z.

17. Furthermore, if the increased imports consist almost entirely of product X and imports of product Y can be assembled into product X, then a competent authority could find that increased imports of products X and Y, as a whole, seriously injured domestic producers of X1 and Z. The Commission made such a finding in this case, as discussed in response to question 10 above. While recognizing that imports of covered parts did not compete with domestic covered parts or LRWs, the Commission found that the significant increase in subject imports as a whole, consisting almost entirely of low-priced LRWs, seriously injured domestic producers of LRWs and covered parts, whose shipments consisted almost entirely of LRWs in direct competition with imported LRWs.[24]

**Question 12:**

> **To both parties. Does the likeness assessment under Article 2.6 of the Anti-Dumping Agreement and footnote 46 of the SCM Agreement require an assessment of the competitive relation between the imported and domestically produced good?**

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

[24] *See* USITC Report, pp 38-44 (Exhibit KOR-1).

appropriate methodologies in defining the domestic like product for purposes of antidumping and countervailing duty investigations.

19. Although the factors logically relevant to such an assessment may relate to competition, such as physical characteristics and uses, an investigating authority is not required to establish some minimum degree of substitutability between domestic and subject imported articles in defining the domestic like product. Rather, the investigating authority must identify the domestically produced article that is either "alike in all respects to the product under consideration" or "has characteristics closely resembling those of the product under consideration," regardless of their degree of substitutability. Under either definition of likeness, a domestic article need not compete directly with an imported product under investigation to be like the imported product. For example, an investigating authority could find that high-end widgets produced domestically possess characteristics closely resembling those of imported low-end widgets within the scope, and define the domestic like product as high-end widgets, even though high-end and low-end widgets compete in different segments of the market. After defining the domestic like product, an investigating authority may permissibly assess the degree of substitutability between the domestic like product and the subject imports as a condition of competition, for purposes of analyzing material injury and threat.

20. Similar considerations would apply to competent authorities defining the like or directly competitive product under articles 2.1 and 4.1(c) of the Safeguards Agreement, though the text of those articles differs from that of ADA Article 2.6 and ASCM footnote 46 in important ways. As with the Antidumping Agreement and SCM Agreement, the Safeguards Agreement is silent on how competent authorities are to identify "the like or directly competitive products" for purposes of defining the domestic industry,[25] affording competent authorities with the discretion to employ reasonably methodologies in making such determinations. In defining the domestic like product in this case, the Commission considered five factors – (1) the physical properties of the article, (2) customs treatment, (3) manufacturing process, (4) uses, and (5) marketing channels – that are logically relevant to identifying domestic articles that are like subject imports, as recognized by the Appellate Body.[26] Although these factors relate to competition, the Commission was under no obligation to establish any minimum degree of substitutability between domestic and imported products to find that they were "like" for purposes of defining the domestic industry, any more than investigating authorities must do so in antidumping and countervailing duty investigations. As in antidumping and countervailing duty investigations, the Commission thoroughly considered the degree of substitutability between the domestic like product and the subject imports as a condition of competition for purposes of analyzing the causal link between increased imports and serious injury.

21. Furthermore, as the United States pointed out in its first written submission, the text of the Safeguards Agreement makes clear that a domestic article "like" an imported article subject

[25] United States' First Written Submission, para. 125.

[26] *EC – Asbestos (AB)*, para. 101.

to investigation need not be "directly competitive" with the imported article.[27] SGA Articles 2.1 and 4.1(c) define "domestic industry" in the disjunctive as the producers as a whole of like ***or*** directly competitive products. Thus, competent authorities may define the domestic industry to include producers of articles "like" the imported articles subject to investigation or producers of articles "directly competitive" with the imported articles. While Korea recognizes that "not every product that is in competition with another is 'like' the other product," the converse is also true.[28] Not every domestically produced product that is "like" an imported product subject to investigation will be "directly competitive" with the imported product. Thus, the very text of the Safeguards Agreement underscores that competent authorities may find that a domestically produced article is "like" a product under investigation irrespective of the degree of competition between the two.

### 2 Increase in Imports

**Question 14:**

**In paragraph 138 of its first written submission Korea states that "the market share of imports remained the same throughout the POI [(period of investigation)] as consumptions increased throughout the POI, including in interim 2017 compared with interim 2016".[29] In paragraph 141 of its first written submission Korea states that in the most important, recent period of the POI, imports decreased, *inter alia*, in terms of market share.**

**In paragraph 205 of its first written submission, the United States submits that the USITC found that the market share of subject imports increased each year between 2012 and 2015 before declining in 2016 to a level that remained several percentage points higher than in 2012, but then again resuming its ascent in 2017, increasing to a level higher than in interim 2016.**

**a. To the United States. The USITC stated on page 39 of its report (Exhibit KOR-1) "that the domestic industry's market share fluctuated within a narrow band during the period of investigation and was roughly the same in 2016 as in 2012". If imports of LRWs increased significantly during the POI in terms of market share, did this increase in imports not lead to a corresponding decrease in the domestic industry's market share during the POI?**

**i. If no, please explain why the domestic industry's market share did not decrease correspondingly.**

**ii. If yes, how does such a decrease in market share reconcile with the USITC's statement that the domestic industry's market share fluctuated within a narrow band during the POI and was roughly the same in 2016 as in 2012?**

[27] See United States' First Written Submission, para. 177.

[28] Korea first written submission, para. 225.

[29] Emphasis added.

22. The answer to the Panel's question is no. The Commission recognized that the domestic industry's market share in 2016 was similar to that in 2012 even after imports of LRWs had increased their penetration of the U.S. market to a significant degree.[30] Nevertheless, the Commission found that subject import competition negatively affected the domestic industry's market share during the period of investigation. As the Commission explained, fluctuations in the domestic industry's market share coincided with LG's and Samsung's movement of LRW production from country to country during the period as imports of LRWs from Korea and Mexico, and then China, became subject to antidumping and countervailing duty disciplines.[31] Specifically, the Commission noted that the imposition of such disciplines on LRWs from Korea and Mexico coincided with an increase in the domestic industry's market share, while LG's and Samsung's subsequent movement of LRW production to China coincided with declines in the domestic industry's market share.[32] The subsequent imposition of an antidumping duty order on LRWs from China coincided with another increase in the domestic industry's market share.[33] Based on these data, the Commission concluded that "import levels appear to have been restrained by serial antidumping and countervailing duty orders during the period of investigation."[34] In other words, the significant increase in subject import volume and market share during the period of investigation occurred despite the imposition of WTO-consistent trade remedies that LG and Samsung had completely evaded by the end of the period by shifting production to Thailand and Vietnam, which were subject to no measures.

23. The reason that the domestic industry's market share did not decline between 2012 and 2016 by the same amount as the significant increase in subject import market share is that the increase corresponded to a decline in the market share of out-of-scope imports of belt-driven washers. In analyzing the conditions of competition, the Commission found that the U.S. market was served by domestic producers, in-scope imports, and "out-of-scope imports (PSC/belt drive TL washers and CIM/belt drive FL washers)."[35] The Commission provided no further discussion of imports of out-of-scope washers in its report because no party argued that such imports were an important condition of competition or an alternative cause of injury.

24. Although data on the volume and market share of out-of-scope imports is confidential, counsel to Whirlpool, who had access to all confidential business information on the record subject to the administrative protective order, discussed these data at the Commission's public hearing, in arguing that out-of-scope imports were not an alternative cause of injury:

> {F}irst of all, if you look at the absolute volume of out-of-scope imports . . . you can see that those volumes are plummeting from 2012 to 2016. Why is that?

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

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

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

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

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

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

> Because this technology's an obsolescing dinosaur. It's not a cause of serious injury. To the contrary, it's not an alternate cause of injury.
>
> And so not surprisingly, if you look at the {market} share trend . . . out-of-scope import share is plummeting. It's not taking away from the domestic industry. . ..[36]

25. Respondents raised no objection to this description of the data. Thus, the record showed that the significant increase in subject import market share between 2012 and 2016 coincided with a decline in out-of-scope import market share.

**Question 16:**

> **To the United States. Please provide an unredacted version of the parts of the USITC's report of December 2017 (Exhibit KOR-1) set out in Annex A of this document.**

26. The USITC redacted from the public version of its report any information that was business confidential or would otherwise reveal business confidential information ("BCI"). Where possible, the USITC provided narrative descriptions of BCI relevant to its analysis and conclusions. However, 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 lion's share of domestic production.

27. In an effort to provide the Panel with a more robust summary of the data in the sections of the report indicated in this question, the United States is providing additional tables derived from the tables in the confidential report. The directional version of Table C-2,[37] which contains a compilation of the information relied on by the Commission, shows trends in key datapoints considered and cited by the Commission, including in the redacted paragraphs contained in Annex A to the written questions from the Panel. The United States is also providing an additional table with directional indicators for the import data in Table II-1,[38] which was the additional source for the information cited in the Annex A excerpts.

28. Additionally, the United States notes, as reflected in our response to Panel question 17, that the public data in exhibit 2A to the Petition, reflecting Whirlpool's best estimate based on public sources, showed that imports of LRWs increased in every year of the period of

[36] Hearing Transcript at 90 (Levy) (Exhibit US-12).

[37] Exhibit US-13.

[38] Exhibit US-14.

investigation and doubled between 2012 and 2016.[39] As explained in our response to question 17, the trends shown in exhibit 2A were consistent with the Commission's analysis of increased imports, which was based on the actual questionnaire data.

**Question 17:**

> **To the United States. In paragraph 30 and footnote 39 of its opening statement at the first substantive meeting, Korea notes that the official U.S. import statistics were submitted as an annex by Whirlpool in its petition and contends that while the United States suggests that this data should be rejected as "extra-record evidence", it was already on the record before the USITC.**
>
> **a. Please clarify whether the United States agrees or disagrees that the data referred to by Korea was submitted as an annex to Whirlpool's petition.**
>
> **b. Please clarify if the United States agrees or disagrees that this specific data shows, as Korea contends, as follows:**
>
> **i. Increase in subject imports between 2012 to 2016 was 33.7%, with yearly increases of about 6%, 5%, 8%, 13% and 5%40;**
>
> **ii. Deceleration in imports from 2015 and an actual decline in 2017 of -5%41;**
>
> **iii. Subject imports increased by 50.3% between 2012 and 2016, and by 26.2% between 2013 and 2016.**

29. Whirlpool appended the data referenced by Korea to its petition as **exhibit 2D**. However, the United States emphasizes that these data are inaccurate and unreliable as the measure of imports of LRWs. Indeed, the petition itself, from which Korea admittedly draws its data, specifically includes another table – **exhibit 2A** – containing data Whirlpool believed to more accurately estimate imports of LRWs.[42]

30. The primary problem with the data in exhibit 2D is that they are not limited to imports of LRWs, as Korea mistakenly suggests.[43] Rather, these data also include imports of out-of-scope belt-driven washers and domestically produced LRWs assembled with imported parts (other than covered parts) that were classified as imported LRWs upon withdrawal from Foreign Trade Zones ("FTZs").[44] Under the FTZ regulations, domestically produced LRWs were classified as imported LRWs for the sole purpose of collecting duties on the imported parts incorporated into them, and no party argued that such LRWs should be treated as anything other than domestically

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

[40] Korea's opening statement at the first meeting of the Panel, para. 30.

[41] Korea's opening statement at the first meeting of the Panel, para. 30.

[42] Petition, Exhibit 2A (Addendum to Exhibit KOR-5)

[43] Korea's opening statement, para. 31.

[44] *See* USITC Report, III-4-5 (Exhibit KOR-1); Petition, Exhibit 2B (Addendum to Exhibit KOR-5).

produced.[45] Petitioner excluded such domestically produced LRWs from its estimate of imported LRWs in exhibit 2A to the petition.[46] The data in exhibit 2A, reflecting petitioner's best estimate based on public sources,[47] 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 of increased imports.[48]

31. Rather than simply rely on petitioner's estimates of imports of LRWs, however, the Commission independently collected data on imports of LRWs during the POI through the questionnaires it sent to industry participants. Specifically, the Commission based its analysis of increased imports on the questionnaire responses of five importers – including primarily the two largest importers, LG and Samsung – that accounted for virtually all imports of LRWs.[49] Responding importers certified the accuracy of the data reported in their questionnaire responses, and no party (including the Government of Korea) contested the accuracy of these data. The Commission reasonably relied on these data as the most precisely accurate data reflecting imports of LRWs.

**Question 20:**

> **In paragraph 28 of its opening statement at the first substantive meeting, Korea states as follows:**
>
> > **The U.S. also suggests that imports' market share "significantly increase[d]". However, this was not the finding by the ITC. Rather, it found that demand increased in the POI, but that the market share of the domestic industry "fluctuated within a narrow band" in the POI to remain "roughly the same in 2016 as in 2012". This confirms that imports increased in line with consumption and did not displace domestic sales.**

[45] As explained in the Commission's report, Whirlpool reported that, commencing in 2013, it admitted into the FTZ duty free various non-covered LRW parts from various countries of origin, for use in the production of LRWs at the Clyde, Ohio, manufacturing facility. Doing so allowed Whirlpool to minimize tariff liability. USITC Report at III-4. Whirlpool reported that tariff savings occur when the foreign components admitted into the FTZ have a higher duty rate than a finished washer. *Id.* at III-4 n.5. In those cases, the foreign components will be classified as the finished washer when they are withdrawn from the FTZ and will be subject to the lower duty applicable to finished washers. *Id.* GE also domestically produced LRWs in an FTZ. *Id.* at III-5.

Pursuant to FTZ regulations, production activities must be approved by the FTZ board and U.S. Customs entries must be made for finished goods leaving the FTZ for U.S. consumption that utilized foreign components in their production. *Id.* at III-3-4. According to these same FTZ regulations, the country of origin of the finished good for Customs purposes is the country of origin of the highest-value foreign component, regardless of the number of foreign components or the share of U.S. content. *Id.* at III-4.

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

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

[48] *See* Petition, Exhibit 2A (Addendum to Exhibit KOR-5); compare USITC Report, pp. 20, 38-39 (Exhibit KOR-1).

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

**b. To the United States. In stating that imports of LRWs increased significantly during the period of investigation in terms of both volume and market share, did the USITC find that increase in imports' market share displaced domestic sales? If yes, please point to, and quote, the relevant parts of the USITC's report containing such a finding.**

32. The United States' response to question 14 above also addresses the inquiry posed in question 20(b).

### 3 Serious Injury

**Question 21:**

**To both parties. In paragraph 248 of its first written submission, Korea contends that while "a fully-fledged and exhaustive analysis of all known factors that may cause injury to the domestic industry is not necessary at this stage of the analysis, an authority must address evidence that calls into question the explanatory force of the imports for the serious injury".[50] Korea cites the Appellate Body's report in *China – GOES* in support of its view, where the Appellate Body interpreted the specific text of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement (specifically Articles 3.2 and 15.2, respectively).**

**a. Considering the Appellate Body made its decision based on the specific textual language of the Anti-Dumping and SCM Agreements, how should the absence of such language in the Agreement on Safeguards inform the Panel's view on whether this agreement requires an analysis of the explanatory force of imports?**

33. The problems with the assertions in paragraph 248 of Korea's first written submission go beyond the fact that the cited Appellate Body finding addresses language absent from the Safeguards Agreement. More importantly, the Appellate Body's findings are not relevant to the point Korea apparently seeks to make.

34. In paragraph 248, Korea cites *China – GOES* for the proposition that "{w}hile a fully-fledged and exhaustive analysis of all known factors that may cause injury to the domestic industry is not necessary at this stage of the analysis, an authority must address evidence that calls into question the explanatory force of the imports for the serious injury." Paragraph 247 makes clear that the "stage" in question is the "evaluation" of the relevant factors and a conclusion on the "overall impairment" of the industry.[51] In its analysis, the USITC first addressed the question of significant overall impairment, and then evaluated whether there was a causal link between the increased imports and that impairment.[52] Korea's argument goes to that initial inquiry into the condition of the industry, while the cited analysis in *China – GOES* addressed causation, as represented by the obligation under Article 3.2 of the AD Agreement for the authority to consider "whether the effect of [dumped] imports is otherwise to depress prices

[50] Emphasis added.

[51] Korea's first written submission, paras. 247-248.

[52] See USITC Report, pp. 33-37 (significant overall impairment), 38-44 (causal link) (Exhibit KOR-1).

to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree." Therefore, the reasoning in *China – GOES* cannot legitimately be read to *require* an authority to consider the causal effect of imports in an initial evaluation of the overall condition of the domestic industry, in advance of the specific analysis of causation.

35. This question identifies an *additional* flaw with Korea's reliance on *China – GOES*, namely, that the Appellate Body was analyzing obligations in the AD and SCM Agreements that do not appear in the Safeguards Agreement. In this regard, it is especially relevant that the Appellate Body was addressing the AD and SCM Agreement obligations regarding analysis of price depression from the separate obligations, applicable when factors other than unfair imports are causing injury, "to ensure that the injuries caused by these other factors [are not] attributed to the [dumped or subsidized] imports."[53]

36. The Safeguards Agreement contains an obligation that "[w]hen factors other than increased imports are causing injury . . . such injury shall not be attributed to increased imports," but not an obligation to consider whether price depression is the effect of imports. Therefore, there is no basis for Korea's efforts to leverage the Appellate Body's findings regarding the analysis of price suppression under the AD and SCM Agreements into an obligation to incorporate an additional analysis of "the explanatory force of imports" into the evaluation of the injury factors identified in the Safeguards Agreement.

37. With respect to the Panel's broader question of whether the Safeguards Agreement requires "an analysis of the explanatory force of imports," it does not do so in those explicit terms. Article 4.2(b) calls for the competent authorities to "demonstrate{}, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof." It further admonishes them not to attribute to imports the effects of other factors causing injury to the domestic industry at the same time. It is those obligations that should guide the Panel's review of the USITC's determination.

**b. Would an investigating authority be required to examine, as part of its Article 4.2(b) causation/non-attribution determination, all evidence suggesting that factors other than increased imports are causing injury to the domestic industry? If yes, how would such a determination differ from what Korea considers to be the authority's obligation under Article 4.2(a) to address evidence that calls into question the explanatory force of the imports for the serious injury?**

38. Competent authorities are required to examine evidence suggesting that factors other than increased imports are causing injury to the domestic industry at the same time, pursuant to Article 4.2(b) of the Safeguards Agreement. That article provides that "{w}hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." A competent authority must therefore demonstrate that the causal link between increased imports and serious injury is not attenuated by other factors that are at the same time also causing injury. As the Appellate Body has recognized, the

[53] *China – GOES (AB)*, para. 151 (bracketing in original).

Agreement does not prescribe any particular methodology for not attributing the effects of other factors to those of subject imports.[54]

39. This analysis differs from Korea's "explanatory force" argument in two ways. First, Korea appears to argue that the competent authorities must consider the "explanatory force" of imports at the "stage" of evaluating the condition of the domestic industry *in addition to* the later stage of detailed analysis of the causal link. However, nothing in Article 4.2(b) precludes a sequential analysis, like the USITC conducted, that first considers whether imports increased, then whether the industry was experiencing serious injury, and then whether imports were a cause of that serious injury. There is no obligation to consider the effect of increased imports once under the rubric of "explanatory force" and a second time under the rubric of "causal link." Second, Korea's errs in seeking to replace the explicit obligation to examine the causal link with a colloquial characterization to examine the "explanatory force" of imports. Adopting such a formulation would risk straying from the actual obligation into a different requirement created by one party to the proceeding.

40. As discussed in the U.S. first written submission, the Commission's serious injury determination was consistent with all of the obligations of the Safeguards Agreement. It thoroughly examined and explained all evidence that arguably called into question the causal link between increased imports and serious injury. In particular, the Commission expressly explained how the domestic industry's flat market share and increases in certain measures of industry performance were not inconsistent with its finding that increased imports were a substantial cause of serious injury.[55] The Commission also fully explained why alleged differences in innovation and the domestic industry's production of agitator-based LRWs did not detract from the causal link between subject imports and the domestic industry's serious injury.[56]

41. Finally, the Commission explained in great detail that the record did not support respondents' two alternative causes of injury, finding that neither cause could account for any of the industry's injury.[57] The Commission reasonably concluded that increased imports were the only explanation for the domestic industry's large and increasing financial losses and cuts to capital and R&D expenditures.[58] It further concluded and demonstrated that none of the factors highlighted by Korea detracted from its demonstration of a causal link between increased imports and serious injury. Thus, although not required by the Safeguards Agreement, even under Korea's approach of arguing for an inquiry into the "explanatory force" of imports, the Commission's analysis achieved that.

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[54] *US – Lamb (AB)*, para. 181.

[55] *See* United States' first written submission, paras. 237-251, 282-285.

[56] *See* United States' first written submission, paras. 264-268, 306-310.

[57] *See* United States' first written submission, paras. 311-337.

[58] *See* United States' first written submission, paras. 90-98, 286-305.

**Question 27: To the United States.**

> **In paragraph 271 of its first written submission, with respect to the USITC's decision not to rely on the financial results reported on sales of belt-driven washers, the United States cites the USITC report explaining the reasons for excluding the reported data.**
>
> **Please provide the unredacted version of the USITC's 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's report (Exhibit KOR-1).**

42. Financial results for the very small amounts of belt-driven washers were not included in the aggregate industry data because Alliance – the only U.S. producer of the included belt-driven washers – was unable to provide accurate financial results for its production of covered washers. That is what is reflected in footnote 205, page 33 of the Commission's report.

**Question 28:**

> **In paragraph 272 of its first written submission, the United States submits that by basing its analysis on reliable data, without regard to source, the USITC's approach comports fully with Articles 3.1, 4.1(a), and 4.2(a) of the Agreement on Safeguards. The United States notes in this regard that the first step in reaching a "reasoned conclusion" under Article 3.1 of the Agreement on Safeguards is to make sure that the evidence is sound.**[59]
>
> **a. To both parties. Having defined the domestic industry to include domestic producers of belt-driven washers, was the USITC required to consider the data pertaining to these producers as part of its serious injury analysis? If yes, please explain how an investigating authority can comply with its obligations under Article 4.1(a) as well as Article 3.1 in a scenario where it finds that it does not have reliable data from the producer to make its serious injury analysis.**

43. The answer is yes, to the extent that data pertaining to domestic producers of belt-driven washers is found to be reliable. The Commission collected a full complement of data from Alliance Laundry Systems ("Alliance"), which was the only domestic producer of belt-driven washers, and considered these data to the fullest possible extent in its analysis. As noted in its report, the Commission sent a U.S. producers questionnaire to Alliance and received a response reporting production of belt-driven washers but not LRWs.[60] Based in part on Alliance's questionnaire response, the report included a full description of Alliance's domestic operations producing belt-driven washers.[61] Throughout its serious injury analysis, the Commission relied on data from Alliance's domestic producers' questionnaire response[62] and also on the summary data contained in Table C-2 of the report, which included data reported by Alliance on "selected

[59] United States' first written submission, para. 270.

[60] USITC Report, p. I-24.

[61] USITC Report, pp. I-25-26.

[62] See USITC Report, pp. 16 nn. 75-65, 31 n.31, 32 nn.199, 200, 202, 50 n.304 (Exhibit KOR-1).

out-of-scope residential washers" (*i.e.*, belt-driven washers).[63] Only Alliance's reported financial results were excluded from the report because, as explained in the United States' first written submission, these data were determined to be unreliable and thus unusable.[64]

44. When a responding domestic producer's financial data is found to be unreliable, a competent authority may not use the data in its analysis of serious injury. A competent authority that uses unreliable financial data to analyze serious injury cannot make "reasoned conclusions" on "pertinent issues of fact and law," as required under SGA Article 3.1. Nor could the authority "evaluate all relevant factors of an objective and quantifiable nature," as required under SGA Article 4.2(a), if its data on "profits and losses" is unreliable and thus not an objective measure of the industry's financial performance.

45. Rather, when a domestic producer reports unreliable financial data, the competent authority may make inferences based on the available information on the domestic industry's financial performance, which in this case consisted of the financial data reported by other responding domestic producers. As past reports have correctly noted, it is not the case that "competent authorities must, in every case, actually have before them data pertaining to all those domestic producers whose production, taken together, constitutes a major proportion of the domestic industry."[65] Rather, "the data before the competent authorities must be sufficiently representative to give a true picture of the 'domestic industry.'"[66] In this case, the Commission based its analysis of the industry's financial performance on financial data reported by three producers (Whirlpool, GE, and Staber) that accounted for the vast majority of domestic sales of the like product, as Korea has acknowledged.[67] These objective data were therefore "sufficiently representative" for the Commission's analysis of the domestic industry's worsening financial losses during the period of investigation.

**b. To the United States. In paragraph 272 of its first written submission the United States notes that the domestic production of belt-driven washers was "very, very small". Could the "very, very small" production of belt-driven washers justify the exclusion of the financial results reported on sales of such washers? Please point to the relevant provisions of the Agreement on Safeguards that would provide a basis for such an exclusion.**

46. No, the "very, very small" production of belt-driven washers by Alliance, the only domestic producer of such washers, would not justify the exclusion of Alliance's reported financial results from aggregate industry financial data, and the Commission did not justify the exclusion of Alliance's financial results on such a basis. Rather, as explained in the U.S. first written submission, the Commission excluded Alliance's reported financial results from

[63] See USITC Report, Table C-2 (Exhibit KOR-1).

[64] *See* USITC's Report, p. III-8 (Exhibit KOR-1) ("Three U.S. producers reported usable results on their LRWs operations: GE Appliances, Staber, and Whirlpool.").

[65] *US – Lamb (AB)*, para. 132.

[66] *US – Lamb (AB)*, para. 132.

[67] *See* USITC Report, p.24 (Exhibit KOR-1); Korea first written submission, para. 294.

aggregate industry financial data because those data were determined to be unreliable and thus unusable.[68] Consistent with the requirement under Article 3.1 that competent authorities make "reasoned conclusions" on "pertinent issues of fact and law," the Commission based its analysis of the domestic industry's financial performance only on reliable data that accurately depicted the industry's actual performance during the period of investigation.

47. The United States noted that Alliance's production of belt-driven washers was "very, very small" only to emphasize that the Commission's exclusion of Alliance's financial data did not render the aggregate financial data reported by other domestic producers unreliable or unrepresentative.[69] To the contrary, as discussed in the United States' response to question 28(a) above, the Commission based its analysis of the industry's financial performance on financial data reported by three producers (Whirlpool, GE, and Staber) that accounted for the vast majority of domestic sales of the like product, as Korea has acknowledged.[70] These objective data were therefore "sufficiently representative" for the Commission's analysis of the domestic industry's worsening financial losses during the period of investigation.

### 4 Causal Link

**Question 30: To both parties.**

> **If particular products included in the scope of both the PUC and the domestically produced good are "like" under Article 4.1(c) of the Agreement of Safeguards but not directly competitive, how would an investigating authority examine the conditions of competition between the domestically produced good and the PUC as part of its causation determination?**

48. The analysis of the conditions of competition is a fact-specific inquiry that by necessity differs from investigation to investigation, so it is not possible to provide a generalized answer to this question. In the *Washers* report, the Commission recognized that imports of covered parts did not directly compete with domestically produced covered parts.[71] It addressed the role that covered parts played in domestic and foreign producers' sales as part of both the product under consideration and the domestic like product.[72] Virtually all domestic industry shipments and imports consisted of washers, while imports of covered parts were limited to the small volumes necessary to repair specific imported washers models.[73] Respondents made no argument before the Commission that the increase in subject imports during the period of investigation consisted of covered parts rather than washers or that covered parts otherwise severed the causal link between increased imports and serious injury, confirming that covered parts were not an

[68] *See* USITC's Report, p. III-8 (Exhibit KOR-1) ("Three U.S. producers reported usable results on their LRWs operations: GE Appliances, Staber, and Whirlpool.").

[69] *See* United States' first written submission, paras. 272-273.

[70] *See* USITC Report, p.24 (Exhibit KOR-1); Korea first written submission, para. 294.

[71] USITC Report, p. 16 (Exhibit KOR-1).

[72] USITC Report, p. 16-17 (Exhibit KOR-1).

[73] USITC Report, p. 16, 24-26 (Exhibit KOR-1).

important condition of competition in the U.S. market. The Commission's analysis of covered parts based on increased imports and the domestic like or directly competitive product as a whole was fully consistent with this evidence. For these reasons, the Commission reasonably focused its analysis of conditions of competition and causation on washers, as the locus of competition in the U.S. market.

**Question 32: To the United States.**

> **On page 32 its report (Exhibit KOR-1), the USITC noted that agitator-based top load (TL) LRWs accounted for around half of domestic industry shipments. Please provide the share of agitator-based TL LRWs in domestic industry shipments in other years of the POI.**

49. The Commission found that "agitator-based TL LRWs accounted for around half of domestic industry shipments" throughout the period of investigation, not solely in 2016.[74] The Commission predicated this finding on an examination of 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," which contained the percentage of domestic industry shipments consisting of agitator-based TL LRWs in each full year of the period, interim 2016, and interim 2017.[75] The Commission's reference to 2016 percentage in a parenthetical was not intended to limit the finding to 2016, but rather to illustrate the most recent full-year data, which was illustrative of data throughout the period. In its discussion of differences in product mix between domestic and imported LRWs, the Commission was otherwise clear that its observations spanned the entire period of investigation.[76]

**Question 32: To both parties.**

> **On page 32 of its report (Exhibit KOR-1), the USITC stated that "imports of FL LRWs also competed with domestically produced TL LRWs to the extent that consumers cross-shopped FL and TL LRW models, and all responding purchasers reported that consumers are sometimes or frequently willing to switch between TL and FL LRWs based on relative pricing".[77] Please explain whether the reference to TL LRWs here covers agitator-based TL LRWs, or whether the USITC's statement pertained to competition between FL LRWs and TL LRWs other than agitator-based TL LRWs.**

50. The Commission finding highlighted by the Panel applied to both impeller-based TL LRWs and agitator-based TL LRWs, which consumers cross-shopped with FL LRWs. Throughout its report, the Commission consistently used "TL LRWs" in discussing domestically produced TL LRWs as a whole, including both impeller- and agitator-based TL LRWs. When its observations applied only to specific types of LRWs, it used the term "impeller-based TL

[74] USITC Report. P.32 (Exhibit KOR-1).

[75] USITC Report, p.32 & n.199, III-6 (Exhibit KOR-1).

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

[77] Emphasis added.

LRWs" or "agitator-based TL LRWs."[78] In discussing differences in product mix between domestic and imported LRWs, the Commission referenced domestically produced "impeller-based TL LRWs" in finding that "imports of . . . impeller-based TL LRWs . . . competed directly with domestically produced . . . impeller-based TL LRWs."[79] The Commission referenced "domestically produced TL LRWs," meaning all types of TL LRWs, in finding that "{i}mports of FL LRWs also competed with domestically produced TL LRWs to the extent that consumers cross-shopped FL and TL LRW models . . . ."[80] As support, the Commission noted that "18 responding purchasers reported that consumers are sometimes willing to switch between TL and FL LRWs based on relative pricing between the two offerings, and two reported that consumers frequently do so," without regard to whether the TL LRWs were agitator- or impeller-based.[81] The Commission also relied on a confidential cross-shopping study appended to the Whirlpool's domestic producers' questionnaire response.[82] Thus, the Commission provided a reasonable and adequate explanation for its finding that imports of FL LRWs competed with TL LRWs, including agitator-based TL LRWs, to the extent that consumers cross-shopped the two types of LRWs.

**Question 34: To the United States.**

**On page 32 of its report (Exhibit KOR-1), the USITC stated that "pricing product data" shows that imported LRWs competed at nearly all price points in the US market, including those of domestically produced agitator-based TL LRWs.**

**a. Please clarify what pricing product data on the USITC's record was relied upon by the USITC to conclude that imported LRWs competed at nearly all price points in the US market, including those of domestically produced agitator-based TL LRWs. Please also submit this pricing product data to the Panel.**

51. The Commission's finding that "pricing product data show that imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based TL LRWs," was based upon a comparison of the average unit value of domestic industry shipments for different types of LRWs to importer sales prices for the six pricing products during each quarter of the POI. Specifically, for the price levels of different types of domestically produced LRWs, the Commission relied on the data in Table III-7 of its report, titled "LRWs: U.S. producers' U.S. commercial shipments, by product type, 2012-16, January-March 2016, and January-March 2017," which contained the average unit value of domestic industry shipments of top load LRWs, front load LRWs, top load LRWs with an agitator but

[78] See USITC Report, p. 8 ("TL LRWs possess drums that spin on a vertical axis and are loaded with soiled clothing though a door on the top of the unit . . . TL LRWs can wash clothes using either an agitator or an impeller. Agitator-based TL LRWs are characterized by their use of a pole-shaped agitator inside the drum . . . Impeller-based TL LRWs are characterized by their use of a fan-shaped impeller at the base of the drum . . . .").

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

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

[81] USITC Report, p. 32 & n.201, V-13 (Exhibit KOR-1).

[82] USITC Report, p. 32 n.201 (Exhibit KOR-1).

without Energy Star certification, and top load LRWs with an agitator and Energy Star certification, among other types of LRWs.[83] For the price levels of subject imports, the Commission relied on the data in Tables V-13-18, containing quarterly sales price data reported by importers on six pricing products representing a representative range of TL and FL LRWs.[84] Based on a comparison of these two sets of data, the Commission found that "imported LRWs competed at nearly all price points in the U.S. market, including those of domestically produced agitator-based TL LRWs," meaning that importers reported sales of pricing products at the same "price points" as domestic producer shipments of agitator-based TL LRWs.[85]

52. The pricing product data for imports reflected confidential transactions reported in questionnaire responses primarily by two importers, and the data for domestic sales likewise primarily reflected confidential information provided by two U.S. producers.[86] And in some instances, the data for a sales of a particular product type in a particular quarter reflected confidential data for a single importer or domestic producer. As explained in response to Panel question 16, because of the small number of firms reporting their quarterly prices, it was necessary for the Commission to redact the compiled data to assure that firms could not use simple arithmetic to uncover their competitors' confidential data. In the United States' view, however, its discussion of these data, which is summarized in this response, was robust and sufficiently explains how it analyzed these uncontested data in its examination of the causal link between the imports and the serious injury to the domestic industry.

53. In addition to the data particularly collected during the safeguard investigation, the Commission relied on pricing product data from *LRWs from China*, and the Commission's analysis of the data in its determination for *LRWs from China*, which had been placed on the record of the safeguard investigation. Specifically, the Commission noted that "{i}n *LRWs from China*, the Commission found that subject imports of pricing product 9, an impeller-based TL LRW, undersold domestically produced agitator-based top load LRWs with a capacity of 3.6 cubic feet . . . even though the subject imported model was more fully featured" and should have therefore commanded a higher price.[87] Based on these data, the Commission made the following finding in *LRWs from China*, which the Commission adopted by reference in its report for the safeguard investigation: "That Samsung sold significant volumes of a more fully featured top load LRW with an impeller and 4.0 cubic feet of capacity at a lower price that Whirlpool's

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

[84] USITC Report, p. 32 & n.202, V-27 (Exhibit KOR-1).

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

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

[87] 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).

smaller capacity, agitator-based top load LRWs, provides further evidence that agitator- and impeller-based top load LRW models compete with each other."[88]

54. The Commission also relied on Petitioner's Confidential Hearing Exhibit 1,[89] 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."[90] These data showed "imports and domestics competing head-to-head up and down the product line" across all pricing buckets.[91] Respondents did not challenge the veracity of the data presented in this hearing exhibit.

55. In addition to pricing product data, the Commission supported its finding that subject imports competed at nearly all price points with "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 TL LRWs.[92] 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 agitators either always, usually, or sometimes.[93] 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 TL LRWs.[94] In other words, the evidence before the

[88] Confidential Views, *LRWs from China*, at 35-36, cited in USITC Report, p. 32 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).

[89] 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.*

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

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

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

[93] 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). *Id.*

[94] 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." *Id.*

Commission showed that even higher-end subject imports had indirect competitive effects on lower-end domestically produced agitator-based TL LRWs.

56. 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 imported LRWs competed at nearly all price points in the US market, including those of domestically produced agitator-based TL LRWs.

**b. Is there any price comparison on the USITC's record with respect to imported LRWs and domestically produced agitator-based TL LRWs? If yes, (i) please provide these price comparisons on the USITC's record to the Panel; (ii) please explain how these price comparisons support the USITC's statement that imported LRWs competed with domestically produced agitator-based TL LRWs; and (iii) confirm whether these price comparisons showed that imported LRWs were undercutting agitator-based TL LRWs.**

57. 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*. The pricing data from *LRWs from China* was highly relevant to the Commission's analysis in the safeguard investigation of LRWs because the scope of *LRWs from China* was identical to the scope of the safeguard investigation,[95] and six of the ten pricing products for which data were collected in *LRWs from China* were also used in the safeguard investigation.[96] Furthermore, the period of investigation for which pricing data were collected in *LRWs from China*, which was January 2013 to June 2016, fully overlapped with the period of investigation for which pricing data were collected in the safeguard investigation, which was January 2012 to March 2017.[97] For this reason, the confidential views and staff report from *LRWs from China*, including all pricing data, were placed on the record of the safeguard investigation, and relied upon by the Commission.

58. As the Commission noted, these price comparisons from *LRWs from China* showed 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."[98] Given the importance of price and features to purchasing decisions, the Commission reasoned that underselling by subject imported impeller-based TL LRWs that were more fully featured than otherwise comparable domestically produced agitator-based TL LRWs would have had a competitive impact on sales of the domestically produced model.[99] Purchasers would have clearly preferred the lower-priced subject imported model, as confirmed by the Commission's finding in *LRWs from China* that

[95] USITC Report, p. I-9 (Exhibit KOR-1).

[96] USITC Report, p. V-25 n.62 (Exhibit KOR-1).

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

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

[99] *See* USITC Report, pp. 27-28, 32 (Exhibit KOR-1).

Samsung sold "significant volumes" of such LRWs.[100] Thus, these price comparisons supported the Commission's finding that imported LRWs competed with domestically produced agitator-based TL LRWs.

**Question 35:**

**The USITC found on page 42 of its report (Exhibit KOR-1) that "significant and growing quantity of low-priced imports depressed and suppressed prices for the domestic like product".**

**a. To the United States. Please clarify whether the USITC's findings regarding the depression and suppression of the prices of the domestic like product included domestically produced agitator-based TL LRWs. If so, please point to the evidence on the USITC's record that shows that low-priced imports depressed and suppressed prices of domestically produced agitator-based TL LRWs.**

59. No. As the United States explained in its closing statement at the Panel's videoconference with the parties, 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.[101] 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} well within the range . . . considered reliable in previous investigations," among other things.[102]

60. The Commission reasonably declined to define a pricing product corresponding to agitator-based TL LRWs because doing so would have imposed an unnecessary reporting burden on domestic producers without yielding price comparisons, since there were few imports of agitator-based TL LRWs during the period of investigation.[103] A pricing product definition covering few, if any, imports would hardly be "informative of the 'price undercutting,' if any, by the imported products."[104] Nor did the absence of such a pricing product render the Commission's pricing data unrepresentative, given that around half of the domestic industry's shipments and nearly all subject import shipments in 2016 consisted of LRWs other than TL LRWs with agitators.[105]

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[100] *See* USITC Report, p. 32 n.202 (Exhibit KOR-1), citing *LRWs from China*, (Confidential Views at 35-36); *LRWs from China*, USITC Pub. 4666 at 24-25 (Exhibit US-5) (containing the public version of pages 35-36 of the confidential views).

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

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

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

[104] *China – Broiler Products (Panel)*, para. 7.483.

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

**c. To both parties. How would an investigating authority make representative price comparisons involving a product type that is not imported, or only imported in minimal volume, but comprises a significant part of domestic sales?**

61. Competent authorities should base their price comparisons on product types that are representative of competition in the marketplace, and thus cover an appreciable share of subject imports and domestic producer shipments. For this reason, competent authorities may reasonably forego collecting pricing data on product types that are produced domestically but not imported or imported only in minimal quantities. The collection of such data would impose a reporting burden on responding domestic producers without yielding useful price comparisons. In such a circumstance, the competent authority may examine the extent to which imports of other product types compete with the domestically produced product type. Although pricing data should be collected on product definitions that are narrow enough to permit apples-to-apples price comparisons on directly competitive products, competition between domestically produced articles and subject imported articles need not be limited to such strictly defined product types. In this case, the Commission found that imported LRWs competed with domestically produced LRWs in all segments of the U.S. market, including agitator-based TL LRWs, because the record showed competition across all product types.[106]

62. In some cases, it may be possible for a competent authority to make representative price comparisons involving a product type that is produced domestically but not imported by comparing sales prices of the domestically produced product to the sales prices of the imported product that competes most directly with the domestic product, despite physical differences that prevent the two products from satisfying the same pricing product definition. As discussed in response to question 34(b) above, the Commission collected such information in *LRWs from China* and relied on the information in the safeguard investigation to find that subject imports competed with domestically produced agitator-based TL LRWs.[107] The availability and suitability of such types of data would need to be assessed on a case-by-case basis.

**d. To both parties. Korea contends in paragraph 396 of its first written submission that the USITC omitted agitator-based TL LRWs from the price analysis and consequentially the product categories used by the USITC in its price analysis were not representative of the US market. The United States responds in paragraph 301 of its first written submission that around half of the domestic industry's shipments consisted of LRWs other than agitator-based TL LRWs. Please confirm the pricing product categories adopted by the USITC covered all LRWs other than agitator-based TL LRWs.**

63. The United States confirms that the six pricing product categories adopted by the Commissions covered all types of LRWs other than agitator-based TL LRWs, which accounted for around half of domestic industry shipments during the period of investigation. Specifically, the six pricing products included three FL LRWs and three impeller-based TL LRWs, all Energy Star rated an with a white finish but with different combinations of features (such as water

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

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

heaters, steam cycles, and clear or tinted windows for TL LRWs) and capacity ranges (from 3.7-4.2 cubic feet to 4.7-5.2 cubic feet).[108] Confirming that these six products were representative of competition between domestic and imported LRWs in the U.S. market, they were selected by both domestic producers and respondents in *LRWs from China* and largely endorsed by respondents in their comments on the draft questionnaires in the safeguard investigation.[109]

64. The Commission also found that the pricing data collected for these products covered an "appreciable percentage of domestic producer and importer U.S. shipments covered by the data, which {was} well within the range . . . considered reliable in previous investigations."[110] This coverage confirms that the six products were representative of competition in the U.S. market. Pricing data need not cover all sales in a market to be representative of competition in the market. Indeed, pricing data collected on the basis of strictly defined pricing products that permit apples-to-apples price comparisons will necessarily cover a smaller share of total sales than broadly defined product categories that do not permit such comparisons. As the Commission explained, "in defining pricing products, the Commission must strike a balance between product definitions that are narrow enough to permit apples-to-apples comparisons of directly competitive products but broad enough to yield reasonable coverage of domestic producer and importer shipments."[111] As the panel in *US – Tyres* persuasively explained in endorsing the same type of USITC price comparison methodology as reasonable, "price comparisons . . . undertaken in respect of six different products, each of which was defined by reference to particular size, load index, and speed rating criteria . . . provide{d} a proper basis for comparing prices."[112]

**Question 36: To the United States.**

**Please point to all the relevant parts of the USITC's report where the USITC gave its reasons for excluding agitator-based TL LRWs from the pricing product categories.**

65. The Commission explained that "agitator-based TL LRWs accounted for . . . few import shipments . . . ."[113] In addressing respondents' criticism of the pricing products, including the Commission's rejection of respondents' request for "one additional pricing product definition corresponding to an agitator-based TL LRW," the Commission explained that "the pricing product data on the record of this investigation, based largely on product definitions recommended by respondents, cover an appreciable share of domestic producer and importer U.S. shipments."[114] Contrary to Korea's characterization, the Commission did not "exclude"

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

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

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

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

[112] *US – Tyres (Panel)*, para. 7.255.

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

[114] USITC Report, pp. 41-42, n.255 (Exhibit KOR-1).

certain products from the pricing product categories; rather it selected, after receiving input from all industry participants, the pricing products best *included* to provide comparative pricing data for sales of product types representative of both imported and domestic LRWs throughout the period of investigation.

66. Respondents themselves acknowledged that the Commission should aim for pricing product definitions that that yield "apples-to-apples" price comparisons.[115] Yet, inclusion of a pricing product corresponding to agitator-based TL TRWs would have defeated that purpose because such a product would have yielded few if any price comparisons, given the few import shipments of such LRWs.

67. LG and Samsung unsuccessfully challenged the Commission's rejection of a similar request in their judicial appeal of the Commission's affirmative injury determinations in the antidumping and countervailing duty investigations of LRWs from Korea and Mexico. In that appeal, *LG Electronics, Inc. v. U.S. International Trade Commission*, plaintiffs LG and Samsung "argue{d} that the Commission should have requested quarterly domestic pricing data for {agitator-based TL LRWs}," even though there had been no subject imports of such LRWs.[116] Among the many reasons the U.S. Court of International Trade provided for rejecting this argument, the court held that because "the Commission's purpose in collecting quarterly price data was to make 'apples-to-apples price comparisons based on specifically defined LRW models,'" it was "reasonable for it to have only collected data for the specific models for which there were imports to compare."[117] Because the Commission reasonably limits its collection of pricing data to specific pricing products for which there are imports to compare, the Commission's finding that there were few subject imports of agitator-based LRWs provided a sufficient explanation for its decision to not include an agitator-based TL LRWs among the pricing product categories.

**Question 37:**

**In challenging the six pricing categories adopted by the USITC, Korea notes, relying on submissions made by the Korean respondents before the USITC, that (a) product category 1 covered models that were no longer offered by Whirlpool or GE, and neither were among LG's top-volume FL washers; and (b) many large capacity options were not included in the LRWs pricing data.**[118]

**a. To both parties. On page 43 of the USITC's report, the USITC stated that between the first and last quarters for which pricing data was available, the domestic industry's prices declined *** percent on sales of product 1. How was data for domestic industry prices with respect to pricing category 1**

[115] *See* USITC Report, p. 42, n.255 (Exhibit KOR-1).

[116] LG Electronics, Inc. v. U.S. Int'l Trade Comm'n, 26 F.Supp.3d 1338, 1343, 1350 (Ct. Int'l Trade 2014) (Exhibit US-15) (in its investigation of LRWs from Korea and Mexico, the Commission referred to agitator-based TL LRWs as conventional top-load or CTL LRWs).

[117] LG, 26 F.Supp.3d at 1350 (Exhibit US-15).

[118] Korea's first written submission, para. 400.

**available for the last quarter of the POI if, as Korea contends, pricing category 1 covered models that were no longer offered by Whirlpool or GE?**

68. The Commission found that the domestic industry's prices declined on sales of product 1 "between the first and last quarters for which pricing data are available," which would not necessarily include the last quarter of the period of investigation.[119] Indeed, the Commission recognized that "not all firms reported pricing for all products for all quarters."[120] Nevertheless, the Commission collected sufficient pricing data from domestic producers and importers on their sales of product 1 to compare domestic and imported prices in nine quarters of the period of investigation, and these data showed subject import underselling in seven of nine comparisons.[121] Given this, as well as the moderate to high degree of substitutability between domestic and imported LRWs and the importance of price to purchasing decisions, the Commission reasonably found that the domestic industry's declining prices on sales of product 1 over these quarters resulted from low-priced subject import competition.[122]

**b. To the United States. Please point to the relevant parts of the USITC's determination where it addressed the Korean respondents' argument that many large capacity options were not included in the LRW pricing data.**

69. The Commission addressed respondents' argument that many large capacity options were not included in the LRW pricing data in footnote 255 on pages 41-42 of the report. Specifically, the Commission explained its reasons for rejecting respondents' argument "that the pricing product definitions are unrepresentative because they have not been 'updated' from the investigation of *LRWs from China* to include models featuring greater capacity and different configurations."[123] "In their comments on the draft questionnaires," the Commission explained, "respondents proposed no additional pricing product definitions corresponding to new models introduced since *LRWs from China*," recommending "only one additional pricing product definition corresponding to an agitator-based TL LRW."[124]

70. The Commission also noted that "the pricing product data on the record of this investigation, based largely on product definitions recommended by respondents, cover an appreciable share of domestic producer and importer U.S. shipments."[125] As the Commission explained, "product 5 was proposed by both domestic producers and respondents" in *LRWs from China* and "LG recommended the inclusion of products 1-4 . . . and Samsung endorsed LG's

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

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

[121] USITC Report, p. V-29 (Table V-20) (Exhibit KOR-1).

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

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

[124] USITC Report, p. 41-42 n.255 (Exhibit KOR-1).

[125] USITC Report, p. 42 n.255 (Exhibit KOR-1).

recommended pricing product definitions" in their respective comments on the draft questionnaires.[126]

71. The appropriate time for respondents to have proposed larger capacity pricing products was in their comments on the draft questionnaires. Instead of proposing such products, however, LG and Samsung recommended four of the pricing products adopted by the Commission. Having failed to raise the issue at an appropriate point in the investigation, respondents only objected to the absence of larger capacity pricing products after seeing that the collected pricing product data were unhelpful to them.[127] Thus, the Commission reasonably rejected their argument, and provided a reasoned and adequate explanation for doing so.

**Question 38: To the United States.**

> **Please confirm whether the USITC made any specific injury or causation findings with respect to "covered parts" of LRWs. If yes, please point to the specific parts of the USITC's report that contain such findings.**

72. The Commission made its injury and causation findings with respect to the products under investigation in the aggregate, including both LRWs and covered parts. And nothing in the Safeguards Agreement obligated the Commission to make separate injury and causation determinations with respect to LRWs on the one hand and covered parts on the other.[128]

73. The Commission recognized that imported and domestic covered parts did not directly compete because every manufacturer producers cabinets, tubs and assembled baskets that are dedicated for use in its own washers.[129] Nonetheless, after finding that increased imports of LRWs and covered parts caused serious injury to the domestic industry, the Commission recommended inclusion of covered parts in the safeguard measure as necessary to remedy serious injury and facilitate adjustment.[130] As the Commission explained,

> 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.[131]

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

[127] Respondents raised their argument concerning large capacity pricing products in their joint prehearing brief, filed after the Commission had issued the prehearing staff report containing compilations of the pricing data. *See* USITC Report, p. 41 n.255 (Exhibit KOR-1).

[128] *See* United States' first written submission, paras. 197-199.

[129] USITC Report, p. 16 (Exhibit KOR-1).

[130] *See* USITC Report, pp. 16, 74 (Exhibit KOR-1).

[131] 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

In other words, excluding covered parts would 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 would 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.[132]

**Question 39: To the United States.**

> **If domestically produced covered parts are *like* imported covered parts, and included in the definition of the domestic industry, what in Article 4.2(a) and Article 4.2(b) of the Agreement on Safeguards would permit a safeguard authority to exclude covered parts from the scope of the serious injury or causation determination?**

74. To be clear, the United States did not exclude covered parts from its analysis of serious injury and causation. To the contrary, having found that domestically produced covered parts were like the imported covered parts subject to investigation, the Commission defined the domestic industry as "the producers as a whole of the like . . . products," including producers of covered parts, consistent with SGA Article 4.1(c). Consistent with that definition, the Commission's analyses of serious injury and causation under SGA Articles 4.2(a) and 4.2(b) included covered parts as well as LRWs. For example, the Commission considered the conditions of competition pertaining to covered parts; increased imports with respect to the products under consideration as a whole, including LRWs and covered parts; and the domestic industry's performance with respect to domestic production of covered parts and LRWs.[133]

**Question 41: To the United States.**

> **The USITC explained in its report that 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, from negative percent as a ratio to net sales in 2012 to negative percent as a ratio to net sales in 2016.[134] The USITC stated that Respondents' "joint pricing" theory, if true, could at most explain profit margins on**

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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. *Id.* The President adopted the Commission's recommendation with respect to covered parts.

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

[133] *See* USITC Report, pp. 16-17, 19-20, II-1-2, and Tables II-1, C-2 (Exhibit KOR-1). For its analysis of increased imports, the Commission relied on the data presented in tables II-1 and C-2, which included both LRWs and covered parts. *Id.* at 20, II-1-2 & n.4. Likewise, for its examination of serious injury and causation, the Commission relied on the data in Table C-2, which included both LRWs and covered parts, as well as Alliance's PSC/belt drive TL and CIM/belt drive FL washers. As reflected in the United States' response to Question 16, it is providing a public version of that table, showing trends in key datapoints considered and cited by the Commission pertaining to LRWs and covered parts combined. (Exhibit US-13).

[134] *See, e.g.*, USITC's report, (Exhibit KOR-1), pp. 35-36.

**sales of LRWs that are consistently lower than profit margins on sales of matching dryers.**[135]

**Please clarify whether the USITC made any findings (as alternative findings or part of the main findings) separating and distinguishing the alleged injurious effect of joint pricing, or whether it only found, as United States contends on paragraph 316 of its first written submission, that joint pricing did not explain any of the injury to the domestic industry.**

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

76. As explained in the U.S. first written submission, the Commission found, based on a thorough examination of all the evidence, that "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."[136] In particular, Whirlpool's Chairman and CEO emphatically testified that Whirlpool did not engage in such a practice, but rather evaluated its washer business by itself.[137] GE explained that it does not manufacture dryers domestically, but imports them under a contract manufacturing agreement that precludes outsized profits on dryers; therefore it does not and cannot use profits on sales of dryers to compensate for losses on sales of LRWs.[138] Whirlpool and GE also maintained that matching washers and dryers were seldom sold together or at the same net wholesale price, although respondents provided some conflicting evidence.[139] The Commission examined all the evidence proffered by respondents and concluded that it did not rebut the sworn testimony of the Whirlpool and GE officials themselves that they seldom sell LRWs and matching dryers together at wholesale and never at the same net wholesale price.[140] Consistent with this testimony, domestic producers reported in their questionnaire responses that few LRWs were sold "paired" with matching dryers.[141] Thus, the Commission provided a reasoned and adequate explanation for its finding that the record did not support respondents' joint pricing theory.

[135] *See, e.g.*, USITC's report, (Exhibit KOR-1), p. 36.

[136] *See* United States' first written submission, paras. 317-329.

[137] USITC Report, pp. 34-35 (Exhibit KOR-1).

[138] USITC Report, pp. 34-35 (Exhibit KOR-1).

[139] USITC Report, p. 35 & n.216 (Exhibit KOR-1).

[140] USITC Report, p. 46 n.277 (citing Hearing Tr., 157 (Tubman) (Exhibit US-2), 160-61 (Tubman), 162 (Pepe)) (Exhibit KOR-1); *see also* United States' first written submission, paras. 321-223.

[141] USITC Report, p. 46 n.277 (Exhibit KOR-1).

77. The Commission could have ended its analysis of respondents' joint pricing theory at that point, having concluded that the theory was unsupported by the record. Because it was unsupported by the record, respondents' joint pricing theory did not qualify as a "factor{} other than increased imports . . . causing injury to the domestic industry at the same time" within the meaning of SGA Article 4.2(c). There was therefore nothing for the Commission to separate and distinguish from the injury caused by increased imports. On this basis alone, the Commission's analysis of respondents' joint pricing theory fully complied with SGA Article 4.2(c). As indicated below, the Commission did not end its analysis at this point, but also provided an *arguendo* evaluation of another element of the argument.

**Were the statements and explanations quoted above provided as part of any non-attribution analysis, or as part of the USITC's explanation that joint pricing did not explain any injury to the domestic industry?**

78. The statements and explanations quoted by the Panel are taken from the Commission's further analysis of respondents' joint pricing theory, which was also part of the Commission's explanation that joint pricing did not explain any injury to the domestic industry.

79. Notwithstanding the Commission's finding that respondents' joint pricing theory was unsupported by the record, the Commission proceeded to find that, even assuming *arguendo* that "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 . . . ."[142] Respondents' joint pricing theory claimed that the domestic industry's alleged practice of selling LRWs and matching dryers for the same price yields lower profits on sales of LRWs that are compensated for by higher profits on sales of matching dryers, which cost less to produce.[143] As the Commission pointed out, "respondents' theory, if true, could at most explain profit margins on sales of LRWs that are consistently lower than profit margins on sales of matching dryers" for Whirlpool, which was the only domestic producer of matching LRWs and dryers.[144] But instead of maintaining the modest level of profitability achieved on sales of LRWs in 2012, Whirlpool suffered dramatically worsening operating losses during the period of investigation, despite strong demand growth and competitive new LRW models.[145] Whirlpool's worsening losses could not have resulted from any joint pricing of LRWs and dryers, the Commission explained, because "{r}espondents do not claim that Whirlpool compensated for these increasing losses with increasing profits on sales of matching dryers, nor explain how Whirlpool could have earned increasing profits on sales of dryers when dryer prices would have declined with matching LRW prices during the period of investigation" under their theory.[146]

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

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

[144] USITC Report, pp. 45-46 (Exhibit KOR-1).

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

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

80. It was mathematically impossible for Whirlpool or any domestic producer to pursue a joint pricing strategy that yielded worsening losses on sales of LRWs compensated by increasing profits on sales of matching dryers sold for the same price, even if doing so were not economically unsound. For this reason also, the Commission found that respondents' joint pricing theory could explain none of the domestic industry's worsening losses on sales of LRWs during the period of investigation, leaving nothing to separate and distinguish from injury caused by increased imports.

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

**Question 45 (To the United States):**

> **In paragraph 54 of its first written submission, the United States submits that the USITC's report contains a description of the tariff obligations at issue, including the bound most favoured nation (MFN) rate. Please point to the relevant parts of the USITC's report where the USITC refers to the relevant bound MFN rate. In doing so, please quote the relevant bound MFN rate identified by the USITC in its report that reflects the WTO tariff obligations.**

81. Page I-24 of the USITC Report contains this information.

**Question 46 (To both parties):**

> **Could a Member meet its obligations under Article XIX:1(a) with respect to the second circumstance ("the effect by the obligations incurred") solely by showing in its published report that it has undertaken tariff obligations with respect to the product at issue? If the answer is no, how could a Member meet its obligations under Article XIX:1(a) in this regard?**

82. As the United States has pointed out elsewhere, the "obligations incurred . . . including tariff concessions" language in Article XIX:1(a) sets out a factual circumstance in which a safeguard measure is available.[147] A simple recitation of a relevant tariff concession establishes the existence of that circumstance; no more is needed. The rationale is obvious. Where a concession under GATT 1994 Article II prevents the Member experiencing an injurious increase in imports from taking tariff action to address the problem, the increase is indisputably "the effect of" the concession.

83. We note the *Korea – Dairy (AB)* report reasoned correctly that "With respect to the phrase 'of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions,' we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions."[148] The United States considers that this reasoning is straightforward and persuasive. This understanding leads us to answer that a Member could indeed demonstrate its compliance with the "obligations incurred" language in Article XIX:1(a)

[147] *See* U.S. first written submission at paras. 28-32, 41; U.S. Panel Videoconference Opening Statement, para. 8.

[148] *Korea – Dairy (AB)*, para. 84.

solely by showing in the published report that it has undertaken tariff obligations with respect to the product at issue. In that sense, the U.S. answer to the first sentence of this question is "yes," and the second sentence does not apply.

84. Nonetheless, the United States provides some further observations to assist the Panel in its evaluation of Korea's claim. Under Article XIX:1(a), a Member meets its obligation with respect to the second circumstance when, as a matter of fact, the effect of obligation incurred, including tariff concessions, is that imports are entering its territory in increased quantities. How and when a Member *demonstrates* that this is the case is a separate question of formalities that Article XIX:1(a) does not address. That silence leaves a Member flexibility as to how and when it *demonstrates* that it has complied with the obligation. It might set out that demonstration via any means that it considers appropriate, for example in the report of the competent authorities, in a separate document, in a notification to the Committee on Safeguards, or in response to a claim raised in dispute settlement.. A panel facing a claim under Article XIX:1(a) would need to address that demonstration – wherever it appeared – in making a factual finding as to whether at the time of taking the safeguard measure, the increased imports were "the effect of the obligations incurred . . . including tariff concessions.

**Question 47 (To the United States):**

> **In paragraph 75 of its first written submission, Korea notes that the panel in *Dominican Republic - Safeguards Measures* "clarified that it does not suffice that tariff concessions have been made in respect of the relevant product, but that it still falls on the Member in question to link these obligations to the increased imports and reflect these considerations in the published report".[149] The Panel also notes that in paragraph 7.89 of its report, the panel in *India – Iron and Steel* stated that "with respect to the effect of a GATT 1994 obligation, the competent authority's published report must demonstrate that a WTO Member imposing a safeguard measure is subject to an obligation (or obligations) under the GATT 1994 and explain how that obligation constrains its ability to react to the import surge causing injury to its domestic industry".**
>
> **Please comment on the findings of these panels regarding the relevant obligations under Article XIX:1(a) of the GATT 1994 with respect to the "effect of the obligations incurred".**

85. As an initial matter, the United States has expressed elsewhere, including in its closing statement at the Panel's videoconference with the parties, that panel and Appellate Body reports in other disputes are germane only to the extent the reasoning contained in them is persuasive as it applies to the facts at hand.[150] They are not law or in any sense binding.

86. The United States submits that the reasoning in the quoted passages in *Dominican Republic – Safeguards* and *India – Iron and Steel* is unpersuasive insofar as those panels extended to the "obligations incurred" language the flawed logic regarding "unforeseen

[149] Korea's first written submission, para. 75 (quoting Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.146-7.149).

[150] U.S. Panel Videoconference Closing Statement, paras. 27-28.

developments" in the *US – Lamb* and *US – Steel Safeguards* appellate reports. In *Dominican Republic – Safeguard Measures*, the report quotes the Appellate Body's statement in *Argentina – Footwear* that, "we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions."[151] But with no explanation or support, the report next states that: "It then falls to the importing Member to identify those obligations incurred under the GATT 1994 that are linked with the increase in imports causing serious injury to its domestic industry. These findings and conclusions *must be reflected in the report* of the competent authority."[152] The problem with this statement is that it simply assumes that "identifying" (itself not Agreement text) obligations requires "findings and conclusions," and that these must appear in the report of the competent authorities. The absence from the Safeguards Agreement of an obligation to address "obligations incurred" means that, as with most other WTO obligations, a Member need not demonstrate compliance in a report of its competent authorities.

87. In *India – Iron and Steel*, the panel's finding is even more nominal. The paragraph cited by Korea simply states, with no explanation whatsoever, that

> With respect to the effect of a GATT 1994 obligation, the competent authority's published *report must demonstrate that* a WTO Member imposing a safeguard measure is subject to an obligation (or obligations) under the GATT 1994 *and explain how* that obligation constrains its ability to react to the import surge causing injury to its domestic industry.[153]

In a similar vein, the panel declined to consider an argument made by India with regard to obligations occurred simply because "India's argument on Article XXIV is an ex post explanation, because the Indian competent authority's consideration of the effect of the GATT obligations does not include any reference to the obligations with respect to customs unions and free-trade areas contained in Article XXIV."[154]

88. In both these instances, the panel simply assumed without textual basis (while perhaps quoting but not critically examining a prior report[155]) that compliance with the first clause of Article XIX:1(a) of GATT 1994 must be established in the report of the competent authorities. But, as the United States has shown, that view represents a faulty reading of both GATT 1994 and the Safeguards Agreement. Therefore, this panel would be mistaken in following that view.

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[151] *Accord Korea – Dairy (AB)*, para. 84.

[152] Emphasis added.

[153] *India – Iron and Steel (Panel)*, para. 7.89 (emphasis added).

[154] *India – Iron and Steel (Panel)*, para. 7.120.

[155] *India – Iron and Steel (Panel)*, para. 7.6.

**Question 48 (To the United States):**

> **Paragraph 19 of Korea's opening statement at the first substantive meeting states as follows: "[T]he U.S. argues that the ITC Report contains an explicit demonstration that the U.S. incurred obligations under the GATT 1994, which prevented it from increasing tariffs to 'modulate the increase in imports'. This unsubstantiated assertion is refuted by its admission that the ITC Report merely 'contain a description of the tariff lines at issue, including the bound (MFN) rates', but no examination, finding and supporting explanation of how such tariff commitments *resulted in* the increased imports".[156]**
>
> **Please clarify if the USITC report contains any examination, finding or explanation regarding the "effect of the obligations incurred" by the United States, including tariff concessions, within the meaning of Article XIX:1(a) of the GATT 1994. If yes, please quote the relevant parts of the USITC report that set out such an examination, finding or explanation.**

89. The USITC report does not merely identify the tariff lines and bound rates for the United States. It also notes in a number of places (see page 36 and note 219, page 44, and pages I-4-5, F-4-F-5) 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.[157] These passages supplement and provide additional context to the identification of the U.S. obligations incurred through tariff concessions, and could, but need not, be taken into account by the Panel.

**Question 50 (To both parties):**

> **In paragraph 15 of its first written submission the United States notes that a WTO panel must not conduct a *de novo* evidentiary review. Is it possible for a panel to evaluate whether an increase in imports was as a result of unforeseen developments based on argumentation and evidence presented exclusively in dispute settlement proceedings without conducting a *de novo* evidentiary review?**

90. This question raises two different issues – whether the report of the competent authorities complies with the obligations placed upon the competent authorities and the separate question whether the Member has complied with obligations placed directly on the Member. This second category includes obligations like those in Article 5 of the Safeguards Agreement that do not pertain to the competent authorities' findings and its report. As the United States stated in its first written submission, "[i]n reviewing *agency* action, the Panel must not conduct a *de novo* evidentiary review."[158] As the United States has explained, unforeseen developments is a factual circumstance of Article XIX, not a condition relevant to Safeguards Agreement Articles 2, 3, or 4, and therefore it is not in the purview of agency findings. Because neither Article XIX nor the Safeguards Agreement charges the competent authorities with making findings as to unforeseen

[156] Emphasis in original.

[157] USITC Report, pp. 36 &n.219, 44, I-4-5 (Exhibit KOR-1).

[158] U.S. first written submission at para. 15 (citing *US – Lamb (AB)*, paras. 105-07; *Korea – Dairy (Panel)*, para. 7.30) (emphasis added).

developments, the concept of *de novo* review of agency action does not apply. A panel may properly base its evaluation of such claims on argumentation and evidence presented exclusively in a WTO dispute resolution proceeding. That is, in fact, the way panels address compliance with most WTO obligations.

**Question 51 (To the United States):**

> **The United States contends that it did not breach Article XIX:1(a) of the GATT 1994 in imposing a safeguard measure because the evidence shows that imports increased as a result of unforeseen developments.[159] In relation to this contention, the United States refers in paragraph 35 of its first written submission to some findings made by the USITC. The Panel notes that in paragraph 20 of its first written submission, the United States also submits that the absence of a finding on the issue of unforeseen developments in the USITC's report does not signify an inconsistency with Article XIX of the GATT 1994 or Articles 1 and 3.1 of the Agreement on Safeguards.**
>
> **Please confirm whether the USITC's report contains any finding on unforeseen developments within the meaning of Article XIX:1(a) of the GATT 1994 and if yes, please point to the relevant parts of the USITC's report that contain such a finding.**

91. The USITC report does not contain a finding on unforeseen developments within the meaning of Article XIX:1(a) of the GATT 1994. However, that report does provide explanations of circumstances that qualify as unforeseen developments. As the United States explained in its first written submission, the USITC noted that, "Whirlpool and GE state that they did not foresee that LG and Samsung would move their production of LRWs for the U.S. market first from Korea and Mexico to China, and then from China to Thailand and Vietnam, and escape the disciplining effect of the resulting antidumping and countervailing duty orders, moves that … would have cost hundreds of millions of dollars."[160]

92. These observations demonstrate the existence of unforeseen developments because, if knowledgeable industry participants did not foresee such rapid shifts in production in the 2012-2016 period, it follows that the Uruguay Round negotiators did not foresee such events 18 years earlier. In that respect, these are not "normal" commercial developments, as Korea has suggested.[161] Indeed, Korea acknowledged in its closing statement at the Panel's videoconference that these production moves entailed "huge costs and expenses" that "{n}o reasonable producer" would have undertaken to avoid trade remedy measures.[162] The vantage point from which to judge what is unforeseen is not in retrospect, but rather from the point of view of the negotiators at the time they negotiated and undertook the relevant obligations. Or to put it another way, unforeseen is not the same as unforeseeable. The latter, by definition, is more expansive than the former, but the former is the circumstance set out in GATT Article XIX.

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[159] United States' first written submission, para. 38.

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

[161] *See* Korea first written submission, para. 87.

[162] Korea Panel Videoconference Closing Statement, para. 5.

**Question 52 (To the United States):**

> **In paragraph 55 of its first written submission the United States submits that the USITC's report demonstrates that the United States undertook obligations with respect to the product at issue in the underlying investigation. Please confirm whether in the United States' view the published report of the competent authorities must identify the second circumstance of Article XIX:1(a), i.e. "the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions".**

93. Nothing in Article XIX:1(a) or the Safeguards Agreement requires that the identification of the relevant tariff concession appear in the report of the competent authorities. Article XIX:1(a) itself does not mention the competent authorities, and the provisions of the Safeguards Agreement that set out the duties of the competent authorities do not reference the identification of "obligations incurred . . . including tariff concessions." Thus, had the USITC report been silent as to the tariff treatment applicable to washers, the United States would have been free to identify the bound tariff rate and relevant concession for the first time in this dispute. This point, however, is moot, as the USITC Report explicitly describes the U.S. tariff treatment of washers, which is bound in the U.S. Schedule to GATT 1994.[163]

### 6 Claims under article 5.1 and 7.1 of the agreement on safeguards

**Question 54 (To the United States).**

> **In paragraph 361 of its first written submission, the United States explains that the USITC's partial equilibrium model also accounted for existing trade remedies in the sense that country-specific duty rates entered as inputs would have reflected subsidy and dumping duties.**
>
> **Please explain how this model was applied by the USITC and how the subsidy and dumping duties were taken into account.**
>
> **Please also point to the relevant parts of the record that show, that in applying the partial equilibrium model, the USITC used country-specific duty rates as inputs, which reflected subsidy and dumping duties.**

94. In the United States' system, the USITC is the competent authority that determines whether increased imports have caused serious injury or threat thereof. Section 202(e)(1) of the Trade Act of 1974 also calls on the ITC to "recommend the action that would address the serious injury, or threat thereof, to the domestic industry and be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition."

95. The recommendation is separate from the USITC's determination of serious injury, and outside of its role as the competent authority of the United States. It is in the context of its recommendation that the USITC referenced an economic model developed by its staff.[164]

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[163] *See* U.S. first written submission, paras. 52-55.

[164] USITC December Report, pp. 73, 75, 77-78 and 81-84.

96. In the section of its report on the recommended remedy, the Commission first addressed the arguments of the parties and the supporting evidence they provided.[165] It then explained that:

> We used an industry-specific partial equilibrium model to estimate changes in prices and quantities of imports and domestic products that compete with them in the U.S. market for large residential washers, changes in the revenues and operating income of U.S. producers from their domestic shipments, and changes in U.S. tariff revenues that would result in different remedy scenarios.[166]

97. The USITC cited the modeling result as "additional support for our remedy recommendation."[167] With respect to the antidumping and countervailing duty orders, the Commission explained that

> In light of the apparent disciplining effect of the existing orders on imports of LRWs from Korea and Mexico, in modeling the likely effect of our recommended remedy on imports from countries excluded from the remedy (which would primarily consist of imports from Korea and Mexico), we have assumed that changes in prices would have a relatively small impact on the supply of such LRWs and used an elasticity of foreign supply on the low end of the range recommended by Commission staff.[168]

The Remedy Modeling Attachment, at pages 81-84 of the Commissioners' Opinion, describes the model and its inputs. Country-specific duties were taken into account in the model when simulating the incremental effects of a safeguard remedy, in which existing duties were constant in the simulations.

98. Section 203(a)(2) requires the President to take the ITC recommendation into account in deciding what remedy to impose, and Proclamation 9694 indicates that he did so.[169]

## 7 Claims under articles 12.1 and 12.2

**Question 57 (To the United States):**

> **The Panel refers to the United States' notification under Article 12.1(a) of the Agreement on Safeguards in the LRW investigation (Exhibit KOR-15), which states that the USITC "initiated the investigation on 5 June 2017". Please confirm whether the USITC initiated the investigation on 5 June 2017.**

[165] USITC December Report, pp. 66-73.

[166] USITC December Report, p. 73.

[167] USITC December Report, p. 73.

[168] USITC December Report, p. 68.

[169] Proclamation 9694, recital 5 (Exhibit KOR-3).

**a. If no, please clarify why the United States' notification states that the USITC initiated the investigation on 5 June 2017.**

99. As explained in the United States' first written submission, and Exhibits US-1 and KOR-15, the USITC initiated the investigation on June 5, 2017.

**b. If yes, did the USITC initiate the investigation on 5 June 2017 but publish the USITC notice set out in Exhibit USA-1 on 13 June 2017?**

100. That is correct. The USITC issued and published the notice through its website on June 7, 2017, as indicated in Exhibit US-1.[170] The notice was subsequently officially published in the U.S. *Federal Register* on June 13, 2017. The six days between issuance (on a Wednesday) and official publication (on a Tuesday) is in line with the normal practice of the *Federal Register*, which is issued every weekday (except for Federal holidays). In accordance with normal Federal Register procedure, the *Federal Register* version of the notice also would have been available for public inspection (online), at least one business day prior to the publication date of June 13, 2017.

**Question 60 (To the United States):**

**Please submit as Exhibits the documents cited in footnotes 818, 820, 821, 824, 825, 828, 830, 831, and 832 of the United States' first written submission. Please also confirm that the document cited by the United States in footnote 829 of its first written submission is the same document submitted by Korea as Exhibit KOR-3. If not, please also submit this document as an Exhibit.**

101. The responsive documents are attached as Exhibits US-16 through US-22. We also confirm that the proclamation text cited in footnote 829 is found in Exhibit KOR-3.

**Question 62 (To the United States):**

**In paragraph 556 of its first written submission, Korea notes that the United States notified the decision to apply the safeguard measure three days after the decision, which per Korea is inconsistent with the United States' obligation under Article 12.1(c) to immediately notify the WTO of its decision to apply the LRW safeguard measure. Please comment.**

102. Korea's argument on this issue is noteworthy for its failure to relate the facts it lays out to the legal obligation under Article 12.1(c) to "immediately notify the Committee on Safeguards upon . . . taking a decision to apply . . . a safeguard measure." Korea simply notes the three-day period between the date of Proclamation 9694 and the date of the U.S. notification of the proclamation. It then asserts that because the notification was three pages long and did not require translation, its submission three days after signature of the proclamation was not "immediate," as if the conclusion were self-evident. Korea is mistaken on many levels.

103. First, as a legal matter, evaluation of whether a Member has "immediately" notified the Committee on Safeguards for purposes of Article 12.1(c) is not a simple arithmetic test. As the

[170] 82 Fed. Reg. at 27,078.

United States noted in its first written submission, the appellate report in *US – Wheat Gluten* examined the ordinary meaning of the term and correctly explained that:

> As regards the meaning of the word "immediately" in the chapeau to Article 12.1, we agree with the Panel that the ordinary meaning of the word immediately "implies a certain urgency." The degree of urgency or immediacy required depends on a case-by-case assessment, account being taken of the administrative difficulties involved in preparing the notification, and also of the character of the information supplied. As previous panels have recognized, relevant factors in this regard may include the complexity of the notification and the need for translation into one of the WTO's official languages. Clearly, however, the amount of time taken to prepare the notification must, in all cases, be kept to a minimum, as the underlying obligation is to notify "immediately".[171]

104. Second, Korea's simplistic description of the issuance of Proclamation 9694 and the subsequent notification omits many relevant facts. In particular, evaluation of the washers safeguard measure proceeded in parallel with another safeguard measure on solar products. The proclamations for both safeguard measures were signed on the same day, putting an extraordinary burden on the government officials involved. Staff obligations did not end upon signature. They needed to inform the agencies charged with administering the safeguard measure, and respond to questions from the public, including representatives of affected foreign governments and foreign producers of washers affected by the measures. The United States also considered that it was critical to obtain a formal copy of the proclamation to submit with the notification. However, the process for handling official Presidential documents has a number of formalities that slowed receipt of those copies.

105. Third, Korea's assertions ignore that notifications are formal statements on behalf of a Member's government. As such, the fact that a document is three pages long does not mean that its preparation is simple. Responsible officials must extract relevant information from the documents, distill it to ensure maximum comprehensibility, seek comments from other relevant officials, and execute any necessary changes requested by those officials. Even for a short document, obtaining these sorts of clearances take time, which is necessary to ensure that the notification accurately and completely reflects the views of the Member taking the safeguard measure.

106. Finally, Korea's simple comparison of the dates of the relevant documents ignores that there is a time difference between Washington, DC, and Geneva. Proclamation 9694 was signed after close of business in Geneva on January 23, 2018. The United States transmitted the notification to Geneva in the evening on January 25, 2018, after close of business in Geneva. Thus, the gap between the signature of the proclamation and the notification was actually *two* days.

[171] *US – Wheat Gluten (AB)*, para. 105.

107. In light of these considerations, the United States clearly complied with its obligation under Article 12.1(c) to notify the Committee on Safeguards immediately upon taking a decision to apply a safeguard measure.

**Question 63 (To the United States):**

> **In paragraph 398 of its first written submission, the United States notes that on 9 December 2017 it submitted to the Committee on Safeguards what it describes as the third notification. In paragraph 411 of its first written submission, the United States notes that it announced its readiness for consultations on 11 December 2017, in the third notification. Please confirm whether the third notification was submitted to the Committee on Safeguards on 9 December 2017 or 11 December 2017.**

108. As reflected in Exhibit US-17, the Third Notification was "communicated," or notified, by the United States to the Safeguards Committee on December 9, 2017, and circulated on December 11, 2017.

**Question 64:**

> **In paragraph 530 of its first written submission, Korea contends that it learnt of the "effective date" of the LRW safeguard measure 12 days before the measure entered into force.**
>
> **a. To the United States. Please comment on Korea's contention.**

109. Korea's statement is incorrect. By U.S. statute, the effective date of any safeguard action the President takes is within 15 days from the date of proclamation, which is this case is January 23, 2018.[172] On January 23, 2018, the White House released the text of the proclamation to the public via whitehouse.gov, accompanied by a press release. The proclamation text and accompanying changes to the HTSUS appeared in the Federal Register, as Presidential proclamations normally do, two days following the proclamation. Korea also was actively involved in the washers safeguard proceeding at the USITC and testified during the injury hearing in support of the positions taken by the two Korean respondents, Samsung and LG, during the USITC's remedy hearing, and at a hearing chaired by the U.S. Trade Representative to consider what action the President should take. In light of these facts, Korea had both constructive and actual knowledge of the effective date of the safeguard measure on January 23, 2018, 15 days in advance of the measure taking effect.

**Question 65:**

> **In paragraph 417 of its first written submission, the United States submits that Korea errs in assuming that 7 February 2018 is the last day relevant to its claim under Article 12.3 of the Agreement on Safeguards.**
>
> **a. To the United States. Please confirm that the safeguard measure entered into force on 7 February 2018.**

[172] 19 U.S.C. §2253(d).

110. The United States confirms that the safeguard measure went into effect on February 7, 2018.

**b. To both parties. In paragraph 7.534 of its report, the panel in *Ukraine - Passenger Cars* stated that "Article 12.3 requires a Member proposing to apply a safeguard measure to provide an adequate opportunity for prior consultations with WTO Members having a substantial interest in exporting the product concerned". Per this panel, as "these consultations are meant to be 'prior consultations' on the proposed safeguard measure, they must precede the application of a safeguard measure".[173]**

**Please comment on these statements by the *Ukraine - Passenger Cars* panel.**

111. The United States considers that the ordinary meaning of "prior" is that the consultations come *before* something and, that in the context of Article 12.3, that something is logically the application of the safeguard measure. The United States assumes that the *Ukraine – Cars* panel was following a similar logic when it equated "prior consultations" with those that "precede the application of a safeguard measure."[174] However, that panel erred in failing to consider that the obligation is not to *conduct* "prior consultations," but to "provide an adequate opportunity for" prior consultations. A Member complies with this obligation as long as the *opportunity* is adequate, and without regard as to whether all "Members having a substantial interest as exporters of the product" actually take that opportunity.[175]

112. The washers proceeding provides illustrative examples. Thailand asked to conduct consultations on January 8, 2018, before the announcement of the actual measure. It did not ask for further consultations afterward. Therefore, it apparently considered that the earlier consultations were sufficient for it to represent its interests. China requested consultations before the February 7, 2018, effective date of the measure, but chose to schedule the actual consultations afterward. It has not alleged that the United States failed to provide an adequate opportunity for prior consultations.

113. The United States also reiterates a point it made in the first written submission – that consultation**s** (in the plural) are a process, and not necessarily a single point in time. Article 12.3 signals this fact by calling for consultations to review the information provided in response to notifications under Article 12.1(b) (following a determination of serious injury) and under Article 12.1(c) (following the announcement of the decision to take a safeguard measure). Thus, the adequacy of the opportunity for prior consultations may be informed by circumstances leading up to and following the consultations. In the washers safeguard proceeding, the United States provided numerous opportunities for representatives of exporters and Members with

[173] Fns omitted.

[174] *Ukraine – Cars (Panel)*, para. 7.534.

[175] To read the provision to require actual consultations would create perverse incentives for Members potentially subject to safeguard measures to delay consultations so as to preclude imposition of the measures.

significant export interests to make their views known, including with regard to any business confidential information made available to their legal representatives.

114. The United States also explicitly provided for consultations to continue after the effective date of the safeguard measure. Thus, the exchange of views did not face a hard stop, and there was time to further explore proposals or alternatives as necessary, with the potential that the President could modify the measure in response to any agreement reached. This chance to continue discussions should inform the evaluation of the adequacy of the prior consultations.

115. Finally, Korea's argument ignores the context of SGA Article 1, which provides that the Safeguards Agreement "establish rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994." Article XIX, in turn, authorizes a Member to take "Emergency Action on Imports of Particular Products." The key word is "emergency," which can mean "a serious, unexpected, and often dangerous situation requiring immediate action."[176] At the time that a Member has decided to take a safeguard measure, its competent authorities will have determined, in accordance with SGA Article 2.1, that increased imports are causing serious injury or threat of serious injury to a domestic industry. The Member itself will have decided that a safeguard measure is necessary to prevent or remedy the serious injury. It would be inconsistent with the existence of this emergency to read Article 12.3 as calling for an extended period of time to consult before the Member experiencing serious injury may respond.

[176] Oxford English Dictionary, *available at* https://www.lexico.com/en/definition/emergency.