

***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)**

**WRITTEN SUBMISSION  
OF THE UNITED STATES OF AMERICA**

**Public Version**

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### TABLE OF REPORTS AND AWARDS

Short Form	Full Citation
<i>EC – Bananas III (US)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS27/ARB, 9 April 1999
<i>EC – Hormones (Canada)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS48/ARB, 12 July 1999
<i>EC – Hormones (US)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS26/ARB, 12 July 1999
<i>US – 1916 Act (EC)</i> (Panel)	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by the European Communities</i> , WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R
<i>US – 1916 Act (EC)</i> (Article 22.6 – US)	Decision by the Arbitrators, <i>United States – Anti-Dumping Act of 1916, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS136/ARB, 24 February 2004
<i>US – COOL (Article 22.6 – US)</i>	Decision by the Arbitrators, <i>United States – Certain Country of Origin Labelling (COOL) Requirements - Recourse to Article 22.6 of the DSU by the United States</i> , WT/DS384/ARB, and Add. 1; WT/DS386/ARB, and Add. 1, circulated 7 December 2015
<i>US – FSC</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS108/ARB, 30 August 2002
<i>US – Gambling</i> (Article 22.6 – US)	Decision by the Arbitrator, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS285/ARB, 21 December 2007

<b>Short Form</b>	<b>Full Citation</b>
<i>US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Brazil – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS217/ARB/BRA, 31 August 2004
<i>US – Offset Act (Byrd Amendment) (Canada) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Canada – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS234/ARB/CAN, 31 August 2004
<i>US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS217/ARB/EEC, 31 August 2004
<i>US – Section 110(5) Copyright Act (Article 25)</i>	Award of the Arbitrators, <i>United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU</i> , WT/DS160/ARB25/1, 9 November 2001
<i>US – Tuna II (Mexico) (Article 22.6)</i>	Decision by the Arbitrator, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 22.6 of the DSU by Mexico)</i> , WT/DS381/ARB, 25 April 2017
<i>US – Upland Cotton (Article 22.6 – US II)</i>	Decision by the Arbitrator, <i>United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement</i> , WT/DS267/ARB/2 and Corr.1, 31 August 2009
<i>US – Washing Machines (Panel)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/R, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R
<i>US – Washing Machines (Article 21.3(c))</i>	Award of the Arbitrator, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (Recourse to Article 21.3(c) of the DSU)</i> , WT/DS464/RPT, 13 April 2017

### TABLE OF EXHIBITS

Exhibit No.	Description
USA-1	U.S. International Trade Commission, <i>Large Residential Washers from China</i> , Investigation No. 731-TA-1306 (Preliminary), Publication 4591 (February 2016) (Excerpted)
USA-2	Large Residential Washers from Korea and Mexico Inv. Nos. TA-701-488 & 731-TA-1199-1200 (1st Review), Samsung’s Substantive Response to ITC Notice of Institution (February 1, 2018) (“Samsung 2018 USITC LRWs Sunset Initiation Response”)
USA-3 (BCI)	First Written Submission of the United States of America (Confidential) in <i>US – Washing Machines (Panel)</i> (November 24, 2014) (Excerpted)
USA-4	LG Electronics’ Notice of Intent to Participate and Substantive Response to Notice of Initiation of Sunset Review – Large Residential Washers from Korea (February 5, 2018) (“LG 2018 Commerce LRWs Sunset Initiation Response”)
USA-5	“LG Electronics To Build U.S. Factory For Home Appliances In Tennessee” (February 28, 2017), <a href="http://www.lg.com/us/press-release/lg-electronics-to-build-us-factory-for-home-appliances-in-tennessee">http://www.lg.com/us/press-release/lg-electronics-to-build-us-factory-for-home-appliances-in-tennessee</a>
USA-6	LG Electronics’ Response to Commission’s Notice of Institution for Washer Sunset Review Certain Large Residential Washers from Korea and Mexico Investigation No. 701-TA-488 and 731-TA-1199-1200 (Review) (February 2, 2018) (“LG 2018 LRWs USITC Sunset Initiation Response”)
USA-7	Large Residential Washers from the Republic of Korea and Mexico; Pre-Hearing Brief of LG Electronics, Inc. and LG Electronics USA, Inc. (December 5, 2012) (“LG 2012 Original LRWs from Korea USITC Pre-Hearing Brief”) (Excerpted)
USA-8	In the Matter of Large Residential Washers from China Investigation No. 731-TA-1306 (Final), Pre-Hearing Brief of Samsung and LG (December 1, 2016) (“Samsung and LG 2016 LRWs from China USITC Pre-Hearing Brief”) (Excerpted)
USA-9	Correct U.S. Import Value of LRWs, Queried by the United States Using USITC DataWeb, by Country and by HTS Code (“U.S. Import Value of LRWs”)
USA-10	U.S. Recreation of Incorrect U.S. Import Value of LRWs, as Queried by Korea Using USITC DataWeb, by Country and by HTS Code

USA-11	Excerpt from the Harmonized Tariff Schedule of the United States (2018), Revision 1.2, (Effective Date 03/01/2018), Subheading 8450
USA-12	U.S. International Trade Commission, Large Residential Washers, TA-201-076 (Remedy), Transcript of Hearing (October 19, 2017) (Excerpted)
USA-13	Letters from Samsung, LG, and the Republic of Korea Authorizing the Parties to Access and Provide to the Arbitrator Information Treated as Business Confidential Information During the Underlying Proceedings
USA-14 <b>(BCI)</b>	Tables Presenting the Inputs and Results of the Application of an Appropriate Armington-Based Partial Equilibrium Model with Respect to the Antidumping Measure on LRWs from Korea
USA-15	Tables Presenting the Inputs and Results of the Application of an Appropriate Armington-Based Partial Equilibrium Model with Respect to the Countervailing Duty Measure on LRWs from Korea
USA-16 <b>(BCI)</b>	Microsoft Excel Version of an Appropriate Armington-Based Partial Equilibrium Model: Antidumping Measure on LRWs from Korea
USA-17	Microsoft Excel Version of an Appropriate Armington-Based Partial Equilibrium Model: Countervailing Duty Measure on LRWs from Korea

## I. INTRODUCTION

1. On February 23, 2018, Korea submitted to the Arbitrator a Methodology Paper that explains the methodological basis and the process that Korea used when making its request to suspend concessions and related obligations in this dispute.<sup>1</sup> Korea's Methodology Paper demonstrates that, 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<sup>2</sup> is not equivalent to the level of nullification or impairment.

2. As the United States shows in this submission, 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 do 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 of the antidumping duty rate from 11.86 percent to

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<sup>1</sup> See Methodology Paper of the Republic of Korea (February 23, 2018) ("Korea's Methodology Paper").

<sup>2</sup> WT/DS464/18.



[[\*\*\*]],<sup>3</sup> not a reduction to zero percent, 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 pointed out above and demonstrated in this submission, 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. As shown in this submission, 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 imports 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 (specifically no more than [[\*\*\*]] 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's Methodology Paper addresses none of these issues. Furthermore, the formula suffers from

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<sup>3</sup> See *infra* section III.B. Pursuant to paragraph 4 of the *Additional Working Procedures of the Arbitrator Concerning Business Confidential Information*, which were adopted on February 23, 2018, the United States requested Korea's assistance in obtaining letters from Samsung, LG, and the Government of Korea, authorizing the United States and Korea to access and submit to the Arbitrator confidential information submitted by those entities during the course of the antidumping and countervailing duty proceedings at issue in this dispute. Korea furnished the requested letters to the United States and the United States provides the letters to the Arbitrator with this submission. See Exhibit USA-13.

conceptual flaws and data input problems that are just as problematic whether the formula is applied to LRWs or products other than LRWs.

9. In the discussion below, following a brief recounting of the procedural background of this proceeding, the United States explains the considerations to determine the correct level of nullification or impairment and why the approach taken by the United States is appropriate.

## **II. PROCEDURAL BACKGROUND**

10. At its meeting on September 26, 2016, the DSB adopted the report of the Appellate Body, and the report of the panel as modified by the Appellate Body, in *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (DS464)*.<sup>4</sup> The adopted reports contain, *inter alia*, findings that certain aspects of Commerce’s antidumping and countervailing duty investigations on LRWs from Korea are inconsistent with U.S. WTO obligations. The reports also contain findings that Commerce’s use of zeroing in connection with the application of the alternative comparison methodology provided in the second sentence of Article 2.4.2 of the AD Agreement and certain aspects of Commerce’s differential pricing methodology are inconsistent with U.S. WTO obligations “as such”.

11. On April 13, 2017, an arbitrator determined pursuant to Article 21.3(c) of the DSU that the reasonable period of time for the United States to implement the recommendations of the DSB in this dispute was 15 months from the date on which the DSB adopted the panel and Appellate Body reports in this dispute.<sup>5</sup> Accordingly, the RPT expired on December 26, 2017.<sup>6</sup>

12. On January 11, 2018, Korea requested authorization from the DSB to suspend the application of concessions or other obligations under the covered agreements pursuant to Article 22.2 of the DSU.<sup>7</sup> On January 19, 2018, the United States objected to the level of suspension proposed by Korea.<sup>8</sup> Pursuant to Article 22.6 of the DSU, the U.S. objection referred the matter to arbitration.

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

13. Pursuant to Article 22.6 of the DSU, the United States objected to Korea’s proposed level of suspension of concessions and related obligations because Korea has submitted a proposed level of suspension that is far in excess of the level of nullification or impairment attributable to the measures at issue.

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<sup>4</sup> See Minutes of September 26, 2016 DSB Meeting, WT/DSB/M/385, para. 8.28 (November 1, 2016).

<sup>5</sup> *US – Washing Machines (Article 21.3(c))*, para. 4.1.

<sup>6</sup> *US – Washing Machines (Article 21.3(c))*, para. 4.1.

<sup>7</sup> WT/DS464/18.

<sup>8</sup> WT/DS464/19.

14. Article 22.4 of the DSU is explicit and requires that the “level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment.” Korea’s estimation of the level of nullification or impairment is contrary to the evidence and its request for suspension is contrary to the DSU. The evidence demonstrates that the level of nullification or impairment is zero. Additionally, Korea’s estimation of the level of nullification or impairment suffers from conceptual flaws, methodological errors, internal inconsistencies, and data errors that result in a grossly inflated estimate of the level of nullification or impairment. The specific errors in Korea’s economic analysis are discussed in section III.D of this submission.

15. To further establish that Korea has failed to provide an appropriate level of suspension, the United States, in this submission, demonstrates the appropriate level of nullification or impairment. This submission first discusses the requirement of Article 22 of the DSU that the proposed level of suspension be equivalent to the level of nullification or impairment. The submission then discusses the proper approach to determining the level of nullification or impairment in this dispute.

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

16. 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. Arbitrators in the past have recognized that “equivalence” is an exacting standard:

[T]he ordinary meaning of the word “*equivalence*” is “equal in value, significance or meaning”, “having the same effect”, “having the same relative position or function”, “corresponding to”, “something equal in value or worth”, also “something tantamount or virtually identical.”<sup>9</sup>

17. 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).

18. 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.<sup>10</sup> Arbitrators in past proceedings have

<sup>9</sup> *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.1. See also *US – COOL (Article 22.6 – US)*, para. 4.3.

<sup>10</sup> The concept of nullification or impairment derives from Article XXIII of the GATT 1994. Article XXIII provides: “If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired . . . as a result of . . . the failure of another contracting party to carry out its obligations under this Agreement . . . the matter may be referred to the CONTRACTING PARTIES.” This concept is

uniformly based their determinations on hard evidence and have refused to “accept claims that are ‘too remote’, ‘too speculative’, or ‘not meaningfully quantified.’”<sup>11</sup> 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.”<sup>12</sup>

19. In this proceeding, Korea has gone far beyond an “equivalent” level of nullification or impairment.<sup>13</sup> As explained below in section III.C.2, ample evidence demonstrates that, if the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea were brought into compliance following the expiration of the RPT, there would be no increase in the value of U.S. imports of LRWs from Korea because Korean producers of LRWs lack both the interest and the capacity to resume production of LRWs in Korea for the U.S. market. Thus, 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.

20. Despite this, Korea proposes that 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 be determined using a conceptually flawed economic model, which is premised on incorrect assumptions that render the model entirely unsuited for use in this proceeding.<sup>14</sup> Korea compounds its error by making numerous mistakes in compiling the data inputs used in its estimation of the level of nullification or impairment.<sup>15</sup>

21. Korea proposes to use the same flawed model and its derived formula to determine the level of suspension to be applied where Commerce uses a differential pricing methodology and

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then reflected in the DSU, including Article 3.3 (“The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”), as well as Articles 3.5, 10.4, and 23. For example, in *US – Section 110(5) Copyright Act (Article 25)*, the arbitrator found that the analysis of nullification or impairment analysis must focus on what benefits the EC would receive if the measure at issue – Section 110(5)(B) – were modified in accordance with the DSB recommendation. *See US – Section 110(5) Copyright Act (Article 25)*, paras. 3.20-3.35.

<sup>11</sup> *US – 1916 Act (EC) (Article 22.6 – US)*, para. 6.10; *see also id.*, paras. 5.54 (“In determining the level of nullification or impairment ... we need to rely, as much as possible, on credible, factual, and verifiable information. We cannot base any such estimates on speculation.”) and 5.69 (“We are of the view that any claim for a deterrent or ‘chilling effect’ by the European Communities in the present case would be too speculative, and too remote.”).

<sup>12</sup> *EC – Hormones (US) (Article 22.6 – EC)*, para. 41; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 40. *See also EC – Hormones (US) (Article 22.6 – EC)*, para. 77 (refusing to consider, as “too speculative,” lost exports that would have resulted from foregone marketing campaigns).

<sup>13</sup> *See DSU*, Art. 22.4.

<sup>14</sup> *See infra* section III.D.

<sup>15</sup> *See infra* section III.D.3.

zeroing after the expiration of the RPT. 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’s Methodology Paper addresses none of these issues. 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.

22. In previous proceedings, the arbitrator has compared the level of trade for the complaining party under the WTO-inconsistent measure to what the complaining party’s level of trade would be expected to be where the Member concerned has brought the WTO-inconsistent measure into conformity following the expiration of the RPT. The situation in which the Member concerned has removed the WTO inconsistency is referred to as the “counterfactual.” The difference in the level of trade under these two situations typically represents the level of nullification or impairment. Other Article 22.6 arbitrators have recognized that a counterfactual was an appropriate method in those proceedings to calculate a level of nullification or impairment,<sup>16</sup> and Korea itself proposes the use of a counterfactual in this proceeding.<sup>17</sup>

23. 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). As described below, 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**

24. 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.

25. Korea appears to agree. Korea explains in its Methodology Paper that “the counterfactual applied by Korea in calculating its level of nullification and impairment is what the value of Korea’s exports of LRWs to the United States would have been had the United States complied

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<sup>16</sup> See, e.g., *US – Gambling (Article 22.6 – US)*, para. 3.14 (“the use of a counterfactual to assess the level of exports that would have accrued to Antigua, had the United States complied with the rulings, constitutes an appropriate basis for assessing the level of nullification or impairment of benefits accruing . . . .”); *US – Offset Act (Byrd Amendment) (Canada) (Article 22.6 – US)*, para. 4.22; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 37; *EC – Bananas III (US) (Article 22.6 – EC)*, para. 7.1 *et seq.*; *US – Tuna (Article 22.6 – US)*, para. 4.4.

<sup>17</sup> See, e.g., Korea’s Methodology Paper, para. 22.

with all the DSB recommendations and rulings at the end of the RPT, which was 26 December 2017.”<sup>18</sup>

26. 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, as Korea contends.<sup>19</sup> Without question, 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.<sup>20</sup> 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. The United States continues to consider various alternatives for coming into compliance with the DSB’s recommendations, including redeterminations that would result in antidumping and countervailing duty measures that are modified – but not terminated – to bring the measures into conformity with U.S. WTO obligations.

27. In this regard, the United States recalls that 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 [[\*\*\*]],<sup>21</sup> 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 from 13.02 percent<sup>22</sup> to [[\*\*\*]].

28. In that case, the counterfactual to be applied to measure 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 be a reduction

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<sup>18</sup> See, e.g., Korea’s Methodology Paper, para. 23.

<sup>19</sup> See Korea’s Methodology Paper, paras. 4, 23.

<sup>20</sup> See *Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,988 (December 26, 2012) (“LRWs AD Investigation Final Determination”), p. 75,992 (Exhibit KOR-5); *Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 Fed. Reg. 75,977 (Dep’t of Commerce December 26, 2012) (“LRWs CVD Investigation Final Determination”), p. 75,976 (Exhibit KOR-6).

<sup>21</sup> See First Written Submission of the United States of America (Confidential) in *US – Washing Machines (Panel)* (November 24, 2014), para. 126 (citing Final Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc.) (Exhibit USA-3 (BCI)).

<sup>22</sup> See Korea’s Methodology Paper, para. 42.

of the weighted-average antidumping duty rate<sup>23</sup> from 11.86 percent to [[\*\*\*]],<sup>24</sup> not a reduction to zero percent.

29. 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 measures and the countervailing duty measures, while challenged by Korea in the same dispute, are not related. As Korea notes, Commerce has initiated a proceeding under section 129 of the *Uruguay Round Agreements Act* with respect to the WTO-inconsistent aspects of the U.S. countervailing duty measure.<sup>25</sup> The United States expects that this proceeding, the aim of which is to bring the countervailing duty measure on LRWs from Korea into conformity with U.S. WTO obligations, will be completed later this year.

30. Despite the fact that a variety of potential measures could be taken to comply with the DSB's recommendations relating to certain aspects of the U.S. countervailing duty measure on LRWs from Korea – and, in any event, as explained above, termination of the countervailing duty measure is not required due to the assignment to Daewoo of a countervailing duty rate determined based on the application of facts available, which is not subject to any DSB recommendations – 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<sup>26</sup> 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.<sup>27</sup>

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<sup>23</sup> As explained above, Daewoo 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.

<sup>24</sup> The United States determined this weighted-average dumping margin using the calculation presented in Korea's methodology paper. See Korea's Methodology Paper, footnote 33. Thus, if Samsung's dumping margin changes to zero percent and LG's dumping margin changes to [[\*\*\*]], then  $0 \times 0.31 + [[***]] \times (1-0.31) = [[***]]$ .

<sup>25</sup> Korea's Methodology Paper, para. 14.

<sup>26</sup> As explained above, Daewoo 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.

<sup>27</sup> See Korea's Methodology Paper, paras. 35, 39, 43, and 44, and Appendix A, p. A1.

**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**

31. Ample evidence demonstrates that reducing or terminating the 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, and thus those U.S. measures do not nullify or impair any benefits accruing to Korea. In other words, the correct level of nullification or impairment is zero.

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

32. As an initial matter, the United States recalls that Article 3.8 of the DSU provides that:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.<sup>28</sup>

33. 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.<sup>29</sup> As the arbitrator found in *EC – Bananas III (US) (Article 22.6 – EC)*:

[A]n initial decision on whether or not to raise a complaint is necessarily the result of a subjective and strategic consideration from the individual perspective of a Member. However, a decision on whether the assertion of nullification or impairment by an individual Member was warranted and justified in light of WTO law is a different decision, taken by a panel or the Appellate Body

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<sup>28</sup> DSU, Art. 3.8 (emphasis added).

<sup>29</sup> See also DSU, Art. 23.2(a). Article 23.2(a) provides that “...Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding”. Article 23.2(a) distinguishes between a Member’s determination “to the effect that a violation has occurred” and a Member’s separate determination “that benefits have been nullified or impaired,” as well as a third type of determination “that the attainment of any objective of the covered agreements has been impeded”.



from the objective benchmark of the agreements covered by the WTO.

The *presumption* of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as *evidence* proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the WTO dispute settlement system. The review of the level of nullification or impairment by Arbitrators from the objective benchmark foreseen by Article 22 of the DSU, is a separate process that is independent from the finding of infringements of WTO rules by a panel or the Appellate Body. As a result, a Member’s potential interests in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreements are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. However, a Member’s legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU.<sup>30</sup>

34. The arbitrator in *US – 1916 Act (EC) (Article 22.6 – US)* “agree[d] with the arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)* that the *presumption* of nullification or impairment, as provided in Article 3.8 of the DSU, by no means provides evidence of the *level* of nullification or impairment sustained by the Member requesting authorization to suspend obligations.”<sup>31</sup> The arbitrator went on, however, to reason that:

[T]he fact that the presumption does not automatically translate to a given level does not mean that the level is “zero.” The original Panel determined that the 1916 Act “nullifies and impairs benefits accruing to the European Communities.” In light of this conclusion, the level must be something greater than “zero”, and it is a contradiction in terms to suggest otherwise.<sup>32</sup>

35. The reasoning of the arbitrator in *US – 1916 Act (EC) (Article 22.6 – US)* is flawed. As noted above, Article 3.8 of the DSU expressly provides for the possibility that the Member concerned may “rebut” the “presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement.” It follows logically that, if the Member concerned successfully rebuts that presumption, it is possible that the correct conclusion would

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<sup>30</sup> *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 6.9-6.10 (emphasis added).

<sup>31</sup> *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.50 (emphasis in original).

<sup>32</sup> *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.50.

be that there is no nullification or impairment, despite the existence of a WTO-inconsistent measure.

36. 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.<sup>33</sup> As the arbitrators explained in *EC – Hormones (Canada) (Article 22.6 – EC)* and *EC – Hormones (US) (Article 22.6 – EC)*:

[O]ur task of estimating nullification and impairment is very different from that of a panel examining the WTO conformity of certain measures. Once a panel has found a WTO inconsistency, it can presume – pursuant to Article 3.8 of the DSU – that the inconsistency has caused nullification and impairment. On that ground the panel can give redress to the winning party under Article XXIII of GATT 1994 or corresponding provisions in other WTO agreements. What normally counts for a panel is competitive opportunities and breaches of WTO rules, not actual trade flows. A panel does not normally need to further assess the nullification and impairment caused; it can presume its existence. We, in contrast, have to go one step further. We can take it for granted here that the hormone ban is WTO inconsistent. What we have to do is to estimate the nullification and impairment caused by it (and presumed to exist pursuant to Article 3.8 of the DSU). To do so in the present case, we have to focus on trade flows. We

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<sup>33</sup> We note that the findings of the original panel in *US – 1916 Act (EC) (Panel)* concerning nullification or impairment were limited to the following brief discussion at paras. 6.226-6.227 of the panel report:

The EC claims that, by violating Articles XVI:4 of the Agreement Establishing the WTO, Articles VI:1 and VI:2 of the GATT 1994, Articles 1, 2.1, 2.2, 3, 4 and 5.5 of the Anti-Dumping Agreement and Article III:4 of the GATT 1994, the United States has nullified or impaired benefits accruing to the EC under those agreements.

We have found that the 1916 Act as such violates Article VI:1 and VI:2 of the GATT 1994, as well as Articles 1, 4 and 5.5 of the Anti-Dumping Agreement. We also concluded that, by not ensuring the conformity of the 1916 Act with its obligations as provided under the above-mentioned provisions, the United States violates Article XVI:4 of the Agreement Establishing the WTO. Since Article 3.8 of the DSU provides that “In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment” and as the United States has adduced no evidence to the contrary, we conclude that the 1916 Act nullifies or impairs benefits accruing to the European Communities under the WTO Agreement.

must estimate trade foregone due to the ban's continuing existence beyond [the expiration of the RPT on] 13 May 1999.<sup>34</sup>

It follows from this reasoning that, 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.

37. 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. As the arbitrator in *US – 1916 Act (EC) (Article 22.6 – US)* found, “any suspension of obligations in excess of the level of nullification or impairment would be punitive”, and “punitive sanctions are prohibited by Article 22.4.”<sup>35</sup>

38. 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.<sup>36</sup> 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.”<sup>37</sup> As explained in the following section, evidence indicates that the value of Korea's exports of LRWs to the United States would not have increased at all if the United States had complied with all the DSB recommendations following the expiration of the RPT.

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

39. Ample evidence demonstrates that bringing the WTO-inconsistent U.S. antidumping and countervailing duty measures on LRWs from Korea into compliance following the expiration of the RPT would result in no increase at all in the value of LRWs exported from Korea to the United States. This evidence is provided in the form of numerous public statements made by Samsung and LG, the two Korean producers of LRWs that Korea suggests account for all

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<sup>34</sup> *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 41 (emphasis added; citations omitted); *EC – Hormones (US) (Article 22.6 – EC)*, para. 42 (emphasis added; citations omitted).

<sup>35</sup> *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.22.

<sup>36</sup> See *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.23. See also *id.*, para. 5.27 (“The *US – Section 110(5) of the US Copyright Act (Article 25.3)* arbitrators ... observed that the object of the proceeding was to ‘quantify the economic harm suffered by the European Communities’ as a consequence of the continued application of the US legislation.” (citing *US – Section 110(5) of the US Copyright Act (Article 25.3)*, footnote 38).

<sup>37</sup> See, e.g., Korea's Methodology Paper, para. 23.

Korean LRWs sold in the United States.<sup>38</sup> Those public statements include sworn testimony given to the U.S. International Trade Commission (“USITC”), written statements provided to Commerce and the USITC, the veracity of which has been certified by company officials and legal counsel,<sup>39</sup> and press releases published by the companies.

40. Korea’s Methodology Paper reports that, after the imposition of the antidumping and countervailing duty measures, Samsung discontinued exports to the U.S. market and LG has substantially lowered its volume of exports to the U.S. market.<sup>40</sup> However, the decisions by Samsung and LG to discontinue and reduce exports from Korea to the United States, and to shift production from Korea to other countries, were not made in response to the imposition of the U.S. antidumping and countervailing duty measures, according to statements made by Samsung and LG.

41. The USITC noted in its preliminary report in the 2015-2016 antidumping and countervailing duty investigations of LRWs from China that “Samsung stated that operating cost savings and its ability to consolidate LRW production from Korea and Mexico into one facility in China were the factors in its decision to move production of LRWs from Korea to China,” and that “Samsung currently produces LRWs in Korea for markets other than the United States.”<sup>41</sup> In a February 2018 submission to the USITC in the ongoing sunset reviews of LRWs from Korea

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<sup>38</sup> See Korea’s Methodology Paper, para. 38 (Representing that, “[i]n 2011, the share of Korean washing machines was 22.5% of total U.S. sales”. That figure is derived by summing the market shares of LG and Samsung, as reflected in Appendix C of Korea’s Methodology Paper). The only other Korean producer of LRWs mentioned in Korea’s Methodology Paper is Daewoo, and Korea reports that Daewoo has discontinued exports of LRWs to the United States. See *id.*, para. 44. As explained above, Daewoo 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. See *supra* section III.B.

<sup>39</sup> See, e.g., Company Representative Certification of Jangmuk Park, Vice-President, Samsung, and Counsel Certification of Lynn M. Fischer Fox, in Large Residential Washers from Korea and Mexico Inv. Nos. TA-701-488 & 731-TA-1199-1200 (1st Review), Samsung’s Substantive Response to ITC Notice of Institution (February 1, 2018) (“Samsung 2018 USITC LRWs Sunset Initiation Response”) (pp. 3-4 of the PDF version of Exhibit USA-2); Company Certification of Namsu Kim, Senior Manager for Trade Team, LG, and Certificate of Accuracy and Completeness of Daniel L. Porter, in LG Electronics’ Notice of Intent to Participate and Substantive Response to Notice of Initiation of Sunset Review – Large Residential Washers from Korea (February 5, 2018) (“LG 2018 Commerce LRWs Sunset Initiation Response”) (pp. 5-6 of the PDF version of Exhibit USA-4); Counsel Certification of Daniel L. Porter in LG Electronics’ Response to Commission’s Notice of Institution for Washer Sunset Review Certain Large Residential Washers from Korea and Mexico Investigation No. 701-TA-488 and 731-TA-1199-1200 (Review) (February 2, 2018) (“LG 2018 USITC LRWs Sunset Initiation Response”) (p. 3 of the PDF version of Exhibit USA-6).

<sup>40</sup> See Korea’s Methodology Paper, para. 44. Korea notes that Daewoo also discontinued exports to the U.S. market. As explained above, Daewoo 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. See *supra* section III.B.

<sup>41</sup> U.S. International Trade Commission, *Large Residential Washers from China*, Investigation No. 731-TA-1306 (Preliminary), Publication 4591 (February 2016), p. VII-4, footnote 12 (Exhibit USA-1). The United States provides to the Arbitrator with this submission an excerpt of this USITC preliminary report. The full report is available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4591\\_1.pdf](https://www.usitc.gov/publications/701_731/pub4591_1.pdf).

and Mexico, Samsung represented that it “has virtually eliminated production capacity in Korea and Mexico.”<sup>42</sup>

42. As the USITC noted in the December 2017 report on its global safeguard investigation of LRWs:

[B]oth LG and Samsung are in the initial stages of constructing LRW production facilities in the United States that will likely reduce the need for both companies to import LRWs. Specifically, in February 2017, LG announced plans to open a \$250 million LRW production facility in Clarksville, Tennessee, in 2019. In June 2017, Samsung announced plans to open a \$380 million LRW production facility in Newberry, South Carolina, in early 2018.

Both LG and Samsung claim that their U.S. production facilities, once fully operational, will be capable of satisfying most U.S. demand for their LRWs. Accordingly, assuming LG’s and Samsung’s plans come to fruition, neither company will have an incentive to increase imports from Korea significantly in the imminent future.<sup>43</sup>

43. In a June 2017 press release, Samsung described its plans to commence manufacturing LRWs in the United States in the following terms:

For nearly forty years, Samsung has steadily expanded our operations in the United States – creating thousands of jobs and investing billions of dollars in cutting edge manufacturing facilities, research and development,” said Samsung Electronics America President & CEO Tim Baxter. “With this investment, Samsung is reaffirming its commitment to expanding its U.S. operations and deepening our connection to the American consumers, engineers and innovators who are driving global trends in consumer electronics.”<sup>44</sup>

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<sup>42</sup> Samsung 2018 USITC LRWs Sunset Initiation Response, p. 10 (p. 16 of the PDF version of Exhibit USA-2).

<sup>43</sup> U.S. International Trade Commission, *Large Residential Washers*, Investigation No. TA-201-076, Publication 4745 (December 2017) (“USITC LRWs 201 Report”), pp. 59-60 (pp. 68-69 of the PDF of Exhibit KOR-25) (emphasis added). *See also id.*, p. 70 (p. 79 of the PDF of Exhibit KOR-25) (“LG and Samsung also claim that their planned U.S. production facilities will ultimately satisfy the vast majority of U.S. demand for their LRWs.”). *See also* USITC LRWs 201 Report, p. 26 (p. 35 of the PDF of Exhibit KOR-25).

<sup>44</sup> “Samsung to Expand U.S. Operations, Open \$380 Million Home Appliance Manufacturing Plant in South Carolina,” Samsung Newsroom (June 28, 2017), in Samsung 2018 USITC LRWs Sunset Initiation Response, Exhibit 2 (p. 42 of the PDF version of Exhibit USA-2).

44. In a January 2018 press release, Samsung “announced the start of commercial production at its first U.S. based home appliance manufacturing facility ... in Newberry, South Carolina.”<sup>45</sup> As explained in that press release, “Samsung plans to produce one million washing machines at the Newberry County facility in 2018.”<sup>46</sup>

45. LG offered a similar explanation for its planned U.S. production facility in a submission to Commerce in February 2018, quoting sworn testimony given by Mr. John Toohey, Director of Strategy for LGEUS, during the ITC remedy hearing in the 2017 LRWs global safeguard investigation:

At LG, we’ve been discussing US production for quite some time, and I’ve been personally involved since I joined the Company in 2010. In fact, we started looking at US production before any of the anti-dumping cases came along. A US production site affords us tremendous operational benefits, shortening our supply chain by several weeks and allowing us to be more responsive to the market.<sup>47</sup>

46. LG’s submission continued:

In short, LG is similar to many other global producers of complex consumer durables that initially established a presence in the U.S. market with imports, and switched to supplying the U.S. market using domestic U.S. production once a critical mass of market acceptance has been reached. LG’s new Tennessee production plant is all about continuing the natural progression of LGEUS’ commitment of its highly sought after residential washers to the United States....<sup>48</sup>

47. LG’s construction of a U.S. LRWs production facility is part of LG’s broader plans to expand its presence in the United States:

The announcement of the new home appliance factory in Tennessee comes on the heels of the start of construction of the LG North American Headquarters in Englewood Cliffs, N.J., where LG broke ground earlier this month. That \$300-million project is

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<sup>45</sup> “Samsung Kicks Off U.S. Production of Premium Home Appliances,” Samsung Newsroom (January 12, 2018), in Samsung 2018 USITC LRWs Sunset Initiation Response, Exhibit 2 (p. 33 of the PDF version of Exhibit USA-2).

<sup>46</sup> “Samsung Kicks Off U.S. Production of Premium Home Appliances,” Samsung Newsroom (January 12, 2018), in Samsung 2018 USITC LRWs Sunset Initiation Response, Exhibit 2 (p. 35 of the PDF version of Exhibit USA-2).

<sup>47</sup> LG 2018 Commerce LRWs Sunset Initiation Response, p. 7 (p. 16 of the PDF Version of Exhibit USA-4) (emphasis added).

<sup>48</sup> LG 2018 Commerce LRWs Sunset Initiation Response, p. 8 (p. 17 of the PDF Version of Exhibit USA-4).

expected to increase LG’s local employment there from 500 today to more than 1,000 by 2019.<sup>49</sup>

“[B]eginning later this year [2018], LGEUS-TN will be a major U.S. producer of the subject merchandise, and will have a significant stake in ongoing U.S. production.”<sup>50</sup>

48. Indeed, both Samsung and LG are on record “claim[ing] that their planned U.S. production facilities will ultimately satisfy the vast majority of U.S. demand for their LRWs.”<sup>51</sup> As Samsung explained to the USITC in February 2018, in the context of the ongoing sunset reviews of LRWs from Korea and Mexico:

U.S. demand for the subject merchandise has increased steadily throughout the period of review, and is likely to continue to increase in the reasonably foreseeable future. . . . Samsung and LG’s domestic production [i.e., production at their new U.S. facilities] is poised to meet this growing demand, further obviating the need for continuation of the orders.<sup>52</sup>

49. LG likewise represented to Commerce in the ongoing sunset reviews that:

Revocation of the order on LRWs from Korea will not lead to continuation or recurrence of dumping by Korean respondents because Korean respondents will have new U.S. LRW production facilities from which they will supply the U.S. market. The existence of the brand new U.S. washer production factories will virtually eliminate the need for LRW imports from Korea.<sup>53</sup>

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We detail below (a) the substantial evidence that demonstrates that the new U.S. production facilities will be completed by the end of 2018 and (b) the substantial evidence that the new U.S. production

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<sup>49</sup> “LG Electronics To Build U.S. Factory For Home Appliances In Tennessee” (February 28, 2017), <http://www.lg.com/us/press-release/lg-electronics-to-build-us-factory-for-home-appliances-in-tennessee> (p. 4 of the PDF of Exhibit USA-5).

<sup>50</sup> LG 2018 Commerce LRWs Sunset Initiation Response, pp. 2-3 (pp. 11-12 of the PDF Version of Exhibit USA-USA-4).

<sup>51</sup> USITC LRWs 201 Report, p. 70 (p. 79 of the PDF of Exhibit KOR-25).

<sup>52</sup> Samsung 2018 USITC LRWs Sunset Initiation Response, p. 10 (p. 16 of the PDF version of Exhibit USA-2) (emphasis added).

<sup>53</sup> LG 2018 Commerce LRWs Sunset Initiation Response, p. 6 (p. 15 of the PDF Version of Exhibit USA-4) (emphasis added).

facilities will have the capability to supply virtually all of the LRW needs of LG and Samsung.<sup>54</sup>

\* \* \*

What this means is that, by the time this sunset review concludes (4Q 2018), LG and Samsung will be supplying virtually all of their U.S. demand from their new U.S. production factories in Clarksville, TN and Newbury, SC.<sup>55</sup>

\* \* \*

[S]tarting from the 4Q 2018 ... more than 95 percent of LG and Samsung LRWs will be supplied from the LG and Samsung U.S. LRW production factories.<sup>56</sup>

50. Samsung and LG have publicly stated, repeatedly, that they have no intention of resuming production of LRWs in Korea for the U.S. market because the companies intend instead to supply the U.S. market with LRWs manufactured at their new U.S. production facilities. Furthermore, beyond the stated intentions of Samsung and LG, there is, at present, insufficient LRWs production capacity in Korea to support any increase in exports of LRWs from Korea to the United States, according to statements made by Samsung and LG. As LG has explained:

There is no significant excess capacity in Korea that could be shipped to the United States.<sup>57</sup>

\* \* \*

Much of the existing Korean capacity is being absorbed in the Korean market, with another large portion exported to markets other than the U.S.<sup>58</sup>

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<sup>54</sup> LG 2018 Commerce LRWs Sunset Initiation Response, p. 7 (p. 16 of the PDF Version of Exhibit USA-4) (emphasis added).

<sup>55</sup> LG 2018 Commerce LRWs Sunset Initiation Response, p. 13 (p. 22 of the PDF Version of Exhibit USA-4) (emphasis added).

<sup>56</sup> LG 2018 Commerce LRWs Sunset Initiation Response, p. 15 (p. 24 of the PDF Version of Exhibit USA-4) (emphasis added).

<sup>57</sup> LG 2018 USITC LRWs Sunset Initiation Response, p. 4 (p. 10 of the PDF version of Exhibit USA-6) (emphasis added).

<sup>58</sup> LG 2018 USITC LRWs Sunset Initiation Response, p. 4 (p. 10 of the PDF version of Exhibit USA-6).



There is also no incentive to add new capacity in Korea or to ship from Korea in the future as LGE recently added capacity in other Asian countries to meet demand in Asian markets. Moreover, LGE will soon supply the U.S. market with U.S.-origin LRWs manufactured in Tennessee, further reducing the incentive to add any new capacity in Korea.<sup>59</sup>

\* \* \*

[LG explains that its] Korean manufacturing facility is already operating at full capacity. In December 2016, one of the front load manufacturing lines was demolished, thereby decreasing the capacity of the facility. Instead of adding additional washer capacity, LGE is expanding production of dryers for the Korean market. These situations sequentially lead to the conclusion that there will be no increase of inventories in the Korean facility or the U.S. warehouse.<sup>60</sup>

And, as noted earlier, Samsung represented in February 2018 that it “has virtually eliminated production capacity in Korea and Mexico.”<sup>61</sup> Thus, to the extent that Samsung and LG continue to import LRWs into the United States in 2018 as they work toward reaching full production capacity at their brand new U.S. production facilities, those imports of LRWs necessarily will come from countries other than Korea.

51. 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.

52. 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.

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<sup>59</sup> LG 2018 USITC LRWs Sunset Initiation Response, p. 4 (p. 10 of the PDF version of Exhibit USA-6) (emphasis added).

<sup>60</sup> LG 2018 USITC LRWs Sunset Initiation Response, p. 4 (p. 10 of the PDF version of Exhibit USA-6) (emphasis added).

<sup>61</sup> Samsung 2018 USITC LRWs Sunset Initiation Response, p. 10 (p. 16 of the PDF version of Exhibit USA-2) (emphasis added).

**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**

53. Based on the evidence discussed in the preceding section, 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. Thus, the level of suspension of concessions requested by Korea is not equivalent to the level of nullification or impairment.

54. 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. In the discussion that follows, the United States puts aside for the moment the fact that there would not be any increase at all in the level of U.S. imports of LRWs from Korea to the United States, given that Samsung and LG lack both the interest and the ability to resume production of LRWs in Korea for the U.S. market. Instead, the discussion below focuses on the errors in Korea’s economic model and the results that would be obtained using a model that corrects the errors in Korea’s economic analysis.

55. 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).<sup>62</sup>

56. 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.

57. Korea appears to agree with this approach generally.<sup>63</sup> Korea proposes to estimate the level of nullification or impairment using a “static partial equilibrium model.”<sup>64</sup> However, as

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<sup>62</sup> See, e.g., *EC – Hormones (Canada)* (Article 22.6 – EC), para. 37; *EC – Bananas III (US)* (Article 22.6 – EC), para. 7.1.

<sup>63</sup> See Korea’s Methodology Paper, paras. 22-23.

<sup>64</sup> Korea’s Methodology Paper, para. 28.

explained below, 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)**

58. Korea explains that its model is “based on academic literature,”<sup>65</sup> and Korea cites “a scholarly presentation in the context of WTO disputes ... given by Bown and Ruta” as the specific source of the model it uses to calculate the level of nullification or impairment.<sup>66</sup> As demonstrated below, however, the partial equilibrium model Korea uses is not appropriate in this situation.

59. The Bown and Ruta study “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.”<sup>67</sup> That is an incorrect assumption to make here. As Korea’s Methodology Paper shows, Korea and the United States are not the only two countries that produce and sell LRWs in the U.S. market.<sup>68</sup> LRWs are imported into the United States from more than a dozen countries.<sup>69</sup>

60. Furthermore, the USITC, in a global safeguard investigation conducted in 2017, reported that “[c]onsumers view imports and the domestic product as imperfect substitutes,” and further found that “there is a moderately high degree of substitutability between domestically produced LRWs and imported LRWs.”<sup>70</sup> Korea’s economic model, though, assumes 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. As noted above, this assumption is

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<sup>65</sup> Korea’s Methodology Paper, para. 28.

<sup>66</sup> Korea’s Methodology Paper, footnote 25 (Explaining that, “[i]n preparing Figure 2 below, Korea modified the graphs, ‘Figure 6.1. Reciprocity Compensation when the Respondent Implements a WTO-Inconsistent Tariff,’ shown in the Bown and Ruta study, p. 158.”).

<sup>67</sup> Bown and Ruta, p. 157 (Exhibit KOR-17).

<sup>68</sup> See Korea’s Methodology Paper, Appendix D, p. D1, and Exhibit KOR-8.

<sup>69</sup> See Korea’s Methodology Paper, Appendix D, p. D1, and Exhibit KOR-8.

<sup>70</sup> USITC LRWs 201 Report, pp. 81, V-9 (Exhibit KOR-25). A perfect substitute is “[a] good that is regarded by its demanders as identical to another good, so that the elasticity of substitution between them is infinite.” See *Deardorff’s Glossary of International Economics*, <http://www-personal.umich.edu/~alandear/glossary/p.html>. An example of a good that is perfectly substitutable is gasoline. As the price of one brand of gasoline rises, consumers will substitute another brand of gasoline at a ratio of 1:1. Imperfect substitutes have a lesser level of substitutability. As LG and Samsung have stated, LRWs are not “commodity product[s]” but are instead “highly differentiated, branded consumer products”; “LRWs sold in the U.S. market are sold under brand names, and brand perception is but one of several important non-price factors which drive purchasing decisions.” Samsung and LG 2016 LRWs from China USITC Pre-Hearing Brief, p. 17 (Exhibit USA-8). See also *id.*, pp. 17-23 and footnote 39 (discussing the appropriate elasticity of substitution).

false and contradicted by findings in reports of the USITC on which Korea relies as sources for the elasticities it uses in its own estimation of the level of nullification or impairment.<sup>71</sup>

61. The assumption of perfect substitutability also is contradicted by public submissions made to the USITC by Korean producers of LRWs.<sup>72</sup> For example, in a December 2016 joint submission made to the USITC by Samsung and LG in the antidumping and countervailing duty investigation of LRWs from China, the Korean producers argued that:

This is not a commodity product case. All LRWs sold in the U.S. market are sold under brand names, and brand perception is but one of several important non-price factors which drive purchasing decisions. The Commission must therefore approach its analysis of highly differentiated, branded consumer products differently than its analysis of commodity intermediate goods like steel, or pipe, or chemicals.<sup>73</sup>

Later in that submission, Samsung and LG recommended a specific range for the elasticity of substitution to be used by the USITC.<sup>74</sup>

62. 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.<sup>75</sup>

63. 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

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<sup>71</sup> See Korea's Methodology Paper, para. 36, footnote 28, and para. 45, footnotes 35, 36, and 38 (relying on USITC reports provided to the Arbitrator as Exhibit KOR-18 and Exhibit KOR-25).

<sup>72</sup> See Large Residential Washers from the Republic of Korea and Mexico; Pre-Hearing Brief of LG Electronics, Inc. and LG Electronics USA, Inc. (December 5, 2012) ("LG 2012 Original LRWs from Korea USITC Pre-Hearing Brief"), pp. 19-28 and Exhibit 9 (Exhibit USA-7); In the Matter of Large Residential Washers from China Investigation No. 731-TA-1306 (Final), Pre-Hearing Brief of Samsung and LG (December 1, 2016) ("Samsung and LG 2016 LRWs from China USITC Pre-Hearing Brief"), pp. 17-23 and footnote 39 (discussing the appropriate elasticity of substitution) (Exhibit USA-8).

<sup>73</sup> Samsung and LG 2016 LRWs from China USITC Pre-Hearing Brief, p. 17 (Exhibit USA-8). See also *id.*, pp. 17-23 and footnote 39 (discussing the appropriate elasticity of substitution).

<sup>74</sup> See Samsung and LG 2016 LRWs from China USITC Pre-Hearing Brief, pp. 22-23, footnote 39 (Exhibit USA-8).

<sup>75</sup> Again, as noted above, this discussion puts aside the fact that there would not have been any increase at all in the value of U.S. imports 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.

KOR-15.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> 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).”<sup>80</sup>

64. As explained in the Hallren and Riker paper:

The model assumes that there are three varieties of products in the industry that are imperfect substitutes in demand. The three varieties are the domestic product, subject imports, and non-subject imports, denoted by the subscripts *d*, *s*, and *n*. Subject imports are those directly affected by the change in trade policy (e.g., the imports experiencing the reduction in tariff rates), and non-subject imports are all other imports.<sup>81</sup>

The Hallren and Riker paper further explains that “[a]ll three varieties are imperfect substitutes and consumers substitute between each variety at a constant rate ( $\sigma$ ),” which is the Armington elasticity.<sup>82</sup> The Hallren and Riker paper points out that the Armington elasticity “is a key element in the model” because it tells us how sensitive consumers are to changes in the relative prices of each of the three variables.<sup>83</sup>

65. This submission does not reproduce the full explanation of the Armington-based partial equilibrium model that is presented in the Hallren and Riker paper. It suffices to say that:

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<sup>76</sup> See R. Hallren and D. Riker, An Introduction to Partial Equilibrium Modeling of Trade Policy, Economic Working Paper Series (Working Paper 2017-07-B), U.S. International Trade Commission, July 2017 (“Hallren and Riker (2017)”) (Exhibit KOR-15).

<sup>77</sup> See Hallren and Riker (2017), pp. 3-15 (Exhibit KOR-15).

<sup>78</sup> See Hallren and Riker (2017), pp. 12-15 (Exhibit KOR-15).

<sup>79</sup> See Hallren and Riker (2017), pp. 4-5 (Exhibit KOR-15). See also, e.g., WTO & UN (2012), *A Practical Guide to Trade Policy Analysis*, pp. 104, 144-146 (Exhibit KOR-14).

<sup>80</sup> WTO & UN (2012), *A Practical Guide to Trade Policy Analysis*, p. 144 (Exhibit KOR-14) (emphasis added).

<sup>81</sup> Hallren and Riker (2017), p. 4 (Exhibit KOR-15).

<sup>82</sup> Hallren and Riker (2017), p. 4 (Exhibit KOR-15).

<sup>83</sup> Hallren and Riker (2017), pp. 4-5 (Exhibit KOR-15) (emphasis added).

When the tariff is removed, the supply of subject imports increases, and the market price of subject imports falls. Because the three varieties are substitutes, the decline in the market price of subject imports causes consumers to buy more of the subject imports in lieu of the other two varieties, and this is reflected as a reduction in demand for the domestic and non-subject varieties. The model predicts that removing a tariff on subject imports will result in a decline in the market price of all varieties, an increase in quantity demanded of subject imports, and a decrease in quantity demanded of the domestic product and non-subject imports.<sup>84</sup>

66. 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....”<sup>85</sup> 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.

67. In the following sections, the United States discusses the calculations that would be involved in properly applying an Armington-based partial equilibrium model and the correct data inputs that would be used in the model. The United States then presents the level of nullification or impairment that would result from the application of the model.

## **2. Calculations That Would Be Involved in Properly Applying an Armington-Based Partial Equilibrium Model**

68. As explained above, a more appropriate partial equilibrium model for analyzing trade policy changes in the LRWs market would be an Armington model that assumes three varieties of products that are imperfect substitutes. The three varieties, domestic product (U.S.), subject imports (Korea), and non-subject imports (rest of world), are represented by the subscripts  $d$ ,  $s$ , and  $n$ . In this model, consumers substitute between each variety at a constant rate,  $\sigma$ , the “Armington elasticity”, which tells us how sensitive consumers are to changes in the relative prices of the three varieties.

69. As shown in the Hallren and Riker paper, with simple assumptions on demand and supply and allowing for equilibrium in each market, the model is based on the following non-linear simultaneous system of market clearing equations, (1)-(4)<sup>86</sup>:

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<sup>84</sup> Hallren and Riker (2017), p. 12 (Exhibit KOR-15).

<sup>85</sup> Hallren and Riker (2017), p. 12 (Exhibit KOR-15).

<sup>86</sup> See Hallren and Riker (2017), pp. 6-7 (Exhibit KOR-15). Note that equations (1)-(3) presented here reflect the combination, respectively, of equations (1) and (5), (2) and (6), and (3) and (7) in the Hallren and Riker paper. The Hallren and Riker paper explains that equations (1)-(3) in the paper are demand curves and equations (5)-(7) in the paper are supply curves. In equilibrium, supply equals demand in each market, by definition. Thus, both equations (1) and (5) equal  $q_d$ , both equations (2) and (6) equal  $q_s$ , and both equations (3) and (7) equal  $q_n$ , as can be seen in the Hallren and Riker paper. See *id.*

$$a_d (p_d)^{\varepsilon_d} = Q b_d \sigma \left(\frac{p_d}{P}\right)^{-\sigma} \quad (1)$$

$$a_s \left(\frac{p_s}{t_s}\right)^{\varepsilon_s} = Q b_s \sigma \left(\frac{p_s}{P}\right)^{-\sigma} \quad (2)$$

$$a_n (p_n)^{\varepsilon_n} = Q b_n \sigma \left(\frac{p_n}{P}\right)^{-\sigma} \quad (3)$$

$$Q = Y P^\theta \quad (4)$$

70. The relevant variables in the equations above are defined as follows:  $Q$  is the aggregate quantity;  $P$  is the price index of the product;  $p_d$ ,  $p_s$ , and  $p_n$  are consumer prices for the three varieties of products; the producer prices of the domestic product and non-subject imports are  $p_d$  and  $p_n$ ;  $\frac{p_s}{t_s}$  is the producer price of the subject import, where  $t_s$  is the trade cost factor, defined as one plus the *ad valorem* equivalent rate of the tariff;  $\theta$  is the price elasticity of total demand;  $\sigma$  is the elasticity of substitution;  $\varepsilon_d$ ,  $\varepsilon_s$ , and  $\varepsilon_n$  are elasticities of supply; and  $Y$  is the level of aggregate expenditure allocated to this category of goods.<sup>87</sup>

71. Also in the equations above,  $a_d$ ,  $a_s$ , and  $a_n$  represent factors that shift the supply curve, while  $b_d$ ,  $b_s$ , and  $b_n$  are factors that shift the demand curves.<sup>88</sup> These demand and supply shifters would be held constant during the simulation exercise and do not require initial data inputs.

72. Initial data on imports from subject and non-subject countries and the value of domestic production can be used to get the initial market shares of each of the varieties of the product. These baseline values along with the elasticities (supply, demand, and substitution) allow one to get the calibrated values of the parameters  $a_d$ ,  $a_s$ , and  $a_n$ ;  $b_d$ ,  $b_s$ , and  $b_n$ ; and  $Y$ . These parameter values then would be used along with the initial elasticities to solve for price and quantity changes after the removal of the tariffs. The new value of trade thus would represent the effect of removing the tariffs and simultaneously solving this non-linear system of equations.

73. The resulting level of nullification or impairment would equal the 2017 counterfactual value of U.S. imports of LRWs from Korea minus the 2017 actual value of U.S. imports of LRWs from Korea. This equation also can be expressed as  $v_s - v_o$ , with  $v_s$  representing the value of subject imports resulting from the application of the model, and  $v_o$  representing the 2017 actual total value of U.S. imports of LRWs from Korea.

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

74. The Hallren and Riker paper explains that the following data inputs would be used in applying the Armington-based partial equilibrium model that the paper describes:<sup>89</sup>

<sup>87</sup> See Hallren and Riker (2017), pp. 6-8 (Exhibit KOR-15).

<sup>88</sup> See Hallren and Riker (2017), pp. 6 and 7 (Exhibit KOR-15).

<sup>89</sup> Hallren and Riker (2017), p. 6 (Exhibit KOR-15).

Market Share of Domestic Producers;  
Market Share of Subject Imports;  
Market Share of Non-Subject Imports;  
Supply Elasticity for Domestic Producers;  
Supply Elasticity for Subject Imports;  
Supply Elasticity for Non-Subject Imports;  
Elasticity of Substitution within the Industry;  
Price Elasticity of Total Demand;  
Tariff Rates on Subject Imports.

An additional data input that would be necessary to estimate the level of nullification or impairment using an Armington-based partial equilibrium model is the value of U.S. imports of LRWs from Korea for the baseline period, which in this case is 2017.

75. The following subsections discuss the sources of the data inputs that would be used in the calculations of the levels of nullification or impairment using an Armington-based partial equilibrium model. Where possible, the United States relies on information sources and data inputs already provided to the Arbitrator by Korea.

76. Where necessary, the United States explains the errors that Korea has made in compiling the data inputs that it uses to estimate the level of nullification or impairment. As demonstrated below in section III.D.3.h, when correct data inputs are applied in Korea's calculation, the level of nullification or impairment – even using Korea's conceptually flawed economic model – drops from \$711 million per year to \$198.7 million per year, or to [[\*\*\*]] per year, if Korea's approach were further corrected to reflect that the WTO-inconsistent weighted-average antidumping duty rate should be reduced to [[\*\*\*]], not to zero percent.

**a. 2017 Data on U.S. Imports of LRWs from Korea**

77. The United States is providing to the Arbitrator with this submission correct data on the value of U.S. imports of LRWs from Korea for the period 2011-2017.<sup>90</sup> Like Korea, the United

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<sup>90</sup> See Correct U.S. Import Value of LRWs, Queried by the United States Using USITC DataWeb, by Country and by HTS Code ("Correct U.S. Import Value of LRWs") (Exhibit USA-9).



States relies on data queried using the USITC’s online trade statistics and tariff data program, DataWeb.<sup>91</sup>

78. Korea, however, appears to have queried data using the 6-digit HTS subheadings 8450.11, 8450.20, and 8450.90.<sup>92</sup> That is an error. In querying data using those 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.

79. Using only the 6-digit HTS subheading 8450.20 would include the HTS subheading 8450.20.0010, which covers “Coin operated” or commercial washing machines.<sup>93</sup> Commercial or coin operated washing machines are expressly excluded from the scope of the U.S. antidumping and countervailing duty measures on LRWs from Korea.<sup>94</sup> Including data reported under HTS subheading 8450.20.0010 thus necessarily overstates the value of imports used in Korea’s estimation of the level of nullification or impairment.

80. The United States has queried import data for LRWs using the appropriate 10-digit HTS subheadings (8450.20.0090 for 2011-2014; 8450.20.0040 and 8450.20.0080 for 2015-2017).<sup>95</sup> As Korea notes, Commerce provided an illustrative list of HTS subheadings when it described the scope of the original antidumping and countervailing duty investigations.<sup>96</sup> Those illustrative lists indicated particular HTS subheadings at the 10-digit level. Specifically, in the final determinations in the antidumping and countervailing duty investigations of LRWs from Korea, Commerce explained that:

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<sup>91</sup> See USITC DataWeb website, available at [https://dataweb.usitc.gov/scripts/user\\_set.asp](https://dataweb.usitc.gov/scripts/user_set.asp). The source of the import data compiled by the USITC is the U.S. Bureau of the Census (an agency within the U.S. Department of Commerce). See <https://dataweb.usitc.gov/>.

<sup>92</sup> See Korea’s Methodology Paper, Appendix D and Exhibit KOR-8, which refer to “HTS 6: General Customs Value by General Customs Value.” In Exhibit USA-10, the United States has recreated Korea’s data query, both by country and by HTS number, to show that Korea’s import data includes all of the subheadings under 8450.11, 8450.20, and 8450.90. When the import data are sorted by country, one can see that the values for each country and each year, as well as the total value for each year (2011-2016), match the data provided to the Arbitrator by Korea. When the import data are sorted by HTS number, one can see that the total value for each year (2011-2016) matches the data provided by Korea. Compare Exhibit USA-10 and Exhibit KOR-8. The 2017 data differ from that provided by Korea because the U.S. data reflect full-year 2017 imports, whereas Korea provided data only through October 2017 and then projected (or “annualized”) the full-year 2017 totals. See Korea’s Methodology Paper, Appendix D and Exhibit KOR-8.

<sup>93</sup> See Excerpt from the Harmonized Tariff Schedule of the United States (2018), Revision 1.2, (Effective Date 03/01/2018), Subheading 8450 (“HTSUS Subheading 8450”) (Exhibit USA-11).

<sup>94</sup> See LRWs AD Investigation Final Determination, p. 75,989 (Exhibit KOR-5); LRWs CVD Investigation Final Determination, p. 75,976 (Exhibit KOR-6).

<sup>95</sup> HTS is used to refer to the Harmonized Tariff Schedule of the United States.

<sup>96</sup> See Korea’s Methodology Paper, para. 18.

The products subject to this investigation are currently classifiable under subheading 8450.20.0090 of the Harmonized Tariff System of the United States (HTSUS).<sup>97</sup>

81. In 2015, however, HTS subheading 8450.20.0090 was eliminated and, as the USITC has explained, subheadings “HTS 8450.20.0040 (top loading) and 8450.20.0080 (other machines) were added to create a separate provision for large-capacity top loading washers (in addition to 8450.20.0010, which covers large-capacity coin operated machines). Prior to 2015, HTS statistical reporting number HTS 8450.20.0090 included both top and front loading non-coin-operated large-capacity washers.”<sup>98</sup> This change in the HTS subheadings, which did not constitute a change in the scope of the U.S. antidumping and countervailing duty measures, is reflected in the final results of the first administrative reviews of the antidumping and countervailing duty orders on LRWs from Korea, in which Commerce explained that:

The products covered by the order are all large residential washers and certain subassemblies thereof from Korea. The products are currently classifiable under subheadings 8450.20.0040 and 8450.20.0080 of the Harmonized Tariff System of the United States (HTSUS).<sup>99</sup>

82. The United States notes that Commerce’s determinations also refer to other HTS subheadings, explaining that:

Products subject to this investigation may also enter under HTSUS subheadings 8450.11.0040, 8450.11.0080, 8450.90.2000, and 8450.90.6000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this scope is dispositive.<sup>100</sup>

83. The United States does not include import data reported under these other subheadings in the value of U.S. imports of LRWs from Korea in 2017. Korea, however, does include these subheadings in the U.S. import value data it provided to the Arbitrator, as a result of Korea querying the 6-digit HTS subheadings 8450.11 and 8450.90. In doing so, however, Korea overstates the value of the U.S. imports of LRWs that are subject to the antidumping and

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<sup>97</sup> LRWs AD Investigation Final Determination, p. 75,989 (Exhibit KOR-5); LRWs CVD Investigation Final Determination, p. 75,976 (Exhibit KOR-6).

<sup>98</sup> USITC LRWs 201 Report, p. I-24, footnote 63 (p. 117 of the PDF version of Exhibit KOR-25).

<sup>99</sup> *Large Residential Washers from the Republic of Korea: Amended Final Results of the Antidumping Duty Administrative Review; 2012-2014*, 80 Fed. Reg. 68,508 (Dep’t of Commerce November 5, 2015) (“LRWs AD AR1 Final Results”), p. 65,508 (Exhibit KOR-20); *Large Residential Washers from the Republic of Korea: Final Results of Countervailing Duty Administrative Review; 2012-2013*, 80 Fed. Reg. 55,336 (Dep’t of Commerce September 15, 2015) (“LRWs CVD AR1 Final Results”), p. 55,337 (Exhibit KOR-23).

<sup>100</sup> LRWs AD Investigation Final Determination, p. 75,989 (Exhibit KOR-5); LRWs CVD Investigation Final Determination, p. 75,976 (Exhibit KOR-6); LRWs AD AR1 Final Results, p. 65,508 (Exhibit KOR-20); LRWs CVD AR1 Final Results, p. 55,337 (Exhibit KOR-23). Emphasis added.

countervailing duty measures. While products subject to the U.S. antidumping and countervailing duty measures “may” be entered under these subheadings, the subheadings primarily cover products outside the scope of the measures.

84. HTS subheading 8450 covers “Household- or laundry-type washing machines, including machines which both wash and dry; parts thereof”.<sup>101</sup> HTS subheadings 8450.20.0090, 8450.20.0040, and 8450.20.0080 cover “Machines, each of a dry linen capacity exceeding 10 kg.”<sup>102</sup> These are large residential washing machines within the scope of the antidumping and countervailing duty measures. However, HTS subheadings 8450.11.0040 and 8450.11.0080 generally cover “Machines, each of a dry linen capacity not exceeding 10 kg.”<sup>103</sup> These are smaller residential washing machines, which generally would be outside the scope of the measures.

85. Additionally, HTS subheading 8450.11.0010 covers “Coin operated” washing machines. As noted above, commercial or coin operated washing machines are expressly excluded from the scope of the U.S. antidumping and countervailing duty measures on LRWs from Korea.<sup>104</sup> By including data reported under HTS subheading 8450.11.0010, Korea necessarily overstates the value of imports used in the calculation of the level of nullification or impairment.

86. Similarly, HTS subheadings 8450.90.2000 and 8450.90.6000 generally cover “Parts: Tubs and tub assemblies” and “Other”.<sup>105</sup> While the scope of the U.S. antidumping and countervailing duty measures includes “certain subassemblies used in large residential washers,”<sup>106</sup> not all “parts” are included in the scope. While it is possible that some LRWs or subassemblies subject to the measures may be entered into the United States under these subheadings, it would not be appropriate to include the entire value of goods entered under these subheadings in the value of U.S. imports of LRWs.

87. Generally, Commerce indicates HTS subheadings under which the product “may also enter,” *inter alia*, “for ... customs purposes,” *i.e.*, as a notice to U.S. Customs and Border Protection to look for subject merchandise potentially entering under those subheadings.<sup>107</sup> It would not be appropriate to include the value of imports from those HTS subheadings in an

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<sup>101</sup> See HTSUS Subheading 8450 (Exhibit USA-11).

<sup>102</sup> See HTSUS Subheading 8450 (Exhibit USA-11) (emphasis added).

<sup>103</sup> See HTSUS Subheading 8450 (Exhibit USA-11) (emphasis added).

<sup>104</sup> See LRWs AD Investigation Final Determination, p. 75,989 (Exhibit KOR-5); LRWs CVD Investigation Final Determination, p. 75,976 (Exhibit KOR-6).

<sup>105</sup> See HTSUS Subheading 8450 (Exhibit USA-11).

<sup>106</sup> LRWs AD Investigation Final Determination, p. 75,989 (Exhibit KOR-5); LRWs CVD Investigation Final Determination, p. 75,976 (Exhibit KOR-6).

<sup>107</sup> LRWs AD Investigation Final Determination, p. 75,989 (Exhibit KOR-5); LRWs CVD Investigation Final Determination, p. 75,976 (Exhibit KOR-6); LRWs AD AR1 Final Results, p. 65,508 (Exhibit KOR-20); LRWs CVD AR1 Final Results, p. 55,337 (Exhibit KOR-23).

estimation of the level of nullification or impairment, as doing so would overstate the level of nullification or impairment.

88. Finally, the United States notes that full-year data are now available for 2017, so it is not necessary to use a projected or “annualized” value, as Korea does in its estimation of the level of nullification or impairment.<sup>108</sup>

89. In light of the above, the following would be used in the estimation of the level of nullification or impairment for the 2017 value of U.S. imports of LRWs from Korea and from the rest of the world:

Value of Imports of LRWs from Korea in 2017 ( $v_o$ ): \$244 million<sup>109</sup>

Value of Imports of LRWs from ROW in 2017: \$1,329 million<sup>110</sup>

#### **b. 2017 Market Share Data**

90. The Hallren and Riker paper explains that “[t]he model focuses on a single national market” and “[t]he market shares for the three varieties of products in the industry ( $m_d$ ,  $m_s$ , and  $m_n$ ) sum to one.”<sup>111</sup>

#### **i. Korea Incorrectly Uses 2011 Import Share Data**

91. As an initial matter, the United States notes that 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 also that Korea uses 2011 data for Korea’s import share rather than 2017 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.

92. As Korea explains in its Methodology Paper, “the counterfactual applied by Korea in calculating its level of nullification and impairment 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.”<sup>112</sup> That is,

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<sup>108</sup> See Korea’s Methodology Paper, Appendix D and Exhibit KOR-8.

<sup>109</sup> See Correct U.S. Import Value of LRWs (Exhibit USA-9).

<sup>110</sup> See Correct U.S. Import Value of LRWs (Exhibit USA-9). This value of U.S. imports of LRWs from the rest of the world in 2017 is calculated by subtracting the 2017 value of U.S. imports of LRWs from Korea from the 2017 total value of U.S. imports of LRWs (\$1,573 – \$244 = \$1,329).

<sup>111</sup> Hallren and Riker (2017), p. 6 (Exhibit KOR-15). The subscripts, “*d*,” “*s*,” and “*n*,” refer respectively to the domestic good, subject imports (Korean LRWs), and non-subject imports (LRWs imported from the rest of the world).

<sup>112</sup> See, e.g., Korea’s Methodology Paper, para. 23.

using 2017 import data as a baseline,<sup>113</sup> what would the value of Korea’s imports in 2017 have been if the duties had been brought into conformity following the expiration of the RPT? The relevant data input, in that case, is Korea’s 2017 share of U.S. imports of LRWs, not Korea’s 2011 share of imports.

93. The inconsistency in Korea’s approach is highlighted by Korea’s description of the source of the data it uses for Korea’s import share, which it describes as “USITC Data Web for 2011 when Imports from Korea is uninfluenced by the WTO-inconsistent measure”.<sup>114</sup> Critically, as Korea agrees, the appropriate counterfactual here is what the value of Korea’s 2017 imports of LRWs into the United States would have been if the U.S. antidumping and countervailing duty measures on LRWs had been reduced or terminated following the end of the RPT. The appropriate counterfactual is not what the value of Korea’s 2017 imports would have been if the U.S. antidumping and countervailing duty measures on LRWs had never been imposed at all, and Korea had maintained an import share “uninfluenced”<sup>115</sup> by the antidumping and countervailing duty measures on LRWs from Korea. Yet, that is what Korea is incorrectly modeling when it uses Korea’s 2011 import share in its calculation of the level of nullification or impairment.

94. Past WTO arbitrators have indicated that the normal counterfactual for calculating nullification or impairment is withdrawal of the measure as of the expiration of the RPT.<sup>116</sup> The issue was debated, for example, in *US – COOL (Article 22.6 – US)*, where Mexico argued for a novel counterfactual – that the measure had never been adopted in the first place.<sup>117</sup> The

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<sup>113</sup> See Korea’s Methodology Paper, paras. 34, 39, and 48, and Appendix A, p. A2.

<sup>114</sup> Korea’s Methodology Paper, Appendix A, p. A1 (emphasis added). Korea similarly describes the source of its market share data as “Stevenson Statistics for 2011 when sales from Korea is uninfluenced by the WTO-inconsistent measure”. *Id.* (emphasis added).

<sup>115</sup> Korea’s Methodology Paper, Appendix A, p. A1.

<sup>116</sup> See *US – COOL (Article 22.6 – US)*, para. 6.32 (“For purposes of our own determination, we follow the counterfactual of the COOL measure having been withdrawn at the end of the RPT. We note that this is consistent with the approach adopted by previous arbitrators.”) (citing *EC – Hormones (US) (Article 22.6 – EC)*, para. 38 (“Upon careful consideration of the claims and arguments set forth by the parties, we consider that our starting-point is as follows: what would annual prospective US exports of hormone-treated beef and beef products to the EC be if the EC had withdrawn the ban on 13 May 1999?”) (emphasis original)); see also *US – Upland Cotton (Article 22.6 – US II)*, para. 4.118 (“In the circumstances of this case, we find that the choice of MY 2005, which represents the first moment at which the United States should have come into compliance with the recommendations and rulings at issue by removing the adverse effects of the subsidies or withdrawing them, is in principle legitimate. We note that the end of the implementation period has been chosen as period of reference in arbitrations under Article 22.6 of the DSU previously.”) (citing *US – FSC (Article 22.6 – US)*, para. 2.15 (“We therefore decided to assess the proposed suspension of concessions at the time the United States should have withdrawn the prohibited subsidy at issue, in 2000.”)); *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, para. 3.147 (“Our core rationale is that the trade effect of the CDSOA measure can be estimated to be the nullification or impairment that the Requesting Parties have suffered as a result of the measure having not been withdrawn.”).

<sup>117</sup> *US – COOL (Article 22.6 – US)*, footnote 465 (“Mexico describes the counterfactual in the following terms: ‘if the COOL measure had not been adopted’ and ‘if the COOL measure was never in place’”).

arbitrator there rejected Mexico’s approach, finding that the appropriate counterfactual was that the measure had been “withdrawn at the end of the RPT.”<sup>118</sup>

95. Korea notes in its Methodology Paper that “Korea’s share of total import value decreased from 42.9% ... in 2011 to 12.8% ... in 2017.”<sup>119</sup> As discussed above in section III.C.2, Samsung and LG have stated publicly that they have decided to shift production of LRWs from Korea to China and other Asian countries, and now to the United States, and these decisions predate and are unrelated to the imposition of the U.S. antidumping and countervailing duty measures on LRWs from Korea. In any event, it does not matter whether the decline in Korea’s import share was caused by the U.S. measures. A Member whose measure has been found to be inconsistent with a covered agreement is to bring that measure into conformity. And “if it is impracticable to comply immediately,” a Member “shall have a reasonable period of time in which to do so.”<sup>120</sup> The Member concerned is not required to restore the *status quo* as it existed prior to the adoption of the measure. Rather, the appropriate counterfactual is one where the measure is brought into conformity following the expiration of the RPT. As the arbitrator in *EC – Hormones (US) (Article 22.6 – EC)* observed, “[w]e cannot assume, under the ‘counterfactual’, that the [inconsistent measure] was never imposed...”<sup>121</sup>

96. For these reasons, Korea’s use of its 2011 share of U.S. imports of LRWs in its estimation of the level of nullification or impairment is an error. If Korea’s import share were used in the estimation at all, then Korea’s 2017 import share should be used. Korea asserts in its Methodology Paper that Korea’s 2017 share of U.S. imports of LRWs is 12.8 percent.<sup>122</sup> When determined based on correct 2017 U.S. import data, Korea’s 2017 share of U.S. imports of LRWs is 15.5 percent.<sup>123</sup>

## **ii. Correct 2017 Market Share Data Can Be Derived from Available Information**

97. 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 ( $m_d$ ), subject imports ( $m_s$ ), and non-subject imports ( $m_n$ ). Such market share information is not published for the relevant LRWs industry that is the subject of the analysis in this proceeding.

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<sup>118</sup> See *US – COOL (Article 22.6 – US)*, paras. 6.31-6.32 (noting that the United States had made “repeated assertions that the counterfactual concerned ‘the measure withdrawn,’” and finding that “[f]or purposes of our own determination, we follow the counterfactual of the COOL measure having been withdrawn at the end of the RPT”).

<sup>119</sup> Korea’s Methodology Paper, para. 48.

<sup>120</sup> See DSU, Art. 21.3.

<sup>121</sup> *EC – Hormones (US) (Article 22.6 – EC)*, para. 77. See also *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 37.

<sup>122</sup> See Korea’s Methodology Paper, para. 48.

<sup>123</sup> See Correct U.S. Import Value of LRWs (Exhibit USA-9). The 2017 value of U.S. imports of LRWS from Korea is \$244 million and the 2017 total value of U.S. imports of LRWs is \$1,573 million. Hence, Korea’s 2017 share of U.S. imports of LRWs is 15.5 percent.

98. Korea has provided to the Arbitrator market share data from Stevenson Statistics.<sup>124</sup> Those data, however, report the market shares of companies, not the market shares of countries of origin or even of companies in a particular country.<sup>125</sup> Korea relies on the Stevenson Statistics to assert that, in 2011, “the market share for Samsung was 9%, while the market share for LG was 13.5%, for an aggregate market share of 22.5%,” and thus “the market share of Korean washing machines in the U.S. market in 2011” was 22.5 percent.<sup>126</sup> That 22.5 percent market share, however, is the U.S. market share of Samsung and LG combined for LRWs produced by Samsung and LG in all countries, not only Korea. That figure does not reflect the market share of LRWs produced in Korea.

99. Furthermore, while the data upon which Korea relies may reflect the U.S. market share of Samsung and LG in 2011, the 2017 market share of LRWs produced in Korea is what is needed to be consistent when estimating the level of nullification or impairment using an economic model. In general, the Stevenson Statistics that Korea has provided report that Samsung’s U.S. market share in 2017 was 19.60 percent, and LG’s market share was 16.40 percent, both well above the 2011 market shares of those companies.<sup>127</sup> Yet, as Korea has explained, Samsung has “discontinued ... exports to the U.S. market” from Korea, and LG has “substantially lowered its volume of exports to the U.S. market” from Korea.<sup>128</sup> Necessarily, the 2017 market share data for Samsung and LG reflect significant imports of LRWs produced by those companies in countries other than Korea. Accordingly, the Stevenson Statistics market share data for 2017 cannot be used to estimate the level of nullification or impairment.

100. It is possible, though, 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.

101. Korea states in its Methodology Paper that the total size, *i.e.*, the total value, of the U.S. washing machines market in 2017 was \$4,648 million.<sup>129</sup> Korea establishes the total value of the U.S. washing machines market using data compiled by the Association of Home Appliance Manufacturers (“AHAM”).<sup>130</sup> Korea observes, though, that the AHAM data do not reflect “the U.S. market specifically for LRWs, the product at issue in this dispute,” but instead reflect the “washing machine industry as a whole”.<sup>131</sup> Korea attempts to account for this by using 2011

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<sup>124</sup> See Korea’s Methodology Paper, paras. 38 and 47, Appendix A, Appendix C, and Exhibit KOR-19.

<sup>125</sup> See Korea’s Methodology Paper, Appendix C and Exhibit KOR-19.

<sup>126</sup> Korea’s Methodology Paper, para. 47.

<sup>127</sup> See Korea’s Methodology Paper, Appendix C.

<sup>128</sup> Korea’s Methodology Paper, para. 44.

<sup>129</sup> See Korea’s Methodology Paper, paras. 37 and 46, footnote 41, Appendix A, and Appendix C.

<sup>130</sup> See Korea’s Methodology Paper, para. 17.

<sup>131</sup> Korea’s Methodology Paper, para. 17.

“import statistics specific to LRWs” as a proxy for market share and market size.<sup>132</sup> As demonstrated above, Korea’s approach is fundamentally flawed.<sup>133</sup>

102. However, the AHAM market value data could be used in the application of a proper Armington-based partial equilibrium model in this proceeding. It simply would be necessary to adjust the data appropriately so that the total value of the market utilized in the model is a better estimate of the size of the relevant LRWs market at issue in this dispute. Several different adjustments to the AHAM data might be considered, including 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. Total value of U.S. imports of LRWs, *i.e.*, products entered under HTS subheadings 8450.20.0040 and 8450.20.0080, accounted for 80 percent of the total value of all U.S. imports of washing machines entered under all potentially applicable HTS subheadings in 2017.<sup>134</sup> If the composition of the overall washing machines market in the United States is consistent with the composition of the imports, that suggests that relevant LRWs account for no more than 80 percent of all washing machines, and thus 80 percent of the total value of the washing machines market as reported by AHAM likely would be the maximum value of the relevant LRWs market. To ensure that the level of suspension would not exceed the level of nullification or impairment, a lower estimate should be used, such as 70 percent or 60 percent of the AHAM total market value.

103. The United States provides below market share data derived three ways, using 60 percent of the AHAM total market value, 70 percent of the AHAM total market value, and 80 percent of the AHAM total market value. As explained below in section III.D.4, the United States provides to the Arbitrator the results of an appropriate Armington-based partial equilibrium model using each of these three estimates of the total value of the LRWs market and the corresponding market shares.

104. The estimated value of the LRWs market can be combined with U.S. import data on LRWs to establish the necessary market shares for domestic producers of LRWs ( $m_d$ ), subject imports of LRWs from Korea ( $m_s$ ), and non-subject imports of LRWs from the rest of the world ( $m_n$ ) using the following calculations:

$$m_d = \frac{\text{Total Market Value} - \text{Total Imports Value}}{\text{Total Market Value}}$$
$$m_s = \frac{\text{Value of Subject Imports}}{\text{Total Market Value}}$$
$$m_n = \frac{\text{Total Imports Value} - \text{Value of Subject Imports}}{\text{Total Market Value}}$$

<sup>132</sup> See Korea’s Methodology Paper, para. 18.

<sup>133</sup> See *supra*, section III.D.3.b.i.

<sup>134</sup> See Correct U.S. Import Value of LRWs (Exhibit USA-9).



105. As explained above in section III.D.3.a, the value of subject imports of LRWs from Korea in 2017 was \$244 million and the value of non-subject imports of LRWs from the rest of the world in 2017 was \$1,329 million.<sup>135</sup>

106. Accordingly, the following market shares would be used in the model to determine the level of nullification or impairment, based on estimates of the total value of the LRWs market using 60 percent of the AHAM total market value, 70 percent of the AHAM total market value, and 80 percent of the AHAM total market value:

	60% of AHAM Total	70% of AHAM Total	80% of AHAM Total
Market Share of Domestic Producers ( $m_d$ ):	43.6%	51.7%	57.7%
Market Share of Subject Imports ( $m_s$ ):	8.7%	7.5%	6.6%
Market Share of Non-Subject Imports ( $m_n$ ):	47.7%	40.8%	35.7%

### c. Elasticities of Supply

107. Following Korea’s approach, the United States has used elasticities of supply ( $\epsilon_d$ ,  $\epsilon_s$ , and  $\epsilon_n$ ) published by the USITC.<sup>136</sup>

108. Korea erroneously uses an elasticity of supply of 7, which Korea notes is the median of the range of 6 to 8 that was published in the January 2017 USITC report in the investigation of LRWs from China. Korea should have used an elasticity of supply of 6, the median of the range of 4 to 8, which comes from the more recent December 2017 report published at the conclusion of the USITC’s global safeguard investigation of LRWs.<sup>137</sup> Korea states that the elasticities it uses “have also been confirmed in the recent safeguard investigation on LRWs by the USITC.”<sup>138</sup> While that is correct for the elasticity of demand Korea uses, it is not correct for the elasticity of supply that Korea uses. To be consistent with Korea’s representations about its intention to use “recent”, “confirmed” information, the elasticities of supply used should be 6.

109. Thus, the following supply elasticities would be used in the application of an Armington-based partial equilibrium model:

Supply Elasticity for Domestic Producers ( $\epsilon_d$ ): 6

<sup>135</sup> See Correct U.S. Import Value of LRWs (Exhibit USA-9).

<sup>136</sup> See Korea’s Methodology Paper, para. 45 (Referring to the elasticities it uses in its calculation, Korea states that “[t]hese numbers have also been confirmed in the recent safeguard investigation on LRWs by the USITC.”).

<sup>137</sup> See USITC LRWs 201 Report, pp. V-18 and V-19 (Exhibit KOR-25).

<sup>138</sup> Korea’s Methodology Paper, para. 45.

Supply Elasticity for Subject (Korean) Imports ( $\varepsilon_s$ ): 6

Supply Elasticity for Non-Subject (Rest of World) Imports ( $\varepsilon_n$ ): 6

**d. Elasticity of Substitution within the Industry**

110. Still following Korea’s approach, the United States has used the elasticity of substitution within the industry ( $\sigma$ ) published by the USITC, again in the report issued at the conclusion of the recent global safeguard investigation of LRWs. In that report, the USITC found that, “[b]ased on available information, the elasticity of substitution between U.S.-produced LRWs and imported LRWs is likely to be in the range of 3 to 5.”<sup>139</sup> Using the median of this range, the following would be used for the substitution elasticity in a calculation using an Armington-based partial equilibrium model:

Substitution Elasticity ( $\sigma$ ): 4

**e. Price Elasticity of Total Demand**

111. The United States also follows Korea’s approach to use the median of the range of U.S. demand elasticity reported by the USITC.<sup>140</sup> The USITC estimated the range to be -0.3 to -0.8.<sup>141</sup> Accordingly, the following value would be used for the price elasticity of total demand in the United States, which is the same value used by Korea<sup>142</sup>:

Price Elasticity of Total Demand ( $\theta$ ): -0.55

**f. Changes in the Tariff Rates on Subject Imports**

112. 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.<sup>143</sup>

113. As explained above in section III.B, however, 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.

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<sup>139</sup> USITC LRWs 201 Report, p. V-19 (Exhibit KOR-25).

<sup>140</sup> See Korea’s Methodology Paper, para. 45.

<sup>141</sup> See USITC LRWs 201 Report, p. V-19 (Exhibit KOR-25).

<sup>142</sup> See Korea’s Methodology Paper, paras. 36, 39, and 45, and Appendix A, p. A1.

<sup>143</sup> See Korea’s Methodology Paper, paras. 42-44.

114. Accordingly, the following is used in the U.S. calculation for the change in the antidumping duty rate on subject imports:

Initial Antidumping Duty Rate on Subject Imports ( $t_{s0}$ ): 11.86%

Revised Antidumping Duty Rate on Subject Imports ( $t_{s1}$ ): [[\*\*\*]]

115. And the following is used in the U.S. calculation for the change in the countervailing duty rate on subject imports:

Initial Countervailing Duty Rate on Subject Imports ( $t_{s0}$ ): 0.58%

Revised Countervailing Duty Rate on Subject Imports ( $t_{s1}$ ): 0.0%

**g. There Is No Basis for Incorporating any Growth Rate Factor in the Estimation of the Level of Nullification or Impairment in this Proceeding**

116. 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.<sup>144</sup> 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.

117. As explained above in section III.C.2, 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.<sup>145</sup> 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,”<sup>146</sup> it is expected that the value of U.S. imports of LRWs from Korea will decline, not grow.

118. An additional flaw in Korea’s proposed growth rate factor is that Korea’s use of a simple average of the growth rate of the U.S. washing machines market from 2011-2017 overlooks that the growth rate of that market has slowed in recent years, with the rate of growth declining from

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<sup>144</sup> See Korea’s Methodology Paper, para. 40. See also *id.*, paras. 19, 37, and 46; Appendix A, p. A2; and Appendix C.

<sup>145</sup> See Korea’s Methodology Paper, para. 40. See also *id.*, paras. 19, 37, and 46; Appendix A, p. A2; and Appendix C.

<sup>146</sup> LG 2018 Commerce LRWs Sunset Initiation Response, p. 15 (p. 24 of the PDF Version of Exhibit USA-4).

14.3 percent in 2013, to 6.9 percent in 2014, to 5.9 percent in 2015, to 4.5 percent in 2016, down to 3.3 percent in 2017 (using Korea’s annualized estimate for 2017).<sup>147</sup>

119. In a February 2018 submission to the USITC in the ongoing sunset reviews of LRWs from Korea and Mexico, LG asserted that “[p]rojections by both AHAM (for washers) and by Whirlpool (for appliances) show expectations for continued growth in demand.”<sup>148</sup> The AHAM information submitted by LG projects a rate of growth of the washers market of 4.0 percent for 2018.<sup>149</sup> The Whirlpool information submitted by LG projects a rate of growth of the appliances market of “3+” percent in 2018-2020.<sup>150</sup> The Whirlpool information that LG provided to the USITC in February 2018 also is consistent with testimony given in 2017 by Whirlpool’s North American Region President, Mr. Joseph Liotine, during the USITC’s global safeguard investigation of LRWs. When asked about the “forecast for growth in future demand” for washing machines in the United States, Mr. Liotine testified that:

Generally, we do have a favorable outlook on demand. We shared in the last hearing kind of the bubble that occurred ten years ago. The replacement cycle coming from that, plus the favorable outlook on housing also contributed to that. We don’t publicize a washer-specific number, but we have generally talked about major appliances in about a three to five percent range over the 2017 and ’18 period at a minimum. And so we generally feel like that’s gonna continue based on those fundamentals of the market.<sup>151</sup>

120. Any estimation of the growth of the U.S. washing machines market – if at all relevant to the determination of the level of nullification or impairment, which it is not – would need to be based on actual growth projections rather than simply an average of the rate of growth in prior years. In that case, the rate of growth of the U.S. washing machines market would be in the range of 3 to 5 percent, with the median being 4 percent.

121. As explained above, though, U.S. imports of LRWs from Korea are expected to decline, not grow, irrespective of the growth rate of the U.S. washing machines market, based on public statements made by Samsung and LG. Accordingly, it would be contrary to the DSU to include any growth rate factor in the determination of the level of nullification or impairment.

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<sup>147</sup> Korea’s Methodology Paper, Appendix C.

<sup>148</sup> LG 2018 USITC LRWs Sunset Initiation Response, p. 12 (p. 18 of the PDF version of Exhibit USA-6).

<sup>149</sup> LG 2018 USITC LRWs Sunset Initiation Response, Exhibit 5 (p. 31 of the PDF version of Exhibit USA-6).

<sup>150</sup> LG 2018 USITC LRWs Sunset Initiation Response, Exhibit 6 (p. 34 of the PDF version of Exhibit USA-6).

<sup>151</sup> U.S. International Trade Commission, Large Residential Washers, TA-201-076 (Remedy), Transcript of Hearing (October 19, 2017), p. 143 (Exhibit USA-12) (emphasis added). The United States has provided to the Arbitrator an excerpt of the transcript. The full transcript is available on the Internet at [https://www.usitc.gov/trade\\_remedy/731\\_ad\\_701\\_cvd/investigations/2017/Large%20Residential%20Washers/Safeguard/large\\_residential\\_washers\\_hearing-10-19-2017.pdf](https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2017/Large%20Residential%20Washers/Safeguard/large_residential_washers_hearing-10-19-2017.pdf).

**h. Summary Comments Concerning Data Errors in Korea’s Estimation of the Level of Nullification or Impairment**

122. 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>

123. 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.<sup>152</sup> That figure would be [\*\*\*] if Korea’s approach were further corrected to reflect that the WTO-inconsistent weighted-average antidumping duty rate should be reduced to [\*\*\*], not to zero percent. In that case, the level of nullification determined using Korea’s flawed approach would be [\*\*\*] per year.<sup>153</sup>

<sup>152</sup> Applying the calculation in Korea’s Methodology Paper, at para. 39, using corrected input data:

Trade loss due to the United States’ measures: USD 198.7 million =  
 (price drop of 11.86% by terminating the application of the second sentence of Article 2.4.2 + price drop of 0.58% by terminating the application of countervailing duties) x  
 (The share of imports from Korea of 15.5% as of 2011) x  
 (Price elasticity of demand 0.55 + price elasticity of supply 6) x  
 (The entire actual 2017 U.S. import value of USD 1,573,000,000).

<sup>153</sup> Once again applying the calculation in Korea’s Methodology Paper, at para. 39, using corrected input data and the correct counterfactuals:

Trade loss due to the United States’ measures: [\*\*\*] =  
 (price drop of [\*\*\*] by terminating the application of the second sentence of Article 2.4.2 + price drop of 0.58% by terminating the application of countervailing duties) x

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

124. The following tables present the results that would be obtained by simultaneously solving the Armington system of equations, (1)-(4), which are described above in section III.D.2, using the given data inputs, which are detailed in section III.D.3, 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. In other words, the table presents the level of nullification or impairment as calculated for each of those scenarios. For comparison, the table also presents the level of nullification or impairment as calculated using 100 percent of the total market value reported by AHAM, even though this necessarily would include washing machines other than LRWs covered by the U.S. antidumping and countervailing duty measures on LRWs from Korea.

125. As shown in the first table, when calculated using correct data and a proper Armington-based partial equilibrium analysis, 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<sup>154</sup> annually, depending on assumptions made about the size of the LRWs market.

	<b>60% of AHAM Total</b>	<b>70% of AHAM Total</b>	<b>80% of AHAM Total</b>	<b>100% of AHAM Total</b>
<b>Level of Nullification or Impairment:</b>	[[***]]	[[***]]	[[***]]	[[***]]

126. As shown in the second table, when calculated using correct data and a proper Armington-based partial equilibrium analysis, 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.

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(The share of imports from Korea of 15.5% as of 2011) x

(Price elasticity of demand 0.55 + price elasticity of supply 6) x

(The entire actual 2017 U.S. import value of USD 1,573,000,000).

<sup>154</sup> This ranged estimation is provided to be transparent about the results of the application of the model while protecting BCI used in the calculation of the results.

	<b>60% of AHAM Total</b>	<b>70% of AHAM Total</b>	<b>80% of AHAM Total</b>	<b>100% of AHAM Total</b>
<b>Level of Nullification or Impairment:</b>	\$2.28 million	\$2.32 million	\$2.35 million	\$2.39 million

127. Exhibit USA-14 (**BCI**) (for the antidumping measure) and Exhibit USA-15 (for the countervailing duty measure) present tables showing (1) all of the data inputs used in the calculations, and (2) the price and quantity changes for the three varieties of product (domestic, subject, and non-subject) after the simulated reduction of the antidumping duty and the removal of the countervailing duty, which would be obtained by simultaneously solving the Armington system of equations. In addition, the United States also is providing to the Arbitrator with this submission Microsoft Excel versions of the model in which the calculations are performed, so that both the Arbitrator and Korea are able to see the operation of the economic model.<sup>155</sup>

128. As indicated above, 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 [[\*\*\*]] 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.

#### **IV. 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**

129. In addition to its request to suspend concessions and related obligations with respect to the United States in the amount of \$711 million per year (and more in subsequent years) due to 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, 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.<sup>156</sup>

<sup>155</sup> See Exhibit USA-16 (**BCI**) and Exhibit USA-17.

<sup>156</sup> Korea’s Methodology Paper, para. 49.

130. 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 demand and supply conditions. Korea’s Methodology Paper addresses none of these issues. 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**

131. As demonstrated above in section III.D, the “static partial equilibrium model”<sup>157</sup> 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 two incorrect assumptions, which renders it also unsuitable for determining the level of nullification or impairment for Korean imports other than LRWs.

132. 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.”<sup>158</sup> That is an incorrect assumption to make here. 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.<sup>159</sup> As can be seen just by reading the titles of the reports listed in Appendix B of Korea’s Methodology Paper, all but three of the antidumping proceedings identified involve imports of the investigated product from countries other than Korea, and imports from those countries were themselves subjects of investigations by Commerce and the USITC.<sup>160</sup> A review of the three reports in proceedings in which only imports from Korea are examined reveals that, for those three products as well, Korea is not the only source of imports.<sup>161</sup>

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<sup>157</sup> Korea’s Methodology Paper, para. 28.

<sup>158</sup> Bown and Ruta, p. 157 (Exhibit KOR-17).

<sup>159</sup> See Korea’s Methodology Paper, Appendix B.

<sup>160</sup> See Korea’s Methodology Paper, Appendix B.

<sup>161</sup> See Dioctyl Terephthalate (DOPT) from Korea, Inv. 731-TA-1330 (Final), Publication Number 4713, p. 14 (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4713.pdf](https://www.usitc.gov/publications/701_731/pub4713.pdf)); Ferrovandium from Korea, Inv. 731-TA-1314, Publication Number 4683, p. 13 (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4683.pdf](https://www.usitc.gov/publications/701_731/pub4683.pdf)); Phosphor Copper from Korea, Inv. 731-TA-1314 (Final), Publication Number 4681, p. 12 (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4681.pdf](https://www.usitc.gov/publications/701_731/pub4681.pdf)).



133. 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.<sup>162</sup> Korea's assumption of perfect substitution is incorrect.

134. 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.

135. 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

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<sup>162</sup> See *Emulsion Styrene-Butadiene Rubber from Brazil, Korea, Mexico, and Poland*, Invs. 731-TA-1334-1337 (Final), Publication Number 4717, p. II-21 (substitution elasticity reported to be in the range of 3 to 5) (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4717.pdf](https://www.usitc.gov/publications/701_731/pub4717.pdf)); *Diocetyl Terephthalate (DOPT) from Korea*, Inv. 731-TA-1330 (Final), Publication Number 4713, p. II-18 (substitution elasticity reported to be in the range of 4 to 8) (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4713.pdf](https://www.usitc.gov/publications/701_731/pub4713.pdf)); *Ferrovandium from Korea*, Inv. 731-TA-1314, Publication Number 4683, p. II-18 (substitution elasticity reported to be in the range of 3 to 5) (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4683.pdf](https://www.usitc.gov/publications/701_731/pub4683.pdf)); *Phosphor Copper from Korea*, Inv. 731-TA-1314 (Final), Publication Number 4681, p. II-17 (substitution elasticity reported to be in the range of 5 to 7) (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4681.pdf](https://www.usitc.gov/publications/701_731/pub4681.pdf)); *Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, Invs. 701-TA-545-547 and 731-TA-1291-1297, Publication Number 4638, p. II-35 (substitution elasticity reported to be in the range of 3 to 6) (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4638.pdf](https://www.usitc.gov/publications/701_731/pub4638.pdf)); *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea, Mexico, and Turkey*, Invs. 701-TA-539 and 731-TA-1280-1282 (Final), Publication Number 4633, p. II-28 (substitution elasticity reported to be in the range of 2 to 5) (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4633.pdf](https://www.usitc.gov/publications/701_731/pub4633.pdf)); *Certain Corrosion-Resistant Steel Products from China, India, Italy, Korea, and Taiwan*, Invs. 701-TA-534-537 and 731-TA-1274-1278 (Final), Publication Number 4620, p. II-33 (substitution elasticity reported to be in the range of 3 to 5) (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4620.pdf](https://www.usitc.gov/publications/701_731/pub4620.pdf)); *Certain Welded Line Pipe from Korea and Turkey*, Invs. 701-TA-525 and 731-TA-1260-1261 (Final), Publication Number 4580, p. II-31 (substitution elasticity reported to be in the range of 3 to 5) (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4580.pdf](https://www.usitc.gov/publications/701_731/pub4580.pdf)); *Certain Steel Nails from Korea, Malaysia, Oman, Taiwan, and Vietnam*, Invs. 701-TA-521 and 731-TA-1252-1255 and 1257 (Final), Publication Number 4541, p. II-33 (substitution elasticity reported to be in the range of 3 to 5) (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4541.pdf](https://www.usitc.gov/publications/701_731/pub4541.pdf)); *Non-Oriented Electrical Steel from China, Germany, Japan, Korea, Sweden, and Taiwan*, Invs. 701-TA-506 & 508 and 731-TA-1238-1243 (Final), Publication Number 4502, p. II-35 (substitution elasticity reported to be in the range of 2 to 4) (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4502.pdf](https://www.usitc.gov/publications/701_731/pub4502.pdf)); *Certain Oil Country Tubular Goods from India, Korea, the Philippines, Taiwan, Thailand, Turkey, Ukraine, and Vietnam*, Invs. 701-TA-499-500 and 731-TA-1215-1217 and 1219-1223 (Final), Publication Number 4489, p. II-47 (substitution elasticity reported to be in the range of 3 to 5) (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4489.pdf](https://www.usitc.gov/publications/701_731/pub4489.pdf)).

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.

136. 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.<sup>163</sup> 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 a formula applied using erroneous data inputs that results in an overstatement of the level of nullification or impairment.<sup>164</sup>

137. Finally, we note that 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.<sup>165</sup> This is another conceptual and data input failing of Korea’s proposed formula approach.

138. 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**

139. Despite Korea’s assurance that data are “publicly available and can be readily employed by both Korea and the United States,”<sup>166</sup> the issues discussed in the preceding section demonstrate that the formula approach Korea proposes 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.

140. 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. As the arbitrator in *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)* found, there is “no limitation in the DSU to the possibility of providing for a variable level of suspension if the

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<sup>163</sup> See Korea’s Methodology Paper, para. 51.

<sup>164</sup> See DSU, Art. 22.4 (“The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment.” (emphasis added)).

<sup>165</sup> See Korea’s Methodology Paper, para. 49.

<sup>166</sup> See Korea’s Methodology Paper, para. 51.

level of nullification or impairment also varies.”<sup>167</sup> Similarly, the arbitrator in *US – Antidumping Act of 1916 (EC) (Article 22.6 – US)*, in determining a level of suspension of concessions according to a formula that would vary over time, disagreed with the proposition that the complaining party’s “right to suspend obligations must be frozen in time as of the date it made the request under DSU Article 22.2.”<sup>168</sup>

141. 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.”<sup>169</sup> 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.

142. 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”<sup>170</sup> and thus would not be “justified.”<sup>171</sup>

143. 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.<sup>172</sup> Indeed, the level of suspension under Korea’s proposed approach simply could not be predicted at all.

144. 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.

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<sup>167</sup> *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*, para. 4.20.

<sup>168</sup> *US – 1916 Act (EC) (Article 22.6 – US)*, para. 6.14.

<sup>169</sup> *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*, para. 4.20 (emphasis added).

<sup>170</sup> DSU, Art. 22.4.

<sup>171</sup> *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*, para. 4.20 (emphasis added).

<sup>172</sup> *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)*, para. 4.20 (emphasis added).

## V. CONCLUSION

145. For the reasons set forth above, 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.