

*United States – Safeguard Measure on Imports of Large Residential Washers*

**(DS546)**

**INTEGRATED EXECUTIVE SUMMARY OF  
THE UNITED STATES OF AMERICA**

**August 10, 2021**

## **EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION**

1. The financial situation of the U.S. washers industry commenced a sustained decrease beginning in the 2013-2014 period, as confirmed by information gathered by the USITC (U.S. International Trade Commission or “Commission”) in the global safeguard investigation Korea has challenged. The pervasive underselling by imported “LRWs” led to a doubling of imports that peaked in 2016. These increasing imports at low prices undersold, suppressed and depressed prices for domestically produced washers, leading to significant and worsening operating losses for the domestic industry producing like or directly competitive products. This precipitous decline occurred despite market conditions that were otherwise favorable to the domestic producers, including increasing domestic demand and the availability of domestic products that customers perceived as being as good as or better than competing imports.

2. The domestic industry first sought to resolve the difficulties posed by increasing imports by seeking antidumping and countervailing duty measures. Instead, each antidumping measure (on washers from Korea, Mexico, and China) and countervailing duty measure (on washers from Korea) prompted a shift in production to a country where washers for export to the United States were not subject to such remedies.

3. In 2017, the domestic industry filed a petition with the USITC requesting imposition of a safeguard measure on imports of LRWs and covered parts from all sources. (“Covered parts” is a limited category that includes only the three largest components of a washer, and not the myriad of parts incorporated in the finished product.) The Commission conducted an investigation and found that increased imports were causing serious injury to the domestic washers industry, and recommending the imposition of TRQs on LRWs and covered parts. The President imposed a safeguard measure, similar in most respects to the USITC’s recommendation, that he determined “will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.”

4. Korea claims that the washers safeguard measure and underlying investigation by the USITC were inconsistent with the GATT 1994 and the SGA. However, the arguments it advances in support of its claims are wrong. Korea relies on multiple misunderstandings of the relevant obligations, fails to take account of the totality of the evidence, and distorts the findings of the competent authorities.

5. Korea does not address the factual question of whether the increased imports were “as a result of unforeseen developments.” It mistakenly assumes that all it needs do to establish an inconsistency with Article XIX:1(a) of GATT 1994 is to show that the competent authorities did not make an explicit finding on this point. Korea misunderstands the text and context for Article XIX:1(a) and SGA Articles 1 and 3.1, and by relying on erroneous Appellate Body statements, seeks to read into the text of Article XIX and the SGA an obligation that is not there. In fact, the evidence establishes that foreign producers developed an unforeseen ability to rapidly increase their production of LRWs for the U.S. market and then shift production rapidly among countries to avoid the effects of trade measures, and that the increase in imports was a result of this

unforeseen development. Korea also errs in its arguments regarding the “obligations incurred.” The USITC Report explicitly described the tariff concessions the United States took on with respect to the LRWs at issue in this investigation, which is sufficient to establish that the increased imports were “a result of . . . the obligations incurred by a contracting party under this Agreement, including tariff concessions.”

6. The USITC’s serious injury determination is WTO-consistent. The USITC properly defined the domestic like product and the domestic industry, and explained its conclusions. The USITC further examined conditions of competition, the injury factors, and alternate causes of injury put forward by the parties before it, and explained its conclusions at great length. The USITC found that the domestic industry was seriously injured. As the Commission explained, the domestic industry invested heavily in the development and production of competitive new LRWs during the period of investigation, and should have been well positioned to capitalize on the concurrent increase in apparent U.S. consumption. The Commission found that instead “the domestic industry’s financial performance declined precipitously during the period of investigation, necessitating cuts to capital investment and R&D spending that imperil{ed} the industry’s competitiveness.” The Commission found that these factors represented a “significant overall impairment in the position of” the domestic industry. In light of “strong demand growth, rising costs, and the competitiveness of the domestic industry’s LRWs,” the Commission found that “the only explanation for the domestic industry’s declining prices and increasing COGS to net sales ratio is the significant increase in low-priced imports of LRWs during the period of investigation.”

7. The U.S. imposition of the washers safeguard measure is consistent with SGA Articles 5.1 and 7.1. The measure remedied the injury caused by imports – and only the injury caused by imports – with two elements. It addressed the increase in imports by imposing a TRQ set at the average level of imports for the 2014-2016 period during which the serious injury occurred, with an out-of-quota tariff that would likely be preclusive. The measure addressed the low prices with an in-quota tariff set at a level to reduce or eliminate price suppression or depression. On covered parts, the United States imposed a TRQ at a level reflecting import volumes during the period of investigation, which parties agreed were used almost exclusively to repair previously sold models, with a substantial additional amount to facilitate foreign producers’ efforts to ramp up production at new U.S. facilities. The measure imposed no in-quota duty, and an out-of-quota rate set so as to lessen any incentive for Samsung and LG to displace their expected U.S. production of machines or covered parts with imported covered parts for simple assembly. Korea’s assertion that this combination of elements went beyond “the extent necessary to prevent or remedy serious injury and to facilitate adjustment” for purposes of SGA Article 5.1 is baseless. By tailoring the safeguard measure to address aspects of imports that the Commission identified as injurious, the United States stayed within the limits laid out in Article 5.1. Korea offers no support for its claim under Article 7.1 that the United States applied the safeguard for a longer period of time than is necessary.

8. There is no basis for Korea’s claims under SGA Articles 8 and 12 regarding notification and consultation requirements. The United States notified the Committee on Safeguards at each relevant step of the process toward adoption of the washers safeguard measure, from institution

of the investigation on June 12, 2017, through the announcement of the definitive safeguard measure on January 23, 2018. At each stage, the United States made its notification within one week of the triggering event – well within the periods that past panel and appellate reports have accepted as sufficient for purposes of SGA Article 12.1. Each of the notifications contained all of the relevant information available at the time, except as necessary to protect information submitted to the USITC on a confidential basis, in accordance with the obligation under SGA Article 3.2. The United States provided an opportunity for prior consultations beginning on December 11, 2017, and provided for consultations to continue through February 22, 2018. Through this process, the United States provided an opportunity for prior consultations with Members having a substantial interest as exporters of the product, as required under Article 12.3, and endeavored to maintain a substantially equivalent level of concessions and other obligations with those Members, as required under Article 8.1. Members representing the most voluminous exporters of covered washers during the investigation period consulted with the United States from December 11, 2017 – February 22, 2018. Despite Korea’s assertions to the contrary, the United States’ actions were consistent with SGA Articles 8.1, 12.1, 12.2, and 12.3.

#### **EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT PANEL’S FIRST VIDEOCONFERENCE WITH THE PARTIES**

9. The GATT 1994 and the Safeguards Agreement establish a Member’s right to suspend its obligations under the WTO Agreement if a product is being imported into its territory in such increased quantities and under such conditions as to cause serious injury or threat of serious injury to the Member’s domestic industry. The availability of this escape valve is one of the factors that gives Members the comfort to make tariff concessions that could in the future otherwise impede their ability to forestall serious injury to their economies and their stakeholders. Protecting this right is accordingly critical to the continued acceptance of the WTO system in any Member in which government is accountable to its citizens.

10. To be clear, that is exactly what the Safeguards Agreement envisages. Its preamble calls for “multilateral control over safeguards” – not their elimination. Article 1 echoes this point, providing that the Agreement “establishes rules for the application of safeguard measures,” and the remainder of the agreement elaborates on those rules. The assumption throughout is that Members will use safeguard measures in the specified circumstances. Korea’s arguments invert this logic, advocating instead a reading of the Agreement’s disciplines such that no competent authorities and no Member could meet them in practice. Under this approach, rather than setting guidelines for Members, the Safeguards Agreement lays down a procedural minefield with no viable exit. The United States urges you to reject this view and its supposed grounding in past reports of panels and the Appellate Body, which Korea misreads in large part.

11. First, contrary to Korea’s assertions and its misreading of reports interpreting the Safeguards Agreement and Article XIX of the GATT 1994, the United States has acted consistently with the Safeguards Agreement in demonstrating that increased imports were the result of unforeseen developments and obligations incurred, consistent with Article XIX of the GATT 1994. Second, contrary to Korea’s arguments, the USITC acted consistently with the Safeguards Agreement in defining the domestic like product and the domestic industry. Third,

the Commission’s detailed analysis on serious injury thoroughly explained how imports increased significantly “under such conditions” as to cause serious injury to the domestic industry.

### **EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT PANEL’S FIRST VIDEOCONFERENCE WITH THE PARTIES**

12. Korea’s opening statement underscores its failure to establish any *prima facie* case of inconsistency with the Safeguards Agreement in the USITC’s finding that increased imports caused serious injury to the domestic industry. In its statement, Korea asserted, incorrectly, that the United States failed to respond to Korea’s first written submission arguments. Korea also continues to urge the Panel to consider the serious injury section of the Commission’s report in isolation, as if other sections were irrelevant to the Commission’s evaluation of relevant factors. In actuality, the Commission’s report must be read as a whole. Finally, Korea impugns the reliability of the Commission’s data on import volume and prices even though the two Korean producers LG and Samsung themselves reported these data, and recommended five of the six LRW products for which pricing data were collected.

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

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

15. We will now address some of the remarks offered on unforeseen developments, particularly those by Mexico during the third party session with respect to the meaning of “unforeseen.” An obligation based on developments that are “unforeseeable” is different from, and would impose a higher standard on Members, than one based on developments that are “unforeseen.” The proper inquiry is not on what negotiators “could have imagined,” but what they foresaw. And the fact that they might expect imports to increase in response to tariff concessions does not mean, as Mexico suggests, that “significant increases in a short time”, must be accepted as “foreseen.” Mexico errs as a matter of fact in that the unforeseen development is not, as Mexico asserts, simply that imports increased, or that certain producers increased capacity by a specific degree. The speed with which LG and Samsung increased both capacity and output, and shifted from country to country in rapid succession, is what was unforeseen. Korea has provided no basis to think otherwise.

16. We will close with a final systemic point. In this case, Korea’s unforeseen developments arguments have relied on portions of the Appellate Body’s reasoning in *US – Lamb* and *US – Steel* that are not persuasive for the reasons the United States has set out at length in its first written submission. Consequently, the Panel need not, and should not, agree with the faulty reasoning of these reports. The appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is to apply the “customary rules of interpretation of public international law.” Those customary rules of interpretation, as reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties, do not assign any interpretive role to dispute settlement reports. Article 31 of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” As part of engaging in that interpretive exercise, a WTO panel may consider it appropriate to consider a prior report for the assistance it may give in properly understanding a WTO provision interpreted according to customary rules of interpretation – that is, a prior report may be examined for its persuasive value. Thus, relying on prior reports as “case law” or treating so-called DSB “adopted” interpretations as a “sufficient guide” would constitute serious legal error.

## **EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL’S FIRST SET OF QUESTIONS**

### **Question 4**

17. 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. 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.

### **Question 9(a)**

18. 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.” 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,” the Commission defined the domestic industry as “all domestic producers of LRWs, PSC/belt drive TL washers, CIM/belt drive FL washers, and covered parts, including Whirlpool, GE, Alliance, and Staber.” On this basis alone, the Commission’s definition of the domestic industry fully complied with SGA Article 2.1 and 4.1(c).

### **Question 11**

19. 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.

### **Question 12**

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

### **Question 14(a)**

21. 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. 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. 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. The subsequent imposition of an antidumping duty order on LRWs from China coincided with another increase in the domestic industry’s market share. 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.” 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.

### **Question 30**

22. 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. 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. 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. 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 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 34(a)**

23. 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 without Energy Star certification, and top load LRWs with an agitator and Energy Star certification, among other types of LRWs. 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. 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.

24. 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. 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 than Whirlpool’s smaller capacity, agitator-based top load LRWs, provides further evidence that agitator- and impeller-based top load LRW models compete with each other.”

### **Question 35(c)**

25. 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.

### **Question 38**

26. 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.

### **Question 41**

27. 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.

### **Question 46**

28. 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. 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.

#### **Question 47**

29. 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 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.” 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.” 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.

#### **Question 50**

30. 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.” 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 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**

31. 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.”

### **Question 52**

32. 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.

### **EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION**

33. Korea’s statements during the Panel’s videoconference with the parties and written answers to the Panel’s questions essentially recapitulate its arguments from earlier submissions. The U.S. first written submission already explained that the text of GATT 1994 Article XIX:1(a) distinguishes between what prior reports have correctly described as the “circumstances” listed in the first clause and the conditions in the second clause. The United States demonstrated that within this framework, the “pertinent issues of fact or law” for purposes of Safeguards Agreement Article 3.1 are those that Articles 2.1 and 3.1 charge the competent authorities to investigate – whether goods are imported in such quantities as to cause serious injury. Those “issues” do not encompass all considerations related to the taking of a safeguard measure, such as whether the measure is taken only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment or whether the circumstances set out in the first clause of Article XIX:1(a) exist. Thus, Article 3.1 cannot permissibly be read to require the competent authorities to make findings as to unforeseen developments and obligations incurred.

34. The United States also demonstrated in its first written submission that the increase in imports observed by the USITC was indeed the result of unforeseen developments in that the negotiators of those tariff concessions did not foresee that a producer would be able to expand from producing zero or low volumes of large residential washers in a country to producing large volumes in a very short time, enabling foreign producers both to penetrate the U.S. market at unexpected speeds, and to shift production among facilities in multiple countries at unexpected speeds. The increase was also the effect of the U.S. concessions, in that tariff bindings undertaken by the United States, referenced in the USITC Report, prevented it from increasing

applied tariffs so as to modulate the increase in imports and provide the domestic industry with an opportunity to adjust to import competition. As a result, imports almost doubled over the five years of the investigation period.

35. Korea argues that the clause “if as a *result* of unforeseen developments and the *effect* of the obligations incurred,” mandates a “causation” test, under which a competent authority must demonstrate a *genuine and substantial relationship of cause and effect* between the unforeseen development and the obligation, on the one hand, and the increased imports, on the other. It provides no valid support for this assertion. Likewise, contrary to Korea’s assertion that “Korea and the Panel are left guessing what these ‘obligations’ could be and how they would be linked to the alleged increase in imports,” it is beyond dispute that the tariff lines cited by the United States reflect WTO bound rates (concessions), and that those concessions limit the U.S. ability to reduce imports by raising tariffs. More fundamentally, no additional context is needed in the identification of such tariff concessions because the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994.

36. In addition, Korea is wrong in asserting that *ex post* justifications are never admissible in WTO proceedings. Many claims that can be brought at the WTO under the various covered agreements would involve explanations by a Member offered in the course of, or for the purpose of, defending its actions in a WTO dispute. The admonition that a panel must not conduct *de novo* review of *agency action* applies only to the obligations applicable to the agency, and not to other obligations applicable only to the Member. In the safeguards context, obligations on the competent authorities – such as what their report is to contain – are provided under Articles 2, 3, and 4 of the Safeguards Agreement. Other obligations, like those in Article 5 of the Safeguards Agreement, do not pertain to the competent authorities’ findings and report. The existence of unforeseen developments, likewise, is a factual circumstance provided under Article XIX that is applicable only to Members, not a requirement that competent authorities must address in their reports pursuant to Safeguards Agreement Articles 2, 3, or 4. As such, Korea’s statement that the Panel need not examine the U.S. arguments with respect to Korea’s Article XIX claim is without merit. The DSU calls on panels to examine or consider the parties’ arguments unless they are outside the panel’s terms of reference. As the complaining party, Korea determined which claims to bring and how to frame their argumentation. Nothing the United States has offered in response for the Panel’s consideration is outside of the Panel’s terms of reference.

37. Regarding the USITC’s injury determination, the Commission predicated its affirmative serious injury determination in this case on facts that epitomize the circumstances in which safeguard relief is warranted. Starting in 2011, domestic producers of LRWs sought relief from dumped and subsidized imports of LRWs through antidumping and countervailing duty actions, and the Commission found the industry materially injured by significant and increasing volumes of low-priced imports in April 2013 and January 2017. Based on the expected trade relief from the resulting antidumping and countervailing duty orders and projections of strong demand growth, the domestic industry made substantial investments in the development and production of competitive new LRWs, which independent consumer publications ranked among the very best available. These investments, however, were undermined as LG and Samsung shifted their

production of LRWs to facilities in countries not subject to the various AD and CVD orders. With these production shifts, imports of LRWs continued to increase while selling at prices substantially below those of comparable domestic LRWs, in turn leading to mounting financial losses for the U.S. industry.

38. In the ensuing safeguard investigation, the Commission found that imports of LRWs nearly doubled over the period of investigation, significantly increasing their penetration of the U.S. market. It found that pervasive underselling by increasing volumes of imported LRWs, which were substitutable with and comparable to domestically produced LRWs, forced the domestic industry to defend its market share by reducing prices, given the importance of price to purchasers. By significantly depressing and suppressing domestic prices, the Commission explained, the increasing volumes of low-priced imports caused the industry’s “dramatically worsening” financial losses and forced draconian cuts to capital and research and development spending that imperiled the industry’s competitiveness. LG’s and Samsung’s only alternative explanations for these trends were the illogical notions that domestic producers purposefully sustained increasing financial losses on sales of LRWs by selling them at the same prices as matching dryers, and that consumers somehow rejected domestically produced LRWs that were viewed as comparable to imported LRWs by retail purchasers and independent reviewers. Rejecting these arguments as unsupported by the record, the Commission found that increased imports were “the only explanation” for the industry’s serious injury.

39. Korea has failed to show that the Commission’s determination was in any way inconsistent with the Safeguards Agreement. First, Korea’s challenges to the Commission’s like product and domestic industry definitions fail. The Commission could not simply ignore covered parts that were included within the scope of the investigation, as Korea argues, when the Commission was required to include domestically produced parts that were “like” the imported parts in the domestic industry definition. Second, the Commission analyzed the rate of increase and market share taken by imports, as noted by the Panel in its questions to Korea, and reasonably found that the near doubling of import volume satisfied the increased imports requirement and coincided with the industry’s serious injury. Third, in analyzing serious injury, the Commission reasonably found the domestic industry to be seriously injured, as evinced by the data collected in the investigation that showed declines based on no fewer than six negative factors, including massive financial losses that threatened the industry’s viability. The Commission also reasonably explained that seemingly positive trends driven by loss-making investments were not consistent with a healthy industry.

40. In analyzing causation, the Commission objectively relied on pricing data collected on the basis of products that were advocated by LG and Samsung and that covered an appreciable share of domestic and import shipments in the U.S. market, including the very products in which the industry invested substantial sums to develop. The Commission also reasonably found that “neither of respondents’ alleged alternative causes of injury is supported by the record evidence,” notwithstanding references to the statutory “important cause” standard that Korea mistakes for factual findings. The Panel should reject Korea’s challenges to these and other aspects of the Commission’s affirmative serious injury determination and uphold the determination as fully consistent with the Safeguards Agreement.

41. Korea also continues to insert extraneous concepts into the text of Article 5.1. In its responses to the Panel, Korea repeatedly references Article 3.1, “reasoned and adequate explanation,” “the record,” and “findings,” none of which apply to an Article 5.1 claim. Korea also advocates a *sui generis* but undefined “compelling alternative explanation” standard in light of certain assertions Korea makes on the basis of findings selectively chosen from the USITC record. There also is no support, textual or otherwise, for this so-called standard.

42. Finally, regarding Korea’s Articles 8 and 12 claims, the United States notes that Article 12 obligations are ones of transparency. Like all transparency commitments, their function is to ensure that Members provide both adequate notice of any measure taken that affects the interests of other Members and opportunity to express or exchange views on those impacts, so that Members are not unfairly harmed or prejudiced by actions that lack rational basis, process, or predictability. They are not, as mentioned in the U.S. opening statement to the Panel during its videoconference with the parties, part of “a procedural minefield” intended to sabotage a Member’s decision to take emergency action when necessary. The U.S. first written submission and subsequent responses to the Panel’s questions demonstrated many flaws in Korea’s claim that the U.S. efforts were insufficient to satisfy Articles 8 and 12 of the Safeguards Agreement. Korea failed to rehabilitate its claims during the panel’s videoconference and in its responses to the Panel’s questions. In its responses, Korea mischaracterizes the relevant facts, and otherwise fails to establish that the United States did not immediately notify the Committee on Safeguards or provide an adequate opportunity for prior consultations.

#### **EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT PANEL’S SECOND VIDEOCONFERENCE WITH THE PARTIES**

43. The United States notes that Korea complains that the United States did not seek a “supplemental report” on unforeseen developments. Just as there is no obligation for the competent authorities to include unforeseen developments in their report, there is no obligation to seek a “supplemental” report containing findings on those issues.

44. Korea’s new argument that respondents advocated a completely different pricing methodology, and only endorsed the Commission’s pricing product definitions “in the alternative,” is unpersuasive. The Safeguards Agreement does not require competent authorities to analyze subject import price effects, much less prescribe a particular price comparison methodology. Competent authorities therefore have the discretion to adopt reasonable methodologies to analyze the impact of subject imports on a domestic industry’s prices. As the United States has pointed out, the Commission’s price comparison methodology, based upon pricing data collected on the basis of strictly-defined pricing products, was considered by the panel in *US – Tyres* as “a proper basis for comparing prices.” Moreover, the Commission has used the same price comparison methodology in antidumping, countervailing duty, and safeguard investigations for decades. Having participated as respondents in two antidumping/countervailing duty investigations involving LRWs before the Commission, LG and Samsung were aware that the Commission would be utilizing its normal price comparison methodology, as it had in previous investigations of LRWs, when they endorsed four of the six

pricing products in their comments on the draft questionnaires. Respondents and petitioners recommended a fifth product in *LRWs from China* that the Commission adopted for the safeguard investigation. The Commission reasonably considered respondents' recommendation of five of the six pricing products, as well as the appreciable coverage afforded by pricing product data, as evidence that the products were representative of competition in the U.S. market.

### **EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT PANEL'S SECOND VIDEOCONFERENCE WITH THE PARTIES**

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

### **EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS**

#### **Question 67(b)**

46. No, investigating authorities are not required to consider the competitive relationship between domestic and imported parts as part of their likeness assessment pursuant to Article 4.1(c) of the Safeguards Agreement. As the United States has explained, Articles 2.1 and 4.1(c) permit competent authorities to define the domestic industry to include producers of "like or directly competitive" articles, using the disjunctive "or" to indicate that domestically produced articles that are like the products under investigation need not be directly competitive with them. If "like" meant "directly competitive" to a perfect degree, as Korea argues, competent authorities could always define the domestic industry as producers of directly competitive articles. The term "like" would be rendered superfluous, contrary to the interpretative principle "that interpretation must give meaning and effect to all the terms of a treaty."

#### **Question 76(b)**

47. The United States would like to clarify that the Commission's finding that "LRWs competed at all price points in the U.S. market" was not based solely upon a comparison of the average unit value of domestic industry shipments for different types of LRWs to importer sales prices for the six pricing products. Nonetheless, those data supported the finding by showing that importers reported sales of pricing products at the same "price points" as domestic producer shipments of different types of LRWs, including agitator-based top load LRWs. As explained by

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

### **Question 81**

48. As the United States explained in its second written submission in detail, “the date the Commission publicly announced institution is the proper date for evaluating whether the United States satisfied the obligation to ‘immediately notify . . . initiating an investigatory process relating to serious injury or threat thereof and the reasons for it’” under Article 12.1(a) of the Safeguards Agreement. That date was June 8, 2017. The Secretary of the Commission signed the notice of institution on June 7, 2017, and on the next day, June 8, sent it to USTR and entered it on the Commission's Electronic Document Information System, on June 8, 2017. Therefore, the U.S. Government considers June 8, 2017, to be the date on which the Commission publicly announced the initiation of the investigation.

## **EXECUTIVE SUMMARY OF U.S. COMMENTS ON KOREA’S RESPONSES TO THE PANEL’S SECOND SET OF QUESTIONS**

### **Question 67(b)**

49. In responding to this question, Korea agrees with the United States that investigating authorities need not “always assess the nature and extent of the competitive relationship before defining a ‘like product,’” and that there is no “separate requirement to assess the nature and extent of competitive relationship” under the Safeguards Agreement. Korea also acknowledges that the “the four traditional criteria for determining ‘likeness,’ as endorsed by the Appellate Body in *Philippines – Distilled Spirits*” do not include a factor concerning the competitive relationship between domestic and imported articles. As the United States has explained, the Commission based its determination that domestically produced covered parts were “like” imported parts on an assessment of similar factors, and reasonably found that domestic and imported covered parts were similar in terms of physical properties, customs treatment, manufacturing process, uses, and marketing channels. Korea’s only challenge to this finding – “that the Commission did not properly consider the lack of substitutability” between domestic and imported parts – is directly contradicted by its recognition that the Safeguards Agreement does not require such an assessment. Because the Safeguards Agreement does not prescribe a methodology for assessing likeness, and the Commission’s likeness methodology was reasonable, the Commission’s finding that domestic covered parts were like imported covered parts complied with Article 4.1(c) of the Safeguards Agreement.

### **Question 73**

50. Korea once again seeks to magnify the importance of a small decline in subject imports in January-March 2017 relative to January-March 2016. The Commission found that subject import volume “increased steadily” in every year of the 2012-16 period and “nearly doubled” between 2012 and 2016. In other words, imports of LRWs had peaked in 2016, within three months of the end of the period of investigation, at a level nearly twice that of 2012, after



increasing in every year of the investigation period. Korea points to nothing suggesting that the small decline in January-March 2017 outweighs this increase. In fact, as the United States has noted, the increase in imports that the Commission found in this case was greater in percentage terms and more recent than the increase in imports of welded pipe at issue in *US – Steel Safeguard* or the increase in imports of bags and tubular fabric at issue in *Dominican Republic – Safeguard Measures*. In both of those cases, the panels found the increases sufficient to satisfy the increased imports standard under Article 2.1 of the Safeguards Agreement.

#### **Question 74**

51. Korea agrees with the United States that competent authorities need not rely on data covering all domestic producers comprising a domestic industry so long as the data relied upon is “sufficiently representative to give a true picture of the ‘domestic industry.’” In this case, the Commission based its analysis of the domestic industry’s financial performance on the usable financial data reported by “three firms that are estimated to have accounted for all known U.S. production of LRWs in 2016,” namely GE Appliances, Staber, and Whirlpool. As the United States has explained, the exclusion of Alliance’s unusable financial data did not undermine the representativeness of these data, because Alliance’s production of residential belt-driven washers was “very, very small.” Financial data reported by domestic producers accounting for all LRW production, and nearly all production of the domestic like product, are necessarily representative of the financial performance of the domestic industry.

#### **Question 76(a)**

52. Korea prefaces its response to this question by arguing that no analysis of causation was possible without the collection of pricing data on agitator-based top loading LRWs. As the United States has explained, however, the Commission reasonably limited its collection of quarterly pricing data to six pricing products that were representative of competition in the U.S. market and likely to yield probative price comparisons. The Commission reasonably found these pricing data representative of competition in the U.S. market because five of the six pricing products were proposed or endorsed by respondents and the data covered an appreciable percentage of domestic producer and importer U.S. shipments. Moreover, the types of LRWs covered by the pricing products, impeller-based top loading LRWs and front loading LRWs, accounted for nearly all imports of LRWs and half of the domestic industry’s U.S. shipments of LRWs. These types of LRWs accounted for all direct competition between subject imports and domestically produced LRWs, and were the very types of LRWs in which the domestic industry had invested so heavily during the period of investigation. In light of these considerations, the Commission’s pricing data reasonably supported its finding that the large and increasing volume of low-priced imports significantly depressed and suppressed prices for the domestic like product during the period of investigation.

#### **Question 77**

53. Korea mistakenly claims that the inclusion of a pricing product corresponding to an agitator-based top load LRW would have made a price undercutting finding “far less likely”

because such LRWs are, in its view, “particularly low-priced.” That is not the case. The Commission only compares domestic producer and importer sales prices on sales of the same pricing product in the same quarters. Had the Commission collected pricing data for a pricing product corresponding to an agitator-based top load LRW, most if not all of the pricing data would have been reported by domestic producers, as there were few import shipments of agitator-based top load LRWs. In the absence of any sales of domestic and imported agitator-based top load LRWs in the same quarters, there would have been no additional quarterly price comparisons, and the pricing product data would still have shown subject import underselling in 76.1 percent of quarterly comparisons. As the United States has explained, the inclusion of such a pricing product would have imposed an additional reporting burden on domestic producers without yielding additional price comparisons.

### **Question 82**

54. The United States explained why the “notice of institution in the Federal Register” for purposes of calculating the deadline for filing notices of appearance in the Commission’s safeguard investigation was June 13, 2017. The Commission accepted as timely all notices filed within 21 days of June 13, 2017, which in practice meant accepting notices filed as late as July 5, 2017, as July 4th was a U.S. federal holiday. Korea does not challenge or even address these facts.

55. Korea argues that it is irrelevant that interested parties had 23 days after the date of the notification to request to participate in the ITC investigation. The United States made this observation in response to Korea's argument that participants were prejudiced by having the time to request participation curtailed. Korea now appears to have dropped this argument. Instead, Korea again insists that the investigation was “initiated” on June 5, 2017. For the reasons described in the U.S. response to Question 81, the date of initiation was June 8, 2017.

### **Question 83**

56. As of early December 2017, Korea had an adequate opportunity for prior consultations under Article 12.3 of the Safeguards Agreement. As the United States has explained in detail, an evaluation of whether a Member provided an adequate opportunity for prior consultations does not depend exclusively on the content and timing of the final notification. It depends on the notifications (plural) as a whole, and whether Members received the information over time in such a way as to permit consultations. Here, Members received most of the relevant information on December 11, 2017, in the Third Notification. Finally, Korea errs in assuming that the February 7, 2018, effective date of the safeguard measure is the last day relevant to its claims. Proclamation 9694 explicitly provides a further 30 days for consultations and an opportunity to modify the safeguard measure in response to the results. This allowed ample time for Korea to evaluate the final safeguard measure and consult with the United States.

57. Next, Korea contends that the United States acted inconsistently with Article 12.3 because consultations occurred on only “recommendations or hypotheticals” and not a final safeguard measure. Korea’s own responses show the error in its argument. Korea agrees that the

President announced the final proposed measure on January 23, 2018, and that consultations occurred on February 1, 2018. Therefore, the United States provided Korea with an adequate opportunity to hold prior consultations on a final proposed measure. Moreover, the United States explicitly allowed for further consultations up through February 24, 2018, with the possibility for modification of the final safeguard measure.

#### **Question 84**

58. The United States provided Korea with an “adequate opportunity for prior consultations” and “exchanging views on the measure” in accordance with Article 12.3. The United States has explained in detail the factual and legal arguments that undermine Korea's assertion but highlights the following facts: (1) Korea had the opportunity to review information provided in the notifications, (2) Korea and its two LRW producers for the U.S. market, Samsung and LG, had both notice and opportunity to meaningfully participate or consult at every stage of the proceedings; (3) communications from Korea in December 2017 and on January 24, 2018, demonstrate the adequate opportunity for prior consultations under Article 12.3 and the actual knowledge Korea had of the measure; and (4) the January 24, 2018, communication shows that Korea had enough time to analyze and form a final legal conclusion on the measure, that it was inconsistent with the Safeguards Agreement – one day after the Presidential Proclamation was signed and before the U.S. notification.

59. Korea contends that the United States had insufficient time to consider the comments after the consultation and that the U.S. representative “was certainly not in a position to give due consideration to any comments received from Korea presumably because in any case the measure was scheduled to enter into force in less than one week.” Korea provides no evidence or argument to support this statement but only conclusory speculation that the date of enactment of the measure somehow nullified the “adequate opportunity for prior consultations.” To the contrary, Proclamation 9694 explicitly gave the President until February 24, 2018, to consider Korea's views regarding the final measure and “proclaim the corresponding reduction, modification, or termination of the safeguard measure within 40 days.”

60. As noted above, there were in fact 30 days for consultations between the date of Proclamation 9694 and the final date for consultations.

#### **CONCLUSION**

61. For the foregoing reasons set out above, the United States requests that the Panel find that Korea has failed to establish any inconsistency with Article XIX of GATT 1994 or the Safeguards Agreement.