

***UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES  
ON LARGE RESIDENTIAL WASHERS FROM KOREA***

***Recourse to Article 22.6 of the DSU by the United States***

**(DS464)**

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

**July 5, 2018**

## I. INTRODUCTION

1. Contrary to the requirements of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), the level of suspension of concessions that Korea has requested is not equivalent to the level of nullification or impairment.

2. Ample evidence demonstrates that, if the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on large residential washers (“LRWs”) from Korea had been brought into compliance as of the expiration of the reasonable period of time (“RPT”), there would be no increase in the value of U.S. imports of LRWs from Korea. This is because Samsung and LG, the Korean producers of LRWs, lack both the interest and the capacity to resume production of LRWs in Korea for the U.S. market. Instead, they will continue in the short run to supply LRWs from countries other than Korea while working toward their goal of producing virtually all of the LRWs they sell in the U.S. market at new production facilities located in the United States. Samsung and LG expect to be in a position to realize that goal by the end of this year. Accordingly, the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea after the expiration of the RPT is zero.

3. Furthermore, Korea’s Methodology Paper contains errors sufficient by themselves to establish that the level of suspension of concessions Korea has requested far exceeds the level of nullification or impairment, contrary to the DSU. For instance, Korea proposes an incorrect counterfactual, uses an economic model that is wholly inappropriate in this situation, and makes numerous errors when compiling the data inputs it uses to estimate the level of nullification or impairment. As a result, Korea overestimates the level of nullification or impairment attributable to the U.S. measures about which the Dispute Settlement Body (“DSB”) adopted recommendations in this dispute.

4. Korea argues that the level of nullification or impairment is \$711 million per year as a result of the maintenance of the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea beyond the expiration of the RPT on December 26, 2017. Korea further contends that the Arbitrator should determine that the level of suspension of concessions based on this already excessive level of nullification or impairment should be increased each year by 5.8 percent.

5. Korea bases its request on the assertion that the counterfactual used must be the termination of the antidumping and countervailing duty measures on LRWs from Korea following the expiration of the RPT. In fact, the proper counterfactuals to be applied for the purpose of this proceeding are reduction – not elimination – of the antidumping duty rate, and, separately, reduction of the weighted-average countervailing duty rate from 0.58 percent to zero percent.

6. Additionally, while in theory a partial equilibrium model can be employed to determine the level of nullification or impairment (although not in this proceeding, given that such a model assumes that suppliers will increase their production and, as demonstrated by the evidence before the Arbitrator, this is an incorrect assumption here), Korea uses the wrong type of partial equilibrium model. Korea’s economic model assumes that there are only two countries in the

world, Korea and the United States, and further assumes that LRWs are perfectly substitutable. Each of these assumptions is incorrect and contradicted by evidence, further demonstrating that Korea’s request is contrary to the DSU.

7. In a situation where suppliers would increase their production, the appropriate partial equilibrium model would be one that correctly assumes that the products are imperfect substitutes, such as an Armington-based model, which also would take into account U.S. imports of LRWs from countries other than Korea and factor in the correct substitution elasticity for LRWs. Using such a model, the estimated level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping duty measure on LRWs from Korea after the expiration of the RPT would be in the range of \$18 million to \$25 million per year, and the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the countervailing duty measure on LRWs from Korea after the expiration of the RPT would be no more than \$2.32 million per year. This once again demonstrates that Korea’s request of \$711 million per year is far in excess of the equivalent level of nullification or impairment, and thus contrary to the DSU.

8. Korea does not propose a particular level of suspension of concessions resulting from the application by the U.S. Department of Commerce (“Commerce”) of a differential pricing methodology and the use of zeroing in antidumping proceedings involving products other than LRWs that are initiated after the expiration of the RPT. Instead, Korea requests authorization to apply the same conceptually flawed economic framework and derived formula that it proposes for LRWs, so that Korea can determine for itself the level of suspension related to products other than LRWs. Korea’s proposed level of suspension is contrary to the DSU. The formula that Korea proposes is purely speculative and not based on sound economic analysis. The selection of an appropriate economic model or formula is based on a number of critical factors, such as the appropriate estimation technique to apply (simulation or econometrics), substitutability of products, and other variables that could affect demand and supply conditions. Korea addresses none of these issues. Furthermore, Korea’s formula suffers from conceptual flaws and data input problems that are just as problematic whether the formula is applied to LRWs or products other than LRWs.

## **II. APPROPRIATE DETERMINATION OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT FOR THE ANTIDUMPING AND COUNTERVAILING DUTY MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA**

### **A. Article 22 of the DSU Requires that the Proposed Level of Suspension Be Equivalent to the Level of Nullification or Impairment**

9. Pursuant to Article 22.4 of the DSU, the DSB will not authorize the suspension of concessions and related obligations unless “the level” of suspension is “equivalent” to the level of nullification or impairment. Article 22.7 of the DSU further provides that where a matter is referred to arbitration, the arbitrator “shall determine whether the level of . . . suspension is equivalent to the level of nullification or impairment.” The starting point in the analysis of a suspension request is to determine the extent to which any WTO-inconsistent measure

maintained following the expiration of the RPT nullifies or impairs benefits accruing to the complaining party under the relevant covered agreement(s).

10. Thus, an analysis of the level of nullification or impairment must focus on the “benefit” accruing to the complaining Member under a covered agreement that is allegedly nullified or impaired as a result of the breach found by the DSB. Arbitrators in past proceedings have uniformly based their determinations on hard evidence and have refused to “accept claims that are ‘too remote’, ‘too speculative’, or ‘not meaningfully quantified.’” As the arbitrators in *EC – Hormones (US) (Article 22.6 – EC)* and *EC – Hormones (Canada) (Article 22.6 – EC)* found, “we need to guard against claims of lost opportunities where the causal link with the inconsistent [measure] is less than apparent, i.e., where exports are allegedly foregone not because of the [inconsistent measure] but due to other circumstances.”

11. Analysis using a counterfactual is appropriate to determine the level of nullification or impairment caused by the WTO-inconsistent U.S. measures. That is, the appropriate analysis requires consistent consideration of the present trading relationship between Korea and the United States (as represented by the 2017 baseline), as well as what that relationship would be if the U.S. measures had been brought into compliance with the DSB recommendations following the expiration of the RPT (the counterfactual). The trade differential will be the level of nullification or impairment attributable to the U.S. measures.

**B. The Appropriate Counterfactual in this Proceeding Is Modification, Not Termination, of the WTO-Inconsistent U.S. Antidumping and Countervailing Duty Measures on LRWs from Korea**

12. At its most basic level, the determination of the trade effects of the disputed measures requires a comparison between the current value of LRWs exported from Korea to the United States and the value of exports from Korea that could be expected if the United States had complied with the DSB’s recommendations following the expiration of the RPT.

13. Termination of the antidumping and countervailing duty measures on LRWs from Korea is not the only option available for compliance with the DSB’s recommendations, and a counterfactual that assumes termination of the measures is not plausible or reasonable. The DSB did not recommend termination of the measures. Importantly, Daewoo, a Korean producer of LRWs, was assigned a margin of dumping and a countervailing duty rate based on the application of facts available in the original antidumping and countervailing duty investigations of LRWs from Korea. The margin of dumping and countervailing duty rate assigned to Daewoo are not the subject of any DSB recommendations. For that reason, the U.S. antidumping and countervailing duty measures on LRWs from Korea would not, in any event, simply be terminated to bring them into compliance with the DSB’s recommendations in this dispute.

14. Additionally, evidence placed before the original Panel in this dispute demonstrates that the margin of dumping determined for LG in the original antidumping investigation would have been greater than *de minimis*, if it had been determined using the average-to-average comparison methodology (without zeroing). That margin of dumping, if applied to LG following a redetermination of the results of the original investigation, would be in compliance with the

DSB’s recommendations and U.S. WTO obligations. Accordingly, rather than total elimination of the antidumping duty determined for LG in the original investigation, a more appropriate counterfactual in this proceeding is reduction of that antidumping duty rate.

15. It is appropriate in this proceeding to express separately the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea after the expiration of the RPT. The antidumping measure and the countervailing duty measure, while challenged by Korea in the same dispute, are not related. For the purposes of the analysis of a counterfactual in this submission, the United States uses a very conservative counterfactual wherein the weighted-average countervailing duty rate is reduced from 0.58 percent to zero percent following the expiration of the RPT on December 26, 2017. This is consistent with the counterfactual approach described by Korea in relation to the WTO-inconsistent aspects of the U.S. countervailing duty measure on LRWs from Korea.

**C. Modifying or Terminating the WTO-Inconsistent U.S. Antidumping and Countervailing Duty Measures on LRWs from Korea following the Expiration of the RPT Would Not Result in any Increase in the Value of Exports of LRWs from Korea to the United States; The Level of Nullification or Impairment is Zero**

**1. The DSU Permits the Arbitrator To Find that a Measure Causes No Nullification or Impairment**

16. Article 3.8 of the DSU plainly provides for the possibility that the Member concerned may rebut the presumption of the existence of nullification or impairment by putting forth evidence that a breach of WTO obligations does not have an adverse impact on the complaining Member. Additionally, nothing in Article 3.8 of the DSU, which is one of the “General Provisions” of the DSU, limits the opportunity of the Member concerned to make such a rebuttal only during the original panel phase of a dispute settlement proceeding. The more logical time for a Member concerned to make such a rebuttal would be in the context of an arbitration under Article 22.6 of the DSU, wherein the question of the level of nullification or impairment – and indeed, the question of the existence of any nullification or impairment at all following the expiration of the RPT – is placed squarely before the decision maker that is tasked by the DSU with evaluating that question and the question of the level of suspension – *i.e.*, the DSU Article 22.6 arbitrator. If no trade is foregone due to a WTO-inconsistent measure’s continuing existence beyond the expiration of the RPT, *i.e.*, if the estimate of the trade foregone is zero, then the correct conclusion is that the level of nullification or impairment is zero.

17. Furthermore, the factual circumstances related to a WTO-inconsistent measure’s impact on the complaining Member might change over time, including after a panel report is circulated and before a suspension request is made under Article 22.2 of the DSU. In an arbitration under Article 22.6 of the DSU, it is incumbent upon the arbitrator to establish the level of nullification or impairment following the end of the RPT, so as to ensure that the level of suspension authorized by the DSB does not exceed the level of nullification or impairment.

18. Accordingly, it is necessary for the Arbitrator to determine in this proceeding the trade or economic effects on Korea of the maintenance of the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea after the expiration of the RPT on December 26, 2017. As Korea suggests in its Methodology Paper, the relevant question in this proceeding is “what the value of Korea’s exports of LRWs to the United States would have been had the United States complied with all the DSB recommendations and rulings at the end of the RPT, which was 26 December 2017.”

## **2. Ample Evidence Supports Finding that there Is No Nullification or Impairment in this Situation**

19. Ample evidence demonstrates that, if the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea had been brought into compliance as of the expiration of the RPT, there would be no increase in the value of U.S. imports of LRWs from Korea. This is because Samsung and LG, the Korean producers of LRWs, lack both the interest and the capacity to resume production of LRWs in Korea for the U.S. market. Instead, they will continue in the short run to supply LRWs from countries other than Korea while working toward their goal of producing virtually all of the LRWs they sell in the U.S. market at new production facilities located in the United States. Samsung and LG expect to be in a position to realize that goal by the end of this year.

20. Extensive evidence, provided by Samsung and LG, establishes definitively that the value of exports of LRWs from Korea to the United States would not increase by the amount of \$711 million per year (and increasing at a rate of 5.8 percent per year), as Korea claims, if the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures were brought into compliance following the expiration of the RPT. Rather, it is clear from this evidence that there would not be any increase at all in the level of exports of LRWs from Korea to the United States, because Samsung and LG lack both the interest and the ability to resume production of LRWs in Korea for the U.S. market.

21. Accordingly, the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea beyond the expiration of the RPT is zero.

## **D. The Errors in Korea’s Economic Analysis Further Establish that the Level of Suspension Korea Requests Is Not Equivalent to the Level of Nullification or Impairment**

22. An examination of the economic model Korea proposes to use to determine the level of nullification or impairment provides further proof that Korea’s requested level of suspension is not equivalent to the level of nullification or impairment.

23. To use a more appropriate economic model, one would need to take the imports of the relevant LRWs from Korea that are subject to the U.S. antidumping and countervailing duty measures for which the DSB has made recommendations, and compare those imports on a prospective basis to the imports that would occur had the WTO-inconsistent aspects of those

antidumping and countervailing duty measures been brought into compliance with U.S. WTO obligations following the expiration of the RPT. To make that comparison, one would look at the actual value of imports of LRWs into the United States from Korea during the most recent period, full year 2017 (the actual situation), and then estimate the value of imports of LRWs that would exist during the same period if the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures had been brought into conformity and all other factors were held constant (the counterfactual).

24. Thus, in this proceeding, the correct “counterfactual” is the estimated value of relevant U.S. imports of LRWs from Korea that would exist if the antidumping and countervailing duty measures had been brought into compliance with U.S. WTO obligations, holding all other factors constant, and the “level of nullification or impairment” to Korea is the difference between the value of Korea’s exports to the United States as reflected in the trade data, and the estimated export value under the counterfactual scenario.

25. Korea appears to agree with this approach generally. Korea proposes to estimate the level of nullification or impairment using a “static partial equilibrium model.” However, Korea has used an inappropriate type of partial equilibrium model in its Methodology Paper.

**1. The Correct Partial Equilibrium Model for Determining the Level of Nullification or Impairment Would Be an Armington-Based Partial Equilibrium Model (an Imperfect Substitutes Model)**

26. The partial equilibrium model Korea uses is not appropriate in this situation. Indeed, Korea’s proposed calculation of the level of nullification or impairment cannot seriously be called a partial equilibrium model because it is not based on sound economic theory or analysis. First, Korea is using a hypothetical value for the 2017 value of LRWs imports of Korea that is derived using Korea’s 2011 import share, rather than truly modeling the effect of a tariff reduction on the actual 2017 value of LRWs imports from Korea. Second, Korea uses as a “proxy” total import value instead of total consumption and total domestic production. In doing so, Korea simply misapplies partial equilibrium analysis. These flaws rest on top of Korea’s incorrect assumptions that the United States and Korea are the only two countries that produce and sell LRWs in the U.S. market, and that there is perfect substitution between LRWs imported from Korea and U.S. LRWs and, implicitly, no substitution at all between imports from Korea and non-subject imports. These assumptions are contrary to the evidence before the Arbitrator. Korea’s proposed approach is flawed and has no foundation in economic theory or logic.

27. Under correct economic theory, the effect of the reduction or removal of the WTO-inconsistent U.S. antidumping and countervailing duties applied to LRWs from Korea depends on the substitutability between (1) the domestic like product (LRWs made in the United States), (2) subject imports (LRWs imported from Korea that are subject to the antidumping and countervailing duties), and (3) non-subject imports (LRWs imported from countries other than Korea). To properly measure the effect of the reduction or removal of the antidumping and countervailing duties on LRWs from Korea, one would need to use an economic model that accounts for the substitution effects on all three of these varieties of the product.

28. Though Korea does not use such an economic model itself, Korea has placed before the Arbitrator an example of a partial equilibrium model that would be appropriate to use. That example can be found in the 2017 paper by Hallren and Riker, which Korea submitted as Exhibit KOR-15. The Hallren and Riker paper provides a convenient framework to undertake a partial equilibrium analysis of the trade effects of removing import tariffs where the imported and domestic goods are imperfect substitutes and where the tariff is applied to imports from one country but not applied to imports from other countries. Indeed, the Hallren and Riker paper provides as an “illustrative application” an example of modeling the effects of “a reduction in the import ad-valorem tariff applied to subject imports from 5 to 0 percent,” which corresponds to the reduction of duties for purposes of this discussion. The partial equilibrium model in the Hallren and Riker paper is based on the Armington approach to trade, where products are differentiated by source countries and consumers view products from different countries as imperfect substitutes. As explained in *A Practical Guide to Trade Policy Analysis*, also provided to the Arbitrator by Korea, “most simulation models use the ‘Armington assumption’ whereby varieties of goods are differentiated by country of origin (Armington, 1969).”

29. The model detailed in the Hallren and Riker paper permits the estimation of the “magnitudes of the changes in the prices of the three varieties of products, the industry’s overall price index, and the quantities of the products as a result of a reduction in the ad valorem tariff on subject imports....” The goal of the analysis is to quantify these changes given information on the duties and the initial values of trade and market shares in the LRWs industry.

## **2. Correct Data Inputs that Would Be Used in Applying an Armington-Based Partial Equilibrium Model**

30. The United States provided to the Arbitrator correct data on the value of U.S. imports of LRWs from Korea for the period 2011-2017. Like Korea, the United States relies on data queried using the USITC’s online trade statistics and tariff data program, DataWeb. Korea, however, appears to have queried data using 6-digit HTS subheadings. That is an error. In querying data using 6-digit HTS subheadings, Korea has overstated the value of U.S. imports of LRWs by including products outside the scope of the U.S. antidumping and countervailing duty measures on LRWs from Korea. The United States has queried import data for LRWs using the appropriate 10-digit HTS subheadings.

31. Korea has used data for Korea’s share of U.S. imports as a proxy for market share data in its calculation of the level of nullification or impairment, and Korea also uses 2011 data for Korea’s import share (with no adjustment for other factors) rather than 2017 import share data. These are serious errors that contribute to Korea grossly overstating the level of nullification or impairment. If Korea’s import share is included as part of the calculation of the level of nullification or impairment at all, then Korea’s 2017 import share should be used. Using 2011 data would be inconsistent with the correct counterfactual approach on which the parties agree.

32. In reality, Korea effectively more than double counts the level of nullification or impairment, because Korea starts with the share of imports of LRWs from Korea in 2011 multiplied by 2017 total import value, *i.e.*, an assumption of what the value would be unaffected by the U.S. measures. Korea then applies its incorrect economic model to that figure to estimate



how much that figure would increase if the U.S. measures were removed. But again, the 2011 value of imports is already not affected by the U.S. measures. So, in effect, Korea is modeling a tariff reduction on an import value figure that is not subject to the tariffs.

33. The correct data inputs to be used in the calculation of the level of nullification or impairment would be the 2017 market shares of domestic producers, subject imports, and non-subject imports. It is possible to derive the necessary market share information using data that are publicly available. Specifically, one can use data on U.S. imports of LRWs from Korea and from the rest of the world in combination with data on the total value of the U.S. washing machines market compiled by the Association of Home Appliance Manufacturers (“AHAM”), appropriately adjusted to reflect the value of the U.S. LRWs market.

34. Following Korea’s approach concerning the source of elasticities to use in the economic model, the United States has used elasticities of supply published by the USITC. To be consistent with Korea’s representations about its intention to use “recent”, “confirmed” information, the elasticities of supply used should be 6.

35. The United States also follows Korea’s approach to use the median of the range of U.S. demand elasticity reported by the USITC. The USITC estimated the range to be -0.3 to -0.8. Accordingly, the -0.55 would be used for the price elasticity of total demand in the United States, which is the same value used by Korea.

36. Still following Korea’s approach concerning the source of elasticities to use in the economic model, the United States has used the elasticity of substitution within the industry published by the USITC, again in the report issued at the conclusion of the 2017 global safeguard investigation of LRWs. Using the median of this range, the substitution elasticity in a calculation using an Armington-based partial equilibrium model would be 4.

37. The elasticity of substitution that the United States proposes the Arbitrator use, like the elasticities of supply and demand that Korea proposes be used, are estimates made by the USITC after analyzing responses from purchasers, producers, and importers to questionnaires concerning the LRWs market, as well as arguments made by interested parties. These estimated elasticities were published very recently and they are for the specific product at issue, LRWs. That makes them particularly well suited for use in a model to estimate the level of nullification or impairment in this dispute.

38. The United States uses Korea’s calculation of the weighted-average antidumping and countervailing duty rates to be used to model the reduction of the antidumping duties and the termination of the countervailing duties that are subject to DSB recommendations following the expiration of the RPT, *i.e.* 11.86 percent for the antidumping duty rate and 0.58 percent for the countervailing duty rate. The appropriate counterfactuals in this proceeding are reduction of the weighted-average antidumping duty rate from 11.86 percent to [[\*\*\*]] and reduction of the weighted-average countervailing duty rate from 0.58 percent to zero percent.

39. Korea proposes that the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty

measures on LRWs from Korea after the expiration of the RPT should be increased each year using a growth rate factor that assumes an annual rate of growth of the U.S. washing machines market of 5.8 percent. Contrary to Korea’s argument, a proper determination of the level of nullification or impairment resulting from the maintenance of WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea after the expiration of the RPT should not include any growth rate factor at all.

40. Ample evidence in the form of public statements made by Samsung and LG demonstrates that the Korean producers of LRWs lack both the interest and the ability to resume production of LRWs in Korea for the U.S. market. Thus, if the U.S. measures on LRWs were brought into compliance with U.S. WTO obligations, the value of U.S. imports of LRWs from Korea would not increase at all, and it certainly would not increase each year in parallel with the projected growth of the market for washing machines in the United States, as Korea proposes. Given that, as of the end of 2018, “more than 95 percent of LG and Samsung LRWs will be supplied from the LG and Samsung U.S. LRW production factories,” it is expected that the value of U.S. imports of LRWs from Korea will decline, not grow.

41. The numerous methodological and data problems with Korea’s estimation of the level of nullification or impairment discussed above confirm that the level of suspension requested by Korea is far in excess of the level of nullification or impairment. In summary, if Korea’s economic model were applied at all, which it should not be, the following errors in Korea’s estimation of the level of nullification or impairment would need to be corrected:

<b>DO NOT USE</b>	<b>USE INSTEAD</b>
2011 data for Korea’s imports share: 42.9%	2017 data for Korea’s imports share: <b>15.5%</b>
Elasticity of Supply from January 2017: 7	Elasticity of Supply from December 2017: <b>6</b>
Projected 2017 Import Value Based on 6-Digit HTS Subheading: \$1,764,569,000	Actual 2017 Import Value Based on 10-Digit HTS Subheadings: <b>\$1,573 million</b>
Growth Rate Factor Based on Average Growth of the U.S. Washing Machines Market in Prior Years: 5.8%	<b>No Growth Rate Factor</b>

42. When the above errors in Korea’s calculation are corrected, the annual level of nullification or impairment, using Korea’s methodologically flawed approach, declines from \$711 million per year to \$198.7 million per year. That figure would be even lower if Korea’s approach were further corrected to reflect that the WTO-inconsistent weighted-average antidumping duty rate should be reduced but not eliminated.

### **3. The Level of Nullification or Impairment that Would Result from the Application of an Appropriate Armington-Based Partial Equilibrium Model**

43. Simultaneously solving the Armington system of equations using the given data inputs for each of the three estimates of the total value of the U.S. LRWs market, *i.e.*, using 60 percent of the total market value reported by AHAM, using 70 percent of the total market value reported by AHAM, and using 80 percent of the total market value reported by AHAM, yields the following calculations of the level of nullification or impairment, but with respect to the antidumping measure and the countervailing duty measure.

44. The level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping measure on LRWs from Korea after the expiration of the RPT would range between \$18 million and \$25 million annually, depending on assumptions made about the size of the LRWs market.

45. The level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. countervailing duty measure on LRWs from Korea after the expiration of the RPT would be between \$2.28 million and \$2.39 million annually, depending on assumptions made about the size of the LRWs market.

46. The United States considers that the most reasonable estimate of the size of the U.S. LRWs market, which would ensure that the level of nullification is not overstated by the economic model, is 70 percent of the total value of the U.S. washing machines market as reported by AHAM. Accordingly, for purposes of this discussion, the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping duty measure on LRWs from Korea after the expiration of the RPT would be no more than \$18 million to \$25 million per year, and the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the countervailing duty measure on LRWs from Korea after the expiration of the RPT would be no more than \$2.32 million per year.

### **III. KOREA’S REQUEST TO SUSPEND CONCESSIONS FOR PRODUCTS OTHER THAN LRWS ON THE BASIS OF A FORMULA IS CONCEPTUALLY FLAWED AND CONTRARY TO THE DSU**

47. Korea also requests to suspend concessions with respect to products other than LRWs. Rather than proposing a particular level of suspension, however, Korea requests authorization to apply a formula. Korea explains that the same “formula used for calculating the level of nullification and impairment [for] LRW imports will also be used to estimate the level of nullification and impairment” resulting from Commerce’s application of a differential pricing methodology and its use of zeroing in antidumping proceedings involving Korean imports other than LRWs that are initiated after the expiration of the RPT.

48. Korea’s proposed suspension is contrary to the DSU. The formula that Korea proposes is purely speculative and not based on sound economic analysis. The selection of an appropriate

economic model or formula is based on a number of critical factors, such as the appropriate estimation technique to apply (simulation or econometrics), substitutability of products, and other variables that could affect market demand and supply conditions. The use of a single formula for a number of different products is not feasible without first examining the different industries that produce those products, and the different markets in which those products are traded, to determine whether it would be appropriate to use the same economic model or formula to analyze the different products. Korea has not even attempted to establish the basis for determining that the same formula – premised on the same economic assumptions, which are flawed in the case of LRWs – could be used to analyze all of the non-LRW products at issue in this dispute. Furthermore, the formula that Korea proposes to use suffers from the same conceptual flaws and data input problems, whether it is applied to LRWs or imports other than LRWs.

**A. The Formula Korea Proposes To Use To Determine the Level of Nullification or Impairment for Products Other than LRWs Suffers from the Same Conceptual Flaws and Data Input Problems as the Formula Korea Proposes To Use for the Determination for LRWs**

49. The “static partial equilibrium model” that Korea proposes to use is inappropriate for use in determining the level of nullification or impairment resulting from the maintenance of U.S. antidumping and countervailing duty measures on LRWs from Korea after the expiration of the RPT. Korea’s economic model rests on a number of incorrect assumptions, which renders it also unsuitable for determining the level of nullification or impairment for Korean imports other than LRWs.

50. First, the particular type of partial equilibrium model that Korea proposes to use “assume[s] that the world is composed of ... two countries only” and that “export supply and import demand are entirely determined by the domestic conditions in the respondent’s and the complainant’s markets.” That is an incorrect assumption to make for all the products identified in Appendix B of Korea’s Methodology Paper. Korea and the United States are not the only two countries that produce and sell in the U.S. market the products other than LRWs that are identified in Appendix B of Korea’s Methodology Paper.

51. Second, the economic model on which Korea’s formula is based assumes that there is perfect substitution between the Korean products and U.S. products and, implicitly, no substitution at all between imports from Korea and non-subject imports. However, all of the USITC reports identified in Appendix B of Korea’s Methodology Paper recommend substitution elasticities for each of the products examined. Korea’s assumption of perfect substitution is incorrect.

52. For these reasons, just as Korea’s static partial equilibrium model is inappropriate for use in determining the level of nullification or impairment with respect to LRWs, it is equally inappropriate for use in determining the level of nullification or impairment with respect to all the Korean imports other than LRWs that are identified in Appendix B of Korea’s Methodology Paper.

53. Nor would it be appropriate to determine the level of nullification or impairment using the Armington-based partial equilibrium model that is described above. The data input issues that the United States has discussed would be compounded in the application of such an economic model to so many different products. For example, just as there has been difficulty identifying appropriate market share data for the specific LRWs market at issue in this dispute (as opposed to the broader washing machines market), likely there would be similar challenges collecting up-to-date market share data specific to the precise products other than LRWs that are identified in Appendix B of Korea’s Methodology Paper. Nothing in Article 22 of the DSU would permit Korea to make determinations for itself about the proper market share data and other data inputs to be used.

54. Similarly, when calculating the level of nullification or impairment with respect to LRWs, Korea erred in compiling U.S. import data by using incorrect HTS subheadings in its data query, which resulted in Korea misstating of the value of U.S. imports of LRWs. Korea proposes to gather import data for products other than LRWs the same way. This suggests the strong likelihood that Korea would make the same errors with respect to those other products. It would be contrary to the DSU for Korea to suspend concessions with respect to the United States on the basis of an inappropriate formula applied using erroneous data inputs that results in an overstatement of the level of nullification or impairment.

55. Finally, the formula Korea has proposed includes a growth rate factor. Korea, however, gives no evidence to support an assumption of growth, let alone any indication of how that growth rate factor would be applied to products other than LRWs or from where data would come to determine the growth rate factor. This is another conceptual and data input failing of Korea’s proposed formula approach.

56. Given these methodological and data problems, Korea’s request for authorization to suspend concessions by applying a formula to determine the level of nullification or impairment for products other than LRWs should be denied.

**B. Korea’s Request for Authorization to Suspend Concessions on the Basis of a Formula in this Dispute Is Contrary to the DSU**

57. Despite Korea’s assurance that data are “publicly available and can be readily employed by both Korea and the United States,” the issues discussed in the preceding section demonstrate that the formula approach Korea proposes is inappropriate, impractical, and would result in a level of suspension of concessions and related obligations that is not equivalent to the level of nullification or impairment. That renders Korea’s request for suspension contrary to the DSU, and requires its rejection.

58. As a general matter, neither the DSU nor subsequent arbitrator decisions preclude the possibility that the Arbitrator might base the level of suspension of concessions on a formula. That being said, however, a Member’s right to request and be authorized to suspend obligations on the basis of a formula is not without any limitation. The arbitrator in *US – Offset Act (Brazil)* (Article 22.6 – US) reasoned that, as long as the approved level of suspension is equivalent to the level of nullification or impairment, there is no “reason why these levels may not be adjusted

from time to time, provided such adjustments are justified and unpredictability is not increased as a result.” Under Article 22.4 of the DSU, the level of suspension of concessions “is” to be equivalent to the level of nullification or impairment. The use of the present tense “is” indicates that the level of suspension of concessions may need to be determined in a manner that allows it to continue to be equivalent to the level of nullification or impairment, but, at the same time, the level of suspension of concessions must never be permitted to exceed the level of nullification or impairment.

59. As explained above, the formula Korea proposes to apply grossly overstates the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea after the expiration of the RPT. The same would be true if that formula were applied for products other than LRWs. Because they would greatly exceed the actual level of nullification or impairment, the adjustments to Korea’s level of suspension of concessions that Korea proposes to make using its formula would not be “equivalent” and thus would not be “justified.”

60. Additionally, given the data input problems discussed in the preceding section – including the difficulty of identifying correct market share information for the particular products subject to antidumping measures; the errors that Korea has already made querying U.S. import data; and the entirely unknowable volume and value of imports in future years – the adjustments to Korea’s level of suspension of concessions made using Korea’s proposed formula would increase “unpredictability” substantially. Indeed, the level of suspension under Korea’s proposed approach simply could not be predicted at all.

61. For these reasons, Korea’s request for authorization to suspend concessions on the basis of a formula in this dispute is contrary to the DSU.

#### **IV. CONCLUSION**

62. For the reasons set forth in the U.S. written submission, oral statements during the substantive meeting of the Arbitrator with the parties, and the U.S. written responses to questions from the Arbitrator, the United States respectfully requests that the Arbitrator find that the level of suspension of concessions requested by Korea is in excess of the appropriate level of nullification or impairment, and further find that the level of nullification or impairment is **zero**. Furthermore, the United States respectfully requests that the Arbitrator distinguish in its decision the level of any nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping duty measure on LRWs from Korea and the level of any nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. countervailing duty measure on LRWs from Korea.