*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)**

# RESPONSES OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE ARBITRATOR FOLLOWING THE SUBSTANTIVE MEETING OF THE ARBITRATOR WITH THE PARTIES

**Public Version**

**June 21, 2018**

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| *EC – Hormones (US) (Article 22.6 – EC)* | Decision by the Arbitrators, *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*, WT/DS26/ARB, 12 July 1999 |
| *Japan – Agricultural Products II (AB)* | Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999 |
| *US – 1916 Act (EC) (Article 22.6 – US)* | Decision by the Arbitrators, *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*, WT/DS136/ARB, 24 February 2004 |
| *US – COOL (Article 22.6 – US)* | Decision by the Arbitrators, *United States – Certain Country of Origin Labelling (COOL) Requirements - Recourse to Article 22.6 of the DSU by the United States*, WT/DS384/ARB, and Add. 1; WT/DS386/ARB, and Add. 1, circulated 7 December 2015 |
| *US – Gambling (Article 22.6 – US)* | Decision by the Arbitrator, *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*, WT/DS285/ARB, 21 December 2007 |
| *US – Tuna II (Mexico) (Article 22.6 – US)* | Decision by the Arbitrator, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 22.6 of the DSU by Mexico)*, WT/DS381/ARB, 25 April 2017 |
| *US – Washing Machines (Panel)* | Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R |

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| *US – Washing Machines (AB)* | Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 26 September 2016 |
| *US – Washing Machines (Article 21.3(c))* | Award of the Arbitrator, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (Recourse to Article 21.3(c) of the DSU)*, WT/DS464/RPT, 13 April 2017 |

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| USA-24 **(BCI)** | *Memorandum to the File from David Goldberger and Rebecca Trainor re: Antidumping Duty Investigation of Large Residential Washers (Washing Machines) from Korea, Preliminary Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc. (collectively, "LG")* (July 27, 2012) ("LG Preliminary Margin Calculation Memo") |
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| USA-29 **(BCI)** | *Memorandum to the File from Henry Almond and Kate Johnson re: Antidumping Duty Investigation of Large Residential Washers (Washing Machines) from Korea, Preliminary Determination Margin Calculation for Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively, "Samsung")* (July 27, 2012) ("Samsung Preliminary Margin Calculation Memo") |
| USA-30 | *Letter to Warren E. Connelly re: Antidumping Duty Investigation of Large Residential Washers from Korea* (August 1, 2012) |
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| USA-33 **(BCI)** | *Memorandum to the File from Henry Almond and Kate Johnson re: Antidumping Duty Investigation of Large Residential Washers (Washing Machines) from Korea, Samsung Final Determination Calculation Memorandum* (December 18, 2012) ("Samsung Final Margin Calculation Memo") |
| USA-34 | *Memorandum to the File from Rebecca Trainor re: Antidumping Duty Investigations of Large Residential Washers from Korea and Mexico, and Countervailing Duty Investigation of Large Residential Washers from Korea, Deadline for Ministerial Error Comments Concerning the Final Determination Margin Calculations* (December 21, 2012) |
| USA-35 | *Memorandum to Paul Piquado from Gary Tavernman re: Issues and Decision Memorandum for the Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea* (December 18, 2012) ("LRWs AD Final I&D Memo") |
| USA-36 | "An Equilibrium Displacement Model of the U.S. Beef and Pork Sectors," submitted by the United States as Exhibit US-4 in *US – COOL (Article 22.6 – US)* |
| USA-37 | Joint Communications of the United States and Korea to the Association of Home Appliance Manufacturers ("AHAM"), and Responses Received from AHAM (June 14, 2018 – June 19, 2018) |

## 1 GENERAL ISSUES

**52. [1.] To the United States: The United States contends that the "burden of proof relates to the level requested, rather than the complaining Member's methodology or any individual element of that methodology, such as the proposed counterfactual." How does this position reconcile with the arbitrator's decisions in *US – COOL*, where the arbitrator concluded that an objecting party, to meet its *prima facie* burden, must engage with the methodology of the complaining party and not merely assert an alternative methodology?**

**Response:**

1. The United States, as the responding Member, does not have the burden to prove that each and every element of Korea's proposed methodology is incorrect. Or, put another way, it is not the case that the Arbitrator has no choice but to accept each and every element of Korea's proposed methodology unless the United States proves it is wrong. Contrary to Korea's argument, the Arbitrator retains the discretion to determine an appropriate methodology to employ for purposes of this proceeding.

2. The question of the burden of proof was addressed and resolved in the *EC – Hormones* dispute, one of the first arbitrations under Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). There, the arbitrator explained that:

> WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency. The act at issue here is the US proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that the level of suspension be equivalent to the level of nullification and impairment. The EC challenges the conformity of the US proposal with the said WTO rule. It is thus for the EC to prove that the US proposal is inconsistent with Article 22.4. Following well-established WTO jurisprudence, this means that it is for the EC to submit arguments and evidence sufficient to establish a *prima facie* case or presumption that the level of suspension proposed by the US is *not* equivalent to the level of nullification and impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the US to submit arguments and evidence sufficient to rebut that presumption. Should all arguments and evidence remain in equipoise, the EC, as the party bearing the original burden of proof, would lose.[1]

3. Accordingly, the burden relates to the overall level requested and does not relate to the elements of Korea's proposed methodology. This is because what is presumed to be WTO-consistent is the act of Korea, which is Korea's requested level of suspension, not the evidence or

[1] *EC – Hormones (US) (Article 22.6 – EC)*, para. 9 (emphasis added).

arguments that Korea puts forward in an effort to support that act. Consequently, what is presumed to be WTO-consistent is not Korea's proposed methodology for justifying the level of suspension. The Dispute Settlement Body ("DSB") is only granting authorization of the level of suspension; the DSB would not take action with respect to Korea's proposed methodology or any other argument or evidence Korea submits in these proceedings. Indeed, the *EC – Hormones* arbitrator went on to find in that arbitration that "the US is required to come forward with evidence explaining how it arrived at its proposal and showing why its proposal *is* equivalent to the trade impairment it has suffered."[2]

4. In panel proceedings, it is the responding Member's measure that is presumed to be WTO-consistent for purposes of the burden of proof. A panel does not take the approach that each piece of evidence or argument submitted by the responding Member is to be accorded deference or is presumed to be correct until the complaining Member establishes otherwise. Instead, each party bears the burden to establish the facts it alleges.[3]

5. This accords with the arbitrator's statement in *US – COOL (Article 22.6 – US)* that "[m]ethodology papers are different from the actual request to suspend concessions or other obligations at a proposed level, which … is the 'act at issue' that is presumed to be in conformity with WTO obligations."[4] The arbitrator there reasoned that:

> Because the proposed level of suspension rests on the underlying methodology, establishing that the proposed level of suspension is WTO-inconsistent necessarily involves showing that it does not follow from the underlying methodology, or that the methodology itself is flawed. This necessitates engagement by the objecting party with the methodology underlying the proposed level of suspension.[5]

6. So, the arbitrator in *US – COOL (Article 22.6 – US)* identified at least two possible means of establishing that the requested level of suspension is not equivalent to the level of nullification or impairment: either showing that the level of suspension "does not follow from the underlying methodology" or showing that "the methodology itself is flawed."[6] The concern of the arbitrator in *US – COOL (Article 22.6 – US)* was that the United States "merely propos[ed] an alternative methodology" without engaging with the methodology used to arrive at the proposed level of suspension.[7]

7. There could be any number of ways for the responding Member to establish that the level of suspension is not equivalent to the level of nullification or impairment. Here, the United

[2] *EC – Hormones (US) (Article 22.6 – EC)*, para. 11.

[3] *See EC – Hormones (US) (Article 22.6 – EC)*, para. 10.

[4] *US – COOL (Article 22.6 – US)*, para. 4.11.

[5] *US – COOL (Article 22.6 – US)*, para. 4.11 (emphasis added).

[6] *US – COOL (Article 22.6 – US)*, para. 4.11.

[7] *US – COOL (Article 22.6 – US)*, para. 4.14.

States has engaged directly with Korea's methodology, establishing that Korea's proposed counterfactual is not reasonable or plausible, and demonstrating that Korea's proposed economic model is flawed.

8. In addition, the United States has provided to the Arbitrator ample evidence establishing 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 large residential washers ("LRWs") from Korea beyond the expiration of the reasonable period of time for implementation ("RPT") is zero.

9. As well, the United States has proposed an alternative counterfactual and an alternative economic model, both of which are rooted in the evidence before the Arbitrator. And the U.S. economic model is, like Korea's model, a static partial equilibrium model; the U.S. model was originally placed before the Arbitrator by Korea.[8] The United States has more than met its burden to make out a *prima facie* case, including by engaging with Korea's methodology.

10. With regard to Korea's separate request for suspension concerning the "as such" issues, the United States has directly engaged with Korea's proposed formula and has demonstrated that Korea's formula is flawed and necessarily would overstate the level of nullification or impairment. Again, the United States has more than met its burden to make out a *prima facie* case.

11. It is now for Korea to rebut the U.S. *prima facie* case.[9] But Korea has not even attempted to do so. Instead, Korea simply continues to insist on the use of its own proposed formula.[10] It would not be appropriate for the Arbitrator at this point to make Korea's case for it.[11] It is understandable that, if the Arbitrator considers that Korea's proposed level of suspension of concessions is <u>not</u> equivalent to the level of nullification or impairment, the Arbitrator might feel "called upon to go further" and "estimate the level of suspension [it] consider[s] to be equivalent to the impairment suffered."[12] Past arbitrators have done so.

12. That approach may make sense where a complaining Member has requested suspension at a particular numerical level. In that case, the arbitrator might disagree with the methodology used by the complaining Member to determine the requested level of suspension, but the arbitrator could not at that point find that the requested level of suspension is not equivalent to the level of nullification or impairment. That could not be known until the arbitrator has established for itself what the level of nullification or impairment is. Having done so, the arbitrator can compare the level of nullification or impairment it has established with the requested level of suspension to determine whether they are equivalent. Perhaps the arbitrator

[8] *See* Methodology Paper of the Republic of Korea (February 23, 2018) ("Korea's Methodology Paper"), para. 29, footnote 24, and Exhibit KOR-15.

[9] *See EC – Hormones (US) (Article 22.6 – EC)*, para. 9; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 9.

[10] *See* Korea's Replies to Additional Questions from the Arbitrator (May 25, 2018), para. 5.

[11] *See, e.g. Japan – Agricultural Products II (AB)*, para. 129.

[12] *EC – Hormones (US) (Article 22.6 – EC)*, para. 12; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 12.

might find that they are equivalent – or that the level of suspension requested does not exceed the level of nullification or impairment – even though the arbitrator applied a different methodology to arrive at the result. If they are not equivalent, though, and the level of suspension requested exceeds the level of nullification or impairment, it requires no more effort on the part of the arbitrator to state the level of suspension that should be authorized by the DSB, since it would be the level of nullification or impairment that has been determined by the arbitrator.

13. Here, though, Korea has requested to suspend concessions not at a particular numerical level but instead on the basis of a formula, and the United States has demonstrated that Korea's proposed formula necessarily would overstate the level of nullification or impairment. In this situation, the Arbitrator is in a position to conclude that Korea's requested suspension is not equivalent to the level of nullification or impairment without knowing precisely what the numerical level of nullification or impairment actually may be. In this case, then, to continue on and determine the level of nullification or impairment on its own, the Arbitrator would need to go well beyond what is required under Article 22.6 of the DSU, *i.e.*, determining whether the requested level of suspension is equivalent to the level of nullification or impairment. It is difficult to imagine how the Arbitrator could do that without making Korea's case for it.

**53. [**] <u>To both parties</u>: Please comment on the outcome of the most recent countervailing duty review under Section 129 of the Uruguay Round Agreements Act (URAA).**

**<u>Response:</u>**

14. On June 4, 2018, the U.S. Department of Commerce ("USDOC") issued its final determination in the section 129 proceeding regarding the countervailing duty investigation of LRWs from Korea. The United States is providing that determination to the Arbitrator as Exhibit USA-23.

15. The USDOC's determination addresses the recommendations adopted by the DSB, as set out in the Appellate Body report and the Panel report, as modified by the Appellate Body report. Specifically, the USDOC applied the tying standard articulated by the Appellate Body, based on the "design, structure, and operation" of each subsidy program, and continued to find that tax credits provided under RSTA Article 10(1)(3) and RSTA Article 26 are not tied to a particular product. The USDOC calculated Samsung's subsidy ratio based on the company's total sales, rather than activities conducted by any of Samsung's internal business units (*e.g.*, the home appliance business unit) or production facilities.

16. The USDOC also applied the attribution standard articulated by the Appellate Body, based on the "design, structure, and operation" of the subsidy program, as well as the structure and location of the respondent's production facilities, and continued to find that tax credits provided under RSTA Article 10(1)(3) should not be attributed to Samsung's sales of LRWs produced by its overseas affiliates.

17. Finally, the USDOC revised the basis for its specificity finding with respect to the RSTA Article 10(1)(3) tax credit program, and determined that the program was *de facto* specific because it was used by a limited number of certain enterprises.

18. The USDOC's final determination in the section 129 proceeding resulted in no changes to the countervailable subsidy rates calculated in the original countervailing duty investigation of LRWs from Korea. Under section 129(b) of the *Uruguay Round Agreements Act* ("URAA"), which governs the implementation of "as applied" findings of the DSB under U.S. law, two additional steps are now required as part of the implementation process. First, the Office of the United States Trade Representative ("USTR") must consult with the USDOC and relevant congressional committees with respect to the USDOC's final determination. Second, after such consultations, USTR may direct the USDOC to implement, in whole or in part, the USDOC's determination.

## 2 COUNTERFACTUAL (LRW AND NON-LRW PRODUCTS)

**54. [2.] <u>To both parties</u>: Please comment on whether and, if so, how the award of the arbitrator under Article 21.3(c) of the DSU should be taken into account by the Arbitrator in this Article 22.6 arbitration proceeding when determining the counterfactual.**

**<u>Response:</u>**

19. Despite Korea's repeated references to the award of the arbitrator under Article 21.3(c) of the DSU establishing the RPT in this dispute, the United States fails to see how that award would be of relevance to the Arbitrator in this Article 22.6 proceeding when determining the counterfactual.

20. In this arbitration, the United States has not yet brought the breaching measures into compliance with the DSB's recommendations following the expiration of the RPT, and the RPT was, of course, established through arbitration under Article 21.3(c) of the DSU. That is not disputed. Indeed, the fact of the Member concerned remaining out of compliance after the expiration of the RPT – regardless of whether the RPT is established through negotiation or arbitration – is the condition precedent for any arbitration under Article 22.6 of the DSU.

21. No prior arbitrator under Article 22.6 of the DSU has taken into account the award of the arbitrator under Article 21.3(c) of the DSU when determining the appropriate counterfactual to use. However, the Article 22.6 arbitrator in *US – Gambling (Article 22.6 – US)* did refer to the Article 21.3(c) award in that dispute. There, the Article 22.6 arbitrator "assum[ed] that a range of implementation options might exist for the United States", and noted that the Article 21.3(c) arbitrator had "made comparable assumptions".[13] The Article 22.6 arbitrator in *US – Gambling (Article 22.6 – US)* did not suggest, however, that it was bound by any assumptions made by the Article 21.3(c) arbitrator, and nothing in the DSU would support that proposition.

[13] *US – Gambling (Article 22.6 – US)*, paras. 3.59-3.60.

**55. [3.*] <u>To Korea</u>: In arguing that the counterfactual proposed by the United States is not "plausible" or "reasonable", Korea contends, inter alia, that this counterfactual "simply modifies the final outcome of the underlying anti-dumping investigation by relying on a different provision of the Anti-Dumping Agreement (Article 2.4.2, first sentence) that was not at issue in this dispute". In light of the DSB's recommendations and rulings, which relate, inter alia, to the failure of the United States to establish that it was appropriate to resort to the exceptional methodology provided for in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, please explain why, in Korea's view, an anti-dumping margin calculated using the methodology provided for in the first sentence would not constitute a proper counterfactual.**

**<u>Response:</u>**

22. This question is directed to Korea.

**56. [4.] <u>To the United States</u>: Korea observes that "[t]he United States' suggestion that merely amending the anti-dumping duty rate would achieve compliance stands in stark contrast to the description of the procedures that it would need to take in order to implement the DSB's recommendations and rulings in the proceedings under Article 21.3(c) of the DSU" and "cannot be considered a 'plausible' or 'reasonable' counterfactual that assumes that the United States has properly implemented the DSB's findings." Please address Korea's arguments.**

**<u>Response:</u>**

23. The USDOC would not "merely amend[] the anti-dumping duty rate," as Korea suggests. Were the United States to bring the antidumping duty rate determined for LG into compliance by amending that rate, it would do so only after following the procedures described by the United States in the proceedings under Article 21.3(c) of the DSU.

24. That is, the Office of the United States Trade Representative would request that the USDOC undertake a proceeding pursuant to section 129 of the URAA. The USDOC would initiate such a proceeding and request, *inter alia*, comments from interested parties concerning the appropriate calculation methodology. The USDOC would take any comments received into account in re-determining LG's margin of dumping. In short, the USDOC would follow all of the procedural steps required by section 129 of the URAA, consistent with the description of those steps by the United States in the proceedings under Article 21.3(c) of the DSU.

25. Hypothetically, in such a section 129 proceeding, the USDOC might reexamine whether the conditions for applying the alternative comparison methodology exist; determine that they do not exist; and then decide to apply the "normal[]" weighted average-to-weighted average ("W-W") comparison methodology provided in the first sentence of Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), without using zeroing. If the USDOC did that, then it could, absent any new

evidence demonstrating otherwise, determine that LG's margin of dumping is [[***]], as shown by evidence placed before the original Panel and the Arbitrator.[14]

26. Korea's contention that the re-determination of LG's antidumping duty rate, as described above, "cannot be considered a 'plausible' or 'reasonable' counterfactual that assumes that the United States has properly implemented the DSB's findings" is simply wrong. The original Panel and the Appellate Body found that, in the antidumping investigation of LRWs from Korea, the USDOC acted inconsistently with the second sentence of Article 2.4.2 of the AD Agreement when it determined margins of dumping for Samsung and LG using the alternative, average-to-transaction ("W-T") comparison methodology. The original Panel and the Appellate Body found that the USDOC did not properly establish that the conditions for using the alternative comparison methodology had been met; the USDOC applied the alternative comparison methodology to transactions outside of the "pattern" that it had identified; and the USDOC used zeroing, which was found to be inconsistent with Articles 2.4 and 2.4.2 of the AD Agreement.[15]

27. If the USDOC were to re-determine LG's margin of dumping using the "normal[]" W-W comparison methodology provided in the first sentence of Article 2.4.2 of the AD Agreement, without using zeroing, that would eliminate the inconsistencies identified by the original Panel and the Appellate Body. Such a margin of dumping would be in compliance with the recommendations adopted by the DSB in this dispute, and would be entitled to the general presumption of WTO consistency.

28. Korea's reliance on statements made by the United States during the Article 21.3(c) proceeding in this dispute is misplaced. The United States described during the Article 21.3(c) proceeding what it envisioned at the time of that proceeding as "the most practical way under U.S. law for the United States to implement these matters."[16] The U.S. statement in no way suggests that the steps described by the United States would be the only way under U.S. law for the United States to implement the recommendations adopted by the DSB, or that the interplay between section 123 and section 129 of the URAA prescribe only one approach. In excerpts from the U.S. written submission in the Article 21.3(c) proceeding that Korea quotes in response to the Arbitrator's question 4, the word "anticipates" appears three times.[17] This is a further

[14] *See US – Washing Machines (Panel)*, First Written Submission of the United States of America (Confidential) (November 24, 2014), para. 126 (citing Final Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc.) (Exhibit USA-3 **(BCI)**); *Memorandum to the File from David Goldberger and Rebecca Trainor re: Antidumping Duty Investigation of Large Residential Washers from Korea, Final Determination Margin Calculation for LG Electronics Inc. (LGE) and LG Electronics USA, Inc. (LGEUS; collectively, "LG")* (December 18, 2012) ("LG Final Margin Calculation Memo"), Attachment 2, p. 127 (p. 323 of the PDF version of Exhibit USA-28 **(BCI)**) (Korea submitted this document to the original Panel as Exhibit KOR-42. The United States has maintained the BCI marking originally applied by Korea).

[15] *See US – Washing Machines (Panel)*, paras. 8.1.a.i, iii, xiv, and xv. *See also US – Washing Machines (AB)*, paras. 6.2-6.11 (The ultimate implication of the Appellate Body's findings is that the original panel's finding that the USDOC acted inconsistently in the antidumping investigation of LRWs from Korea by using a targeted dumping methodology with zeroing was sustained.).

[16] *US – Washing Machines (Article 21.3(c))*, Written Submission of the United States of America (February 2, 2017), para. 4 (Exhibit KOR-38).

[17] Korea's Replies to Questions from the Arbitrator (May 14, 2018), para. 32.

indication that the approach described by the United States reflected its best understanding at the time of how implementation might proceed under U.S. law.

**57. [6.*] <u>To both parties</u>: Should the same counterfactual be used for LRW and non-LRW products? Or, are there reasons specific to this case that would preclude the Arbitrator from adopting the same counterfactual situation for non-LRW products as for LRW products?**

**<u>Response:</u>**

29. The same counterfactual should not necessarily be used for both LRWs and non-LRW products in this arbitration. Korea made a separate request for authorization to suspend concessions related to U.S. "non-compliance with [the] 'as such' recommendations and rulings," and that request is "[i]n addition" to Korea's request concerning the "as applied" findings.[18] In its methodology paper, Korea describes two different counterfactuals as follows:

> the anti-dumping and countervailing measures that were improperly imposed were terminated as of 26 December 2017, and the United States ceased to use DPM and zeroing when applying the W-T comparison methodology.[19]

Korea goes on to discuss its requests for suspension for the "as applied" findings and the "as such" findings separately in its methodology paper, specifying a particular numerical level of suspension for LRWs and describing a formula approach for suspension related to non-LRW products.

30. The differentiated approach taken by Korea in its methodology paper is logical given the different nature of the "as applied" and "as such" recommendations adopted by the DSB, and the different factual situations of the LRWs market and the various markets of non-LRW products to which the USDOC might apply a differential pricing analysis or zeroing after the expiration of the RPT.

**58. [7.] <u>To Korea</u>: Please respond to the United States' listed concerns in paragraph 153 of its response to Arbitrator question No. 50 with regard to a counterfactual scenario of termination with respect to non-LRW products.**

**<u>Response:</u>**

31. This question is directed to Korea.

**59. [8.*] Concerning the counterfactual proposed by the United States for the CVD:**

[18] WT/DS464/18.

[19] Korea's Methodology Paper, para. 23.

**a. <u>To the United States</u>: The United States proposes to decrease the countervailing duty to zero rather than removing it.**

**i. In your view, is there any difference between lowering the countervailing duty to zero as opposed to removing the measure (i) for purposes of determining the counterfactual, and (ii) for the calculation of nullification or impairment?**

**<u>Response:</u>**

32. There is a difference between lowering the countervailing duty to zero as opposed to removing the measure for the purposes of determining the counterfactual. The counterfactual should be reasonable and plausible. As discussed in the U.S. opening statement at the substantive meeting of the Arbitrator with the parties,[20] Daewoo was assigned a countervailing duty rate determined on the basis of facts available, and that rate is not subject to any recommendations adopted by the DSB. Daewoo's countervailing duty rate would not go to zero and the countervailing duty measure on LRWs from Korea would not be terminated, even if Samsung's countervailing duty rate were lowered to zero. Accordingly, termination of the countervailing duty measure is not a reasonable or plausible counterfactual.

33. That being said, if the Arbitrator were to use the imperfect substitutes static partial equilibrium model proposed by the United States to determine the level of nullification or impairment (or even if the Arbitrator were to use the incorrect model proposed by Korea), there is no practical difference between lowering the countervailing duty to zero as opposed to removing the measure. For either counterfactual scenario, the economic model, in effect, estimates the level of nullification or impairment based on assuming a tariff rate reduction to zero.

**ii. According to Korea, "unless the measure is terminated, allowing a counterfactual where the DSB's findings are not addressed but the measure is permitted to remain in place would indicate that proper implementation could consist of the United States simply avoiding the DSB's findings by arbitrarily reducing the countervailing duty rate to zero, and then continuing to use the inconsistent measures in subsequent administrative reviews." Please comment.**

**<u>Response:</u>**

34. Korea's point is unclear. Under the U.S. counterfactual, the recommendations adopted by the DSB, which relate only to the countervailing duty rate determined for Samsung, would be addressed by virtue of Samsung's countervailing duty rate being re-determined and changed to

[20] *See* Opening Statement of the United States of America at the Meeting of the Arbitrator with the Parties (June 5, 2018) ("U.S. Opening Statement"), paras. 22-25.

zero. In that scenario, Samsung would not be subject to the countervailing duty measure, just as LG is not subject to the countervailing duty measure.

35. The countervailing duty measure on LRWs from Korea, however, would remain in place under the U.S. counterfactual due to the countervailing duty rate that still would apply to Daewoo. Daewoo's countervailing duty rate, which was determined on the basis of facts available, is not subject to any recommendations adopted by the DSB.

**b. <u>To Korea</u>: Does Korea consider that a counterfactual that assumes a zero countervailing duty rate for Samsung is appropriate?**

**<u>Response:</u>**

36. This question is directed to Korea.

**60. [9.] <u>To Korea</u>: Korea seems to imply that for a counterfactual to be judged "reasonable" or "plausible", the party proposing that counterfactual must explain how the counterfactual would actually result in proper implementation.**

**a. Is it Korea's position that the Arbitrator should consider the United States' implementation of remedial actions to bring its measures into compliance in determining the appropriate counterfactual scenario? If so, please provide support for this positon.**

**b. Please explain how Korea's position reconciles with Korea's acknowledgment that it is "not the mandate of the Arbitrator to determine how the United States would have complied with each of the DSB's recommendations and rulings".**

**<u>Response:</u>**

37. This question is directed to Korea.

**61. [11.] <u>To the United States</u>: Does the United States agree with Korea's view that "a distinction should be drawn between the RPT as the reference point at which nullification and impairment is calculated, and the temporal scope of the nullification and impairment itself"? Specifically, please respond to Korea's contention that the Arbitrator, in calculating the level of nullification or impairment, "is not to simply take an isolated snap shot of the state of the market as of the date of expiry" but must account for "the impact of the WTO-inconsistent measure on the market".**

**<u>Response:</u>**

38. The United States discussed Korea's argument in the U.S. opening statement at the substantive meeting of the Arbitrator with the parties.[21] The United States does not agree with Korea's views on what Korea calls "the temporal scope of nullification or impairment."[22] WTO remedies are not punitive.[23] Suspension of concessions or other obligations is not meant to provide damages for past harm, as Korea suggests.[24] The obligation in the DSU is for a Member concerned to bring the measure at issue into conformity with the relevant covered agreement.[25] The DSU does not require a Member concerned to reverse the trade effects of the inconsistent measure, nor does the DSU guarantee that outcome to a complaining Member.

39. Korea is incorrect when it contends that the Arbitrator, in calculating the level of nullification or impairment, is not to take a "snap shot of the state of the market as of the date of expiry" but must account for "the impact of the WTO-inconsistent measure on the market". The issue in this arbitration is the level of nullification or impairment of benefits that would accrue to Korea as a result of the United States maintaining the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures after the expiration of the RPT.

40. The United States and all WTO Members have the right to impose antidumping and countervailing duty measures under the WTO Agreement. When a Member does so, that action is presumed to be WTO consistent. When a Member's antidumping and countervailing duty measures are challenged in WTO dispute settlement and found to be inconsistent with the WTO Agreement, that Member must bring the measures into compliance. If it is impracticable to do so immediately, the Member concerned shall have a reasonable period of time for implementation of the DSB's recommendations.[26] The Member concerned may maintain the measures up until the expiration of the RPT. Only at that point can the complaining Member be authorized to suspend concessions or other obligations.

41. So, the question is, at that point, after the expiration of the RPT, if the Member concerned (hypothetically) brought the measures into compliance, how much would the value of the exports of the complaining Member increase, if they would increase at all?

42. That question must be answered on the basis of evidence. The baseline for the analysis under this scenario[27] is the trading relationship as it exists at the time of the expiration of the

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[21] *See* U.S. Opening Statement, para. 3.

[22] Korea's Replies to Questions from the Arbitrator (May 14, 2018), para. 36.

[23] *See US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.22.

[24] *See, e.g.*, Korea's Replies to Questions from the Arbitrator (May 14, 2018), paras. 36-38, 53, 68, 73-76.

[25] *See, e.g.*, DSU, Art. 19.1 ("Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.").

[26] *See* DSU, Art. 21.3.

[27] The United States recalls that other scenarios could exist, though they are not present at this point in this dispute. For instance, a Member concerned may have taken some measures to comply after the end of the RPT that alter the level of nullification or impairment, or there may have been findings of a compliance panel that the arbitrator would need to take into account.

RPT (or as near to that point in time as can reasonably be estimated using available data). It is logical, as previous Article 22.6 arbitrators have done, to apply a counterfactual analysis to assess whether, and if so by how much, the value of the complaining Member's exports would increase if there were compliance.

43. A "snap shot of the state of the market as of the date of expiry" is precisely what an Article 22.6 arbitrator should use for the purpose of its analysis in the situation presented here. To account for "the impact of the WTO-inconsistent measure on the market", as Korea suggests, would be to reach back to a time when the Member concerned was not yet under an obligation to bring the measures into compliance. That would go beyond what the DSU permits in terms of suspension of concessions.

**62. [12.] <u>To Korea</u>: Korea states that "the level of nullification or impairment is calculated by comparing the two levels between an estimated trade volume calculated under a counterfactual scenario which assumes that a responding party has fully complied with the DSB decision at the expiry of RPT, on the one hand, and the actual trade volume at the expiry of RPT, on the other hand." The Arbitrator understands that Korea calculates the level of nullification or impairment by constructing a hypothetical baseline level of trade in 2017, based on Korean import shares in 2011 and growth of the total market for LRWs in the United States. In light of the cited statement, can Korea explain why it calculates the level of nullification or impairment based on a comparison of two hypothetical situations, namely the hypothetical baseline, on the one hand, and a hypothetical counterfactual, on the other hand?**

**<u>Response:</u>**

44. This question is directed to Korea.

**63. [13.] <u>To Korea</u>: Korea states that in EC – Hormones (US), "the arbitrator used export volumes that existed prior to the WTO-inconsistent measure and calculated the total export volume that would have existed in the absence of the measure, with certain adjustments." Korea then argues that "[i]t is thus reasonable and plausible for Korea to construct its counterfactual based on the 2011 import share data, as the 2011 data represents the most recent data that is not nullified or impaired by the United States' WTO-inconsistent measure." The Arbitrator observes, however, that in EC – Hormones (US) the arbitrator accounted for adjustments to the market to construct the counterfactual based on the pre-ban situation.**

**a. Does Korea hold the opinion that there have been no other changes in the market conditions except for the growth in total market demand, taken into account by Korea based on the data provided by Association of Home Appliance Manufacturers (AHAM)?**

**b. Assuming that market conditions have not changed and that the partial equilibrium model employed by Korea is correct, the model should**

**approximately predict the import share in 2017, based on the introduction of the WTO-inconsistent anti-dumping and countervailing duty measures imposed since 2012. Can Korea use its economic model to show that the decline in import share of Korea between 2011 and 2017 is only the result of the WTO-inconsistent anti-dumping and countervailing duty measures?**

**Response:**

45. This question is directed to Korea.

**64. [14.] To Korea: Would Korea please provide its comments on the United States' response to Arbitrator question No. 43 on the application of a variable level of suspension of concessions?**

**Response:**

46. This question is directed to Korea.

**65. [26.*] To Korea: Concerning paragraph 20 of Korea's opening statement that refers to "termination" as a plausible and reasonable counterfactual, Korea seems to refer to withdrawal of the AD order on LRWs from Korea. How would this be compatible with the scope of the dispute, where the conclusions and recommendations refer to the application of the W-T methodology, including zeroing?**

**Response:**

47. This question is directed to Korea.

**66. [27.*] To both parties: In footnote 268 of the original Panel report (WT/DS464/R), the Panel observes that "the USDOC applies the DPM automatically, without the need for specific allegation from the domestic industry of targeted dumping to a particular purchaser, region or during a particular period of time."**

**a. Please explain whether consideration as to the existence of targeted dumping in the manner prescribed in the DPM is mandatory in every investigation.**

**Response:**

48. Whenever the USDOC engages in a comparison between export price and normal value in an antidumping duty investigation to determine a margin of dumping, the USDOC currently applies the differential pricing methodology ("DPM"). However, because the USDOC does not always engage in such a comparison, the USDOC does not always apply the DPM in every investigation. For instance, if the USDOC determines a dumping margin exclusively on the basis of facts available, the USDOC would not apply the DPM because it would not be making any comparison between export price and normal value.

**b. If so, how would this influence the "reasonability" or "plausibility" of the United States' proposed counterfactual of using the W-W comparison methodology?**

**Response:**

49. As explained in the U.S. opening statement at the substantive meeting of the Arbitrator with the parties,[28] the United States agrees with Korea that an appropriate counterfactual for the purposes of the "as such" findings adopted by the DSB in this proceeding is that "the United States ceased to use DPM and zeroing when applying the W-T comparison methodology" after the expiration of the RPT.[29] The United States has not proposed, for the purposes of a counterfactual analysis, that the Arbitrator consider an alternative methodology applied by the USDOC for analyzing whether targeted dumping is occurring.

50. In that case, in the hypothetical, counterfactual scenario that assumes WTO compliance, it is reasonable and plausible to assume that the USDOC would apply the "normal[]"[30] W-W comparison methodology provided in the first sentence of Article 2.4.2 of the AD Agreement, without zeroing. A margin of dumping determined using such a comparison methodology would be presumed to be consistent with the AD Agreement. It is not reasonable or plausible to assume termination of the antidumping measure, considering that there may exist on the USDOC's administrative record a WTO-consistent margin of dumping determined using the W-W comparison methodology (without zeroing) and there may be margins of dumping determined on the basis of facts available for other exporters or producers.

51. The United States specifically proposes the use of a counterfactual in which the antidumping duty measure is modified to be based on a W-W comparison in the case of LG, for the "as applied" findings adopted by the DSB concerning the LRWs antidumping duty investigation, because there is evidence before the Arbitrator of LG's margin of dumping as calculated using the W-W comparison methodology.

52. And, of course, the U.S. proposed counterfactual is precisely that, a counterfactual. Necessarily, a counterfactual is not about the current state of the measures, but a different, hypothetical situation. Consequently, for purposes of the counterfactual, the manner in which the USDOC currently conducts antidumping proceedings would not be relevant.

53. Additionally, the United States recalls that the USDOC did not apply the DPM in the original LRWs antidumping duty investigation. In that investigation, the USDOC applied a targeted dumping analysis based upon the "Nails" test, a test which the USDOC subsequently abandoned. Given that the DPM has been found to be WTO-inconsistent "as such" in this dispute, it is not reasonable or plausible to assume that the USDOC would apply the DPM in its current form to implement the "as applied" findings related to the LRWs antidumping investigation. A plausible and reasonable counterfactual, as the United States has shown, is that

[28] *See* U.S. Opening Statement, para. 19.

[29] Korea's Methodology Paper, para. 23.

[30] AD Agreement, Art. 2.4.2, first sentence.

the USDOC would determine LG's margin of dumping using the W-W comparison methodology, without zeroing.

**67. [28.] To the United States: Under applicable United States' law, can the USDOC apply the W-W comparison methodology to recalculate the anti-dumping duties for LG and Samsung?**

**Response:**

54. Yes. Implementation can take many forms, and the scenario proposed by the Arbitrator in this question is possible. The United States addressed this question, in part, in its response to question 56 above. Hypothetically, in a section 129 proceeding conducted under U.S. law, the USDOC might reexamine whether the conditions for applying the alternative comparison methodology exist; determine that they do not exist; and then decide to apply the "normal[]" W-W comparison methodology provided in the first sentence of Article 2.4.2 of the AD Agreement, without using zeroing.

**68. [29.*] To the United States: When applying the DPM, does the United States always calculate the anti-dumping duty rate using the W-W methodology?**

**Response:**

55. Yes. In applying the DPM, the USDOC always calculates a margin of dumping using the W-W comparison methodology, either because the USDOC does not find a pattern of price differences to support consideration of an alternative to the W-W comparison methodology, or because, upon finding a pattern of price differences that supports consideration of an alternative to the W-W comparison methodology, the USDOC examines whether using only the W-W comparison methodology can appropriately account for price differences identified in the first stage of a differential pricing analysis (*i.e.*, application of the Cohen's *d* test and the ratio test).

56. In considering the question of whether using only the W-W comparison methodology can appropriately account for any price differences identified, the USDOC tests whether using an alternative comparison methodology, based on the results of the Cohen's *d* and ratio tests, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the W-W comparison methodology only.[31] If the difference between the two calculations is meaningful, then this demonstrates to the USDOC that the W-W comparison methodology cannot appropriately account for differences such as those observed in the analysis, and, therefore, application of an alternative comparison methodology would be appropriate.

**69. [30.] To the United States: With reference to paragraph 19 of the United States' opening statement, when the United States indicates that it may "cease[] to use" the DPM and zeroing with respect to the "'as such' findings", would this mean that the United States will apply the W-W method?**

[31] The Cohen's *d* and ratio tests are described in paragraphs 7.100-7.101 of the original Panel report in *US – Washing Machines*.

**Response:**

57. As explained in the U.S. opening statement at the substantive meeting of the Arbitrator with the parties,[32] the United States agrees with Korea that an appropriate counterfactual for the purposes of the "as such" findings adopted by the DSB in this proceeding is that "the United States ceased to use DPM and zeroing when applying the W-T comparison methodology" after the expiration of the RPT.[33] The United States has not proposed, for the purposes of a counterfactual analysis, that the Arbitrator consider an alternative methodology applied by the USDOC for analyzing whether targeted dumping is occurring.

58. In that case, in the hypothetical, counterfactual scenario that assumes WTO compliance, it is reasonable and plausible to assume that the USDOC would apply the "normal[]"[34] W-W comparison methodology provided in the first sentence of Article 2.4.2 of the AD Agreement, without zeroing. A margin of dumping determined using such a comparison methodology would be presumed to be consistent with the AD Agreement. It is not reasonable or plausible to assume termination of the antidumping measure, considering that there may exist on the USDOC's administrative record a WTO-consistent margin of dumping determined using the W-W comparison methodology (without zeroing) and there may be margins of dumping determined on the basis of facts available for other exporters or producers.

**70. [37.] With regard to the parties' responses to Arbitrator's advance question Nos. 4 and 5 of 30 May 2018:**

**a. <u>To Korea</u>: Please indicate if disclosure was offered to Korean exporters and other interested parties within the framework of the original anti-dumping investigation on LRWs, with respect to the calculation of the intermediate dumping margins on a W-W basis that were later compared to the dumping margins calculated on a W-T basis. If so, please indicate the components of this disclosure Korea received. In addition, what, if any, disclosure did the Korean authority receive in this regard?**

**Response:**

59. This question is directed to Korea.

**b. <u>To the United States</u>: Please indicate:**

**i. whether and when the disclosure of those intermediate dumping margins to interested parties was made during the original investigation;**

[32] *See* U.S. Opening Statement, para. 19.

[33] Korea's Methodology Paper, para. 23.

[34] AD Agreement, Art. 2.4.2, first sentence.

**Response:**

60. The USDOC disclosed to both Korean LRWs producers, LG and Samsung, as well as other interested parties participating in the antidumping duty investigation of LRWs from Korea, margins of dumping calculated using the W-W comparison methodology, without zeroing, which is what the United States understands is meant by the reference in the question to "intermediate dumping margins."

61. In particular, as part of the preliminary determination in the antidumping investigation, the USDOC issued a preliminary "calculation memo" to both LG and Samsung.[35] The calculation memos show in great detail, in Attachment 2 of each memo, how the USDOC calculated the preliminary margin of dumping for each company using the W-W comparison methodology, without zeroing.[36] The preliminary margin of dumping determined for LG using the W-W comparison methodology, without zeroing, appears on page 130 of Attachment 2 of LG's preliminary calculation memo, and the preliminary margin of dumping determined for Samsung using the W-W comparison methodology, without zeroing, appears on page 123 of Attachment 2 of Samsung's preliminary calculation memo.[37]

62. The USDOC also issued calculation memos to both LG and Samsung in connection with the final determination in the antidumping investigation.[38] Those final calculation memos were part of the original Panel record as Exhibit KOR-42 (BCI) (LG) and Exhibit KOR-41 (BCI) (Samsung). The United States is providing the final calculation memos to the Arbitrator as Exhibit USA-28 **(BCI)** (LG) and Exhibit USA-33 **(BCI)** (Samsung). Like the preliminary calculation memos, the final calculation memos show in great detail, in Attachment 2 of each memo, how the USDOC calculated the margin of dumping for each company using the W-W

[35] *See Memorandum to the File from David Goldberger and Rebecca Trainor re: Antidumping Duty Investigation of Large Residential Washers (Washing Machines) from Korea, Preliminary Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc. (collectively, "LG")* (July 27, 2012) ("LG Preliminary Margin Calculation Memo") (Exhibit USA-24) **(BCI)**; *Memorandum to the File from Henry Almond and Kate Johnson re: Antidumping Duty Investigation of Large Residential Washers (Washing Machines) from Korea, Preliminary Determination Margin Calculation for Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively, "Samsung")* (July 27, 2012) ("Samsung Preliminary Margin Calculation Memo") (Exhibit USA-29) **(BCI)**.

[36] *See* LG Preliminary Margin Calculation Memo, Attachment 2, pp. 119-127, 129-130 (pp. 318-326, 328-329 of the PDF version of Exhibit USA-24 **(BCI)**); Samsung Preliminary Margin Calculation Memo, Attachment 2, pp. 114-119, 122-123 (pp. 364-369, 372-373 of the PDF version of Exhibit USA-29 **(BCI)**).

[37] *See* LG Preliminary Margin Calculation Memo, Attachment 2, p. 130 (p. 329 of the PDF version of Exhibit USA-24 **(BCI)**); Samsung Preliminary Margin Calculation Memo, Attachment 2, p. 123 (p. 373 of the PDF version of Exhibit USA-29 **(BCI)**).

[38] *See* LG Final Margin Calculation Memo (Exhibit USA-28) **(BCI)**; *Memorandum to the File from Henry Almond and Kate Johnson re: Antidumping Duty Investigation of Large Residential Washers (Washing Machines) from Korea, Samsung Final Determination Calculation Memorandum* (December 18, 2012) ("Samsung Final Margin Calculation Memo") (Exhibit USA-33) **(BCI)** (Korea submitted this document to the original Panel as Exhibit KOR-41. The United States has maintained the BCI marking originally applied by Korea).

comparison methodology, without zeroing.[39] The margin of dumping determined for LG using the W-W comparison methodology, without zeroing, appears on page 127 of Attachment 2 of LG's final calculation memo, and the margin of dumping determined for Samsung using the W-W comparison methodology, without zeroing, appears on page 125 of Attachment 2 of Samsung's final calculation memo.[40]

63. The Government of Korea and the Korean authority did not receive the disclosure documents because neither entity participated as interested parties in the antidumping duty investigation of LRWs from Korea.

**ii. whether and to what extent interested parties made use of their right to review and comment on those calculations; and,**

**Response:**

64. The USDOC invited LG and Samsung to review the preliminary calculation memos and provide comments on any significant ministerial errors found in the calculations.[41] The USDOC provided the same opportunity to provide comments on any significant ministerial errors found in the final calculation memos.[42]

65. In addition to providing an opportunity to comment on ministerial errors, the USDOC provided interested parties the opportunity to submit case briefs and rebuttal briefs "present[ing] all arguments that continue to be relevant to the [USDOC's] final determination, in the submitter's view."[43]

66. Given these opportunities, LG and Samsung could have submitted arguments concerning whether any aspects of the USDOC's calculation of margins of dumping using the W-W comparison methodology, without zeroing, were improper. They also could have alleged that the USDOC committed significant ministerial errors in performing the calculations.

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[39] *See* LG Final Margin Calculation Memo, Attachment 2, pp. 116-123, 126-127 (pp. 312-319, 322-323 of the PDF version of Exhibit USA-28 **(BCI)**); Samsung Final Margin Calculation Memo, Attachment 2, pp. 116-121, 124-125 (pp. 270-275, 278-279 of the PDF version of Exhibit USA-33 **(BCI)**).

[40] *See* LG Final Margin Calculation Memo, Attachment 2, p. 127 (p. 323 of the PDF version of Exhibit USA-28 **(BCI)**); Samsung Final Margin Calculation Memo, Attachment 2, p. 125 (p. 279 of the PDF version of Exhibit USA-33 **(BCI)**).

[41] *See Letter to Neil R. Ellis re: Antidumping Duty Investigation of Large Residential Washers from Korea* (August 1, 2012) (Exhibit USA-25); *Letter to Warren E. Connelly re: Antidumping Duty Investigation of Large Residential Washers from Korea* (August 1, 2012) (Exhibit USA-30).

[42] *See Memorandum to the File from Rebecca Trainor re: Antidumping Duty Investigations of Large Residential Washers from Korea and Mexico, and Countervailing Duty Investigation of Large Residential Washers from Korea, Deadline for Ministerial Error Comments Concerning the Final Determination Margin Calculations* (December 21, 2012) (Exhibit USA-34).

[43] *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 46,391 (August 3, 2012), p. 46,401 (Exhibit KOR-9).

67. Neither LG nor Samsung identified any significant ministerial errors in the USDOC's calculations. LG and Samsung did, however, submit case briefs and rebuttal briefs to the USDOC.[44] In those submissions, LG and Samsung made a host of arguments concerning the USDOC's determination of margins of dumping, including, for example, comments concerning issues related to expenses, profit rates, rebates, and other costs, which relate to the calculation of margins of dumping using both the W-T comparison methodology and the W-W comparison methodology.[45]

**iii. whether and to what extent the USDOC considered comments made by interested parties.**

**Response:**

68. The USDOC analyzed the comments of the interested parties and, as a result of its analysis and based on findings at verification, the USDOC made changes to the margin calculations for LG and Samsung.[46] Indeed, the USDOC agreed with certain comments made by LG concerning the calculation of LG's margin of dumping, as reflected in the final issues and decision memo[47] and LG's final margin calculation memo.[48] LG's comments in this regard were applicable to the calculation of the margin of dumping using either the W-W comparison methodology or the W-T comparison methodology. LG did not argue that the USDOC otherwise calculated the margin of dumping incorrectly using the W-W comparison methodology.

**71. [**] The parties agree that an appropriate counterfactual with respect to non-LRWs is that the United States ceases to use the DPM and zeroing when applying the W-T. In that scenario:**

**a. <u>To both parties</u>: What is the anti-dumping duty rate that should be used to calculate the level of nullification or impairment?**

**Response:**

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[44] *See* Case Brief of LG Electronics, Inc. and LG Electronics USA, Inc. (November 1, 2012) ("LG Case Brief") (Exhibit USA-26); Rebuttal Brief of LG Electronics, Inc., and LG Electronics USA, Inc. (November 8, 2012) ("LG Rebuttal Brief") (Exhibit USA-27); Case Brief of Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (November 1, 2012) ("Samsung Case Brief") (Exhibit USA-31); Rebuttal Brief of Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (November 8, 2012) ("Samsung Rebuttal Brief") (Exhibit USA-32).

[45] *See, e.g.*, LG Case Brief, sections III.C, III.D, III.E, and III.F (Exhibit USA-26); LG Rebuttal Brief, sections II.A, II.B, II.C, and II.E (Exhibit USA-27); Samsung Case Brief, sections IV and V (Exhibit USA-31); Samsung Rebuttal Brief, sections III and IV (Exhibit USA-32).

[46] *See Memorandum to Paul Piquado from Gary Tavernman re: Issues and Decision Memorandum for the Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea* (December 18, 2012) ("LRWs AD Final I&D Memo"), p. 1 (Exhibit USA-35).

[47] *See* LRWs AD Final I&D Memo, Comments 11, 12, 14 (Exhibit USA-35).

[48] *See* LG Final Margin Calculation Memo, pp. 3-5 (pp. 4-6 of the PDF version of Exhibit USA-28 **(BCI)**).

69. As explained in the U.S. opening statement at the substantive meeting of the Arbitrator with the parties,[49] and above in response to question 69, the United States agrees with Korea that an appropriate counterfactual for the purposes of the "as such" findings adopted by the DSB in this proceeding is that "the United States ceased to use DPM and zeroing when applying the W-T comparison methodology" after the expiration of the RPT.[50] The United States has not proposed, for the purposes of a counterfactual analysis, that the Arbitrator consider an alternative methodology applied by the USDOC for analyzing whether targeted dumping is occurring.

70. In that case, in the hypothetical, counterfactual scenario that assumes WTO compliance, it is reasonable and plausible to assume that the USDOC would apply the "normal[]"[51] W-W comparison methodology provided in the first sentence of Article 2.4.2 of the AD Agreement, without zeroing. A margin of dumping determined using such a comparison methodology would be presumed to be consistent with the AD Agreement. It is not reasonable or plausible to assume termination of the antidumping measure, considering that there may exist on the USDOC's administrative record a WTO-consistent a margin of dumping determined using the W-W comparison methodology (without zeroing) and there may be margins of dumping determined on the basis of facts available for other exporters or producers.

71. Furthermore, Korea's proposed approach is not reasonable or plausible since it assumes that Korean entities would be free to dump products into the U.S. market without the United States being able to address the dumping. Such an approach is particularly implausible and unreasonable in these proceedings since the WTO Agreement provides that injurious dumping "is to be condemned."[52]

72. Additionally, the United States has demonstrated that Korea's proposed formula approach for determining the level of suspension for non-LRW products necessarily overstates the level of nullification or impairment. Additionally, the imperfect substitutes partial equilibrium model proposed by the United States for use with respect to LRWs is the appropriate economic model for analyzing LRWs based on the evidence before the Arbitrator, but would not necessarily be the appropriate economic model for analyzing non-LRW products about which nothing is known, and for which needed data may not be available.

**b. <u>To the United States</u>: If the W-W rate calculated in the investigation were to be used, how can that rate be considered WTO-compatible, if, because it is not a "measure", it cannot be challenged under WTO law?**

**<u>Response:</u>**

73. As explained in response to the preceding sub-question, in the hypothetical, counterfactual scenario that assumes WTO compliance, it is reasonable and plausible to assume

[49] *See* U.S. Opening Statement, para. 19.

[50] Korea's Methodology Paper, para. 23.

[51] AD Agreement, Art. 2.4.2, first sentence.

[52] GATT 1994, Art. VI:1.

that the USDOC would apply the "normal[]" W-W comparison methodology provided in the first sentence of Article 2.4.2 of the AD Agreement, without zeroing, instead of applying the alternative comparison methodology provided in the second sentence of Article 2.4.2 of the AD Agreement. A margin of dumping determined using the "normal[]" comparison methodology would be presumed to be consistent with the AD Agreement.

74. It is critical to remember that a margin of dumping determined using the W-W comparison methodology, without zeroing, could be used here for the purpose of the hypothetical counterfactual, which assumes action by the USDOC taken in compliance with U.S. WTO obligations. It is not relevant that the USDOC has not actually taken such action – indeed, that situation is a necessary precondition for applying a counterfactual approach under Article 22.6 of the DSU. Accordingly, it is not relevant that, in reality, a margin of dumping calculated using the "normal[]" W-W comparison methodology, without zeroing, is not itself a measure taken by the USDOC that could be challenged in WTO dispute settlement.

**72. [**] To Korea: Please comment on the United States' response to Arbitrator question No. 13, indicating that the results of the administrative reviews are not covered by the DSB's rulings and recommendations. If they are covered, why does Korea consider that the duty rates of 2012 should be used as a counterfactual, rather than the 2017 rates?**

**Response:**

75. This question is directed to Korea.

**73. [**] To Korea: When does Korea consider that it is entitled to suspend concessions following the parameters of this Arbitration proceeding:**

**i. at initiation of the investigation;**

**ii. following receipt of questionnaire responses from mandatory respondents;**

**iii. at preliminary determination made by the USDOC;**

**iv. at final determination when and if the anti-dumping duty is calculated using the W-W methodology;**

**v. at final determination when and if the anti-dumping duty is calculated using the W-T methodology.**

**If Korea considers that its understanding does not match any of the situations described in (i) to (v), please explain.**

**Response:**

76. This question is directed to Korea.

## 3 CALCULATION OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT

**74. [15.] <u>To Korea</u>: The United States has requested the Arbitrator to identify the amounts of suspension for the anti-dumping and countervailing measures separately.**

**a. Does Korea have any objection to this request?**

**b. Would Korea undertake partial withdrawal of the countermeasures in the event of partial compliance by the United States?**

**<u>Response:</u>**

77. This question is directed to Korea.

**75. [16.] <u>To the United States</u>: The United States appears to emphasize that there is no nullification or impairment suffered by Korea because of the maintenance of the WTO-inconsistent measures beyond the expiration of the RPT. Please confirm if this argument pertains to the calculation of the level of nullification or impairment solely with respect to the maintenance of the measures, and not for the year 2017.**

**<u>Response:</u>**

78. The RPT expired on December 26, 2017.[53] The United States had until that date, which was, in effect, the end of 2017, to bring the WTO-inconsistent measures into compliance. Accordingly, the level of any suspension of concessions would not include any purported "nullification or impairment" from the year 2017, which was prior to the expiration of the RPT.

79. The United States has proposed that annual 2017 data on the value of U.S. imports of LRWs from Korea be used as the baseline for the counterfactual analysis because that is recent, available data that can be incorporated into a correct economic model to estimate what the value of imports would be if the antidumping and countervailing duties were modified to be consistent with U.S. WTO obligations. 2017 data is not being used because nullification or impairment in 2017 should be included in the level of suspension. If full year 2018 data were available, that would be an even more appropriate baseline, as that would be a period after the expiration of the RPT. Such data are, of course, not available because we are not yet even midway through the year 2018.

**76. [18.] <u>To Korea</u>: Korea intends to show equivalence of its formula with the formula employed in the United States' methodology paper in the India – Agricultural Products Article 22.6 arbitration in its response to Arbitrator question No. 28.**

**a. In comparing equation (3) in para. 91(a) of Korea's response to the Arbitrator, the change in the value of consumption is calculated based on the import quantity, whereas in the original formula the change in the level of**

[53] *See US – Washing Machines (Article 21.3(c))*, para. 4.1.

**consumption is based on the level of consumption, CAI. Can Korea explain how the two changes can be equivalent, given that the base on which the change is calculated is different, i.e. import quantity and the level of consumption, respectively?**

**b. Similarly, in comparing equation (4) in para. 91(b) of Korea's response to the Arbitrator, the change in the value of supply is calculated based on the import quantity, whereas in the original formula the change in the value of supply is based on the level of production, YAI. Can Korea explain how the two changes can be equivalent, given that the base on which the change is calculated is different, i.e. import quantity and the level of consumption, respectively?**

**Response:**

80. This question is directed to Korea.

**77. [19.*] To Korea: Korea confirms in its answer to Arbitrator question No. 27 that "a partial equilibrium model requires the assumption of homogenous products." Korea also indicates that the LRWs cannot be considered perfect substitutes. Nevertheless, it holds the opinion that the degree of substitutability is sufficiently high to "support the use of the partial equilibrium model over the Armington model."**

**a. Is there evidence that shows that even when products are not perfect substitutes, the partial equilibrium framework can be appropriate to calculate the impact on a change in tariffs?**

**b. How sensitive are Korea's calculations of the level of nullification or impairment to its proposed values of the demand and supply elasticities?**

**Response:**

81. This question is directed to Korea.

**78. [20.*] To Korea: Notwithstanding its objection to the use of the Armington model in this proceeding, please respond to the following:**

**a. Can Korea provide the Arbitrator with alternative estimates of the elasticity of substitution for LRWs beyond those supplied by the United States?**

**b. Please comment on the United States' response to Arbitrator question No. 39 on the value of the elasticity of substitution for LRWs proposed by the United States.**

**Response:**

82. This question is directed to Korea.

**79. [31.] <u>To both parties</u>: With regard to the final injury determinations in the safeguard investigation (Exhibit KOR-25) and the original anti-dumping investigation (Exhibit KOR-44) , would the United States be in the position to share with the Arbitrator the actual data on apparent United States consumption of LRWs for the period 2011 to 2017?**

**<u>Response:</u>**

83. As an initial matter, the United States notes that the U.S. International Trade Commission ("USITC") proceedings are not the subject of this dispute settlement proceeding. Further, the data on apparent U.S. consumption of large residential washers were based on confidential business information and therefore redacted from the USITC's publicly available publications.

**80. [32.*] <u>To both parties</u>: Concerning Korea's adjustment request for LRWs and non-LRWs, please provide your views on allowing the level of suspension to vary in accordance with:**

**a. the rate of inflation, or**

**b. United States nominal GDP.**

**<u>Response:</u>**

84. Using the rate of inflation or the change in U.S. nominal GDP as a proxy for a growth factor for non-LRW products, some of which are unknown at this time, would not be appropriate, as there is no evidentiary basis for doing so.

85. In the case of LRWs, evidence establishes that the level of U.S. imports of LRWs from Korea is likely to decline, not grow, due to business decisions made by Samsung and LG, the Korean producers of LRWs, including their decisions to construct LRWs production facilities in the United States and produce LRWs for the U.S. market at those new facilities. That trend is unrelated to the rate of inflation or any change in the U.S. nominal GDP.

86. Indeed, in the original antidumping and countervailing duty investigations of LRWs from Korea, the USITC found that "[d]emand for washers is not highly correlated with general economic conditions or conditions in the housing market because a substantial proportion of washer purchases are made to replace washers that are at or close to the end of their functional lives."[54] In the global safeguard investigation of LRWs undertaken in 2017, the USITC likewise found that "[a]bout two-thirds of demand for LRWs is driven by consumers needing to replace existing washers at the end of those products' functional lives, otherwise known as 'replacement demand,' with the balance driven by home sales, renovations, and new construction. Thus,

[54] U.S. International Trade Commission, *Certain Large Residential Washers from Korea and Mexico*, Inv. Nos. 701-TA-488 and 731-TA-1199-1200 (Final), Publication 4378 (February 2013), p. 17 (available on the Internet at https://www.usitc.gov/publications/701_731/pub4378.pdf).

demand for LRWs is primarily driven by necessity."[55] The evidence before the Arbitrator establishes that there is no connection between changes in the size of the LRWs market (or changes in level of imports of LRWs) and the rate of inflation or any change in the U.S. nominal GDP.

87. Similarly, it is unknown and unknowable whether imports of non-LRWs would increase or decrease in parallel to the rate of inflation or any change in U.S. nominal GDP. What if the product is one where there is a declining market demand? Or where production in other countries has been increasing and the price is less than that of Korea? Simply using the rate of inflation or change in U.S. nominal GDP as a proxy for the growth rate for non-LRW products would be speculation given the situation here, and an Article 22.6 arbitrator's decision cannot be based on speculation.[56]

**81. [33.*] To Korea: The AHAM data submitted by Korea to this proceeding applies to the market for "clothes washers". To the extent that this includes products not covered by the dispute, what criteria can be used to adjust this value to reflect only the value of the LRW market?**

**Response:**

88. This question is directed to Korea.

**82. [34.*] To Korea: Korea calculates the value of United States' imports from Korea in 2017 by multiplying the import share in 2011 with the total United States' imports in 2017.**

**a. Why is the difference between that value and the actual imports from Korea in 2017 not equal to the level of nullification or impairment?**

**b. Why is it necessary, in addition, to feed that value into an economic model?**

**Response:**

89. This question is directed to Korea.

**83. [35.*] To Korea: To construct Korea's counterfactual for LRWs, Korea seems to assume that the reduction in Korea's import share after 2011 is driven only by the imposition of WTO-inconsistent anti-dumping and countervailing duties.**

[55] U.S. International Trade Commission, *Large Residential Washers*, Investigation No. TA-201-076, Publication 4745 (December 2017) ("USITC LRWs 201 Report"), p. 23 (p. 32 of the PDF version of Exhibit KOR-25). *See also* U.S. International Trade Commission, *Large Residential Washers from China*, Investigation No. 731-TA-1306 (Final), Publication 4666 (January 2017), p. 14 (p. 25 of the PDF version of Exhibit KOR-18).

[56] *See US – 1916 Act (EC) (Article 22.6 – US)*, para. 6.10; Written Submission of the Republic of Korea (April 13, 2018) ("Korea's Written Submission"), para. 14.

**a. Can Korea provide information on the change in the production capacity of LRWs in Korea since 2011?**

**b. If production capacity has changed, would it also be reflected in exports to other major markets, i.e. the European Union?**

**Response:**

90. This question is directed to Korea.

**84. [36.*] To Korea: In the example given in Korea's response to Arbitrator question No. 48(a), please explain how did Korea calculate the average duty rate for the subject product? In particular:**

**a. What was the import(s) share(s) used?**

**b. What was the anti-dumping duty or duties rate(s) used?**

**Response:**

91. This question is directed to Korea.

**85. [38.] To the United States: In *US – Tuna II (Mexico) (Article 22.6 – US)* and in *US – COOL (Article 22.6 – US)*, did the United States propose the use of a perfect substitutes partial equilibrium model? If so, what variables and parameters were used as inputs to the model? More specifically, were import values ever used as an input? If so, what was the base period used?**

**Response:**

92. As an initial matter, the United States notes that the U.S. submissions in the *US – Tuna II (Mexico) (Article 22.6 – US)* arbitration and the *US – COOL (Article 22.6 – US)* arbitration are publicly available on the Internet.[57] To increase the transparency of the WTO dispute settlement process, and to permit all Members equal access to other Members' prior submissions, the United States encourages Korea and all WTO Members to make their dispute settlement submissions publicly available (of course, with any business confidential information redacted).

93. Turning to the question, for *US – Tuna II (Mexico) (Article 22.6 – US)*, the answer is no. The United States did not propose the use of a perfect substitutes partial equilibrium model and,

[57] *See, e.g., US – Tuna II (Article 22.6 – US)*, U.S. Written Submission, https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.fin.PUBLIC.pdf; *US – COOL (Article 22.6 – US)*, U.S. Written Submission, https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.Sub1.%28DS384%29.Public.pdf.

in fact, explained that "the data essential to constructing and correctly specifying a partial equilibrium model are not available."[58]

94. For *US – COOL (Article 22.6 – US)*, the United States proposed using a type of partial equilibrium model known as the equilibrium displacement model ("EDM").[59] The U.S. model assumed perfect substitutability because the product, livestock, was homogenous. Variables and parameters used as inputs to the model were quantity data (imports, exports and production), prices, COOL compliance costs (to calculate the price wedge), and elasticities (demand and supply). The United States is providing to the Arbitrator an exhibit that the United States submitted in *US – COOL (Article 22.6 – US)*, which was "a guide to the EDM and its parameters."[60] In particular, that guide describes:

> Tab 1: Trade Effects
> Tabs 2-3: Quantity Data
> Tabs 4-7: Pricing Data
> Tabs 8-10: 2014 Baseline
> Tab 12-13: COOL Compliance Costs
> Tab 14: Elasticities
> Tab 15: EDM Matrix Inversion
> Tab 16: Complete Results.[61]

The United States explained that "[t]he COOL EDM's baseline utilizes 2014 market quantities and prices sourced from the U.S. Census Bureau trade data."[62] "[T]he United States utilize[d] 2014, the most recent full year data, as a baseline to construct the model."[63] The Article 22.6 arbitration in *US – COOL* took place in 2015.

95. The Article 22.6 arbitrator in *US – COOL* declined to use the U.S. proposed approach and instead used an econometric analysis to isolate the impact of the COOL measure, controlling for other relevant factors. It is noteworthy that the arbitrator there found that, "[u]nder the COOL measure, animals of different origins are imperfect substitutes."[64] And that was for livestock, a commodity product, not the branded LRWs at issue here.

**86. [**] Korea and the United States disagreed during the substantive meeting as to whether in *US – Tuna II (Mexico) (Article 22.6 – US)* the partial equilibrium model**

[58] *US – Tuna II (Article 22.6 – US)*, U.S. Written Submission, para. 124.

[59] *US – COOL (Article 22.6 – US)*, U.S. Written Submission, para. 33.

[60] *See* "An Equilibrium Displacement Model of the U.S. Beef and Pork Sectors," submitted by the United States as Exhibit US-4 in *US – COOL (Article 22.6 – US)* ("*US – COOL (Article 22.6 – US)*, Exh. US-4") (Exhibit USA-36).

[61] *US – COOL (Article 22.6 – US)*, Exh. US-4, p. 1 (Exhibit USA-36).

[62] *US – COOL (Article 22.6 – US)*, U.S. Written Submission, para. 37.

[63] *US – COOL (Article 22.6 – US)*, U.S. Written Submission, para. 35.

[64] *US – COOL (Article 22.6 – US)*, para. 48.

**proposed by Korea in this Arbitration was proposed by the United States in that arbitration.**

**a. To Korea: Please explain in what sense the model was the same.**

**b. To the United States: Please explain in what sense the model was different.**

**Response:**

96. The United States will comment on Korea's explanation concerning the sense in which, in Korea's view, the model allegedly proposed by the United States in *US – Tuna II (Mexico) (Article 22.6 – US)* is the same as the perfect substitutes partial equilibrium model (using hypothetical 2017 import value data derived based on Korea's 2011 import share), which Korea proposes in this arbitration. The evidence, *i.e.*, the U.S. written submission in *US – Tuna II (Mexico) (Article 22.6 – US)*, demonstrates that the U.S. approach in *US – Tuna II (Mexico) (Article 22.6 – US)* was not the same as the approach Korea proposes in this arbitration.

97. In *US – Tuna II (Mexico) (Article 22.6 – US)*, Mexico proposed the use of a partial equilibrium model.[65] The United States offered some positive comments about the use of partial equilibrium analysis, in general, and explained how such analysis might have been used in that arbitration.[66] However, the United States argued that Mexico misused the partial equilibrium model and that Mexico's model was not appropriate in that situation given the available data.[67]

98. The United States argued that:

> In light of the evidence available, the most appropriate methodology to calculate the amount of nullification or impairment caused by the U.S. dolphin safe labeling measure would be to compare, on a prospective basis, the U.S. imports from Mexico of tuna product with the measure in place to the level of imports that would occur if the measure were withdrawn. This approach, which examines Mexico's historical market share of the U.S. tuna product market prior to the adoption of the DPCIA, is both consistent with the approach taken by past Article 22.6 arbitrators as well as the evidence on this record.[68]

The approach advocated by the United States was similar to the approaches applied in the *Hormones*, *Bananas*, and *Gambling* Article 22.6 arbitrations.[69]

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[65] *See US – Tuna II (Article 22.6 – US)*, U.S. Written Submission, para. 81.

[66] *See US – Tuna II (Article 22.6 – US)*, U.S. Written Submission, paras. 82-84.

[67] *See US – Tuna II (Article 22.6 – US)*, U.S. Written Submission, paras. 86-87, 124.

[68] *US – Tuna II (Article 22.6 – US)*, U.S. Written Submission, para. 125.

[69] *See US – Tuna II (Article 22.6 – US)*, U.S. Written Submission, para. 126.

99. The United States used historical data, with necessary adjustments, to determine the projected value of U.S. imports of Mexican tuna product under the counterfactual, and then subtracted the value of current U.S. imports of Mexican tuna product to identify how much higher such imports would be if the U.S. measure were withdrawn.[70]

100. The United States did not feed the projected value of U.S. imports of Mexican tuna product (based on historical data with adjustments) into a partial equilibrium model to determine how much higher such imports would be if the U.S. measure were withdrawn, as Korea proposes to do here. Korea's proposed approach has no foundation in economic theory or logic, and is not appropriate for accurately determining the trade effects in differentiated product markets, such as LRWs. As demonstrated above, Korea's proposed approach also bears no resemblance to the analytical approach advocated by the United States in *US – Tuna II (Mexico) (Article 22.6 – US)*.

**87. [**] <u>To both parties</u>: During the substantive meeting, the parties agreed to submit a joint a request to AHAM for a breakdown of the "clothes washers" market into the LRW and non-LRW segments:**

**a. We suggest that the letter indicates a response date no later than 28 June 2018.**

**b. Please provide a copy of the letter sent.**

**<u>Response:</u>**

101. The United States and Korea sent multiple joint communications to AHAM requesting the information described in the question and clarifying the request. The United States is providing to the Arbitrator a copy of that communication as Exhibit USA-37. Ultimately, AHAM responded that it "[does] not have the data with the[] breakdowns" specified by the United States and Korea, *i.e.*, the definition of "large residential washers" for the purposes of the U.S. antidumping and countervailing duty measures.[71]

102. The United States and Korea subsequently sent a further communication requesting that AHAM inform the parties of the breakdowns that AHAM does have for its data on the total size of the U.S. washing machines market. The parties explained that, with that information, it still may be possible to estimate the size of the market for large residential washers.[72] AHAM had not responded to the latest communication from the parties at the time of the submission of these responses to the Arbitrator's questions.

103. That being said, the United States has explained how the AHAM U.S. market value data for all washing machines could be used in the application of a proper imperfect substitutes static 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

[70] *See US – Tuna II (Article 22.6 – US)*, U.S. Written Submission, para. 133.

[71] Exhibit USA-37, p. 5.

[72] *See* Exhibit USA-37, p. 6.

size of the relevant LRWs market at issue in this dispute. The 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.[73] 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 could be used, such as 70 percent or 60 percent of the AHAM total market value.

104. The adjusted AHAM market value data would be a far better proxy than Korea's proposal to use 2011 "import statistics specific to LRWs" as a proxy for market share and market size.[74] As the United States has demonstrated, Korea's approach is fundamentally flawed.[75] The approach proposed by the United States would provide the Arbitrator a reasonable proxy for data about the size of the U.S. LRWs market.

**88. [**] <u>To the United States</u>: With respect to the information provided, concerning the opening of facilities by LG and Samsung into the United States, China, and Mexico, please explain how the Armington model takes into account any opening of production of facilities in those countries.**

**<u>Response:</u>**

105. The imperfect substitutes static partial equilibrium model proposed by the United States is a "basic industry-specific model"[76] that assumes "three varieties of products in the industry that are imperfect substitutes in demand."[77] The three varieties of products are (1) LRWs from Korea, (2) LRWs produced in the United States, and (3) LRWs produced in other countries.[78] The U.S. model takes into account the opening of production facilities by Samsung and LG in the United States and countries other than Korea by incorporating into the model the U.S. market shares of U.S. LRWs and LRWs produced in third countries (including LRWs produced by Samsung and LG in the United States and third countries, respectively), along with Korea's share of the U.S. LRWs market.

[73] *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).

[74] *See* Korea's Methodology Paper, para. 18.

[75] *See* Written Submission of the United States of America (March 23, 2018) ("U.S. Written Submission"), section III.D.3.b.i.

[76] U.S. International Trade Commission, July 2017 ("Hallren and Riker (2017)"), p. 3 (Exhibit KOR-15).

[77] Hallren and Riker (2017), p. 4 (Exhibit KOR-15).

[78] *See* Hallren and Riker (2017), p. 4 (Exhibit KOR-15).

106. That being said, neither Samsung nor LG had commenced production of LRWs in the United States at the end of 2017.[79] Therefore, as the United States has proposed that full-year 2017 data be used in the application of the U.S. model, the results of the application of the model would not reflect Samsung's and LG's business decisions to shift production for the U.S. market to the United States, and thus would overstate the level of nullification or impairment. That is why the United States has argued – and the evidence demonstrates – 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 is zero.[80]

107. Calculating the level of nullification or impairment each year, as contemplated by the Arbitrator's question 45, would mean that the most recent data are incorporated into the economic model, including trade data showing actual exports of LRWs from Korea and other countries to the United States.[81] If Samsung and LG increase production of LRWs in the United States for the U.S. market and that production "ultimately satisf[ies] the vast majority of U.S. demand for their LRWs,"[82] as the companies themselves have predicted, there would be a corresponding decrease in exports of LRWs by Samsung and LG from Korea to the United States, and an increase in total domestic production of LRWs in the United States. That all would be reflected in updated data.

108. The United States further observes that applying the prospective belief, as stated by the Korean companies in submissions and testimony to the U.S. government, that Samsung and LG will produce LRWs for the U.S. market exclusively (or nearly exclusively) from their new U.S. production facilities implies an import supply elasticity of near zero. That is, Samsung and LG essentially have stated that changes in price would have no effect on import quantities, which is a further basis for concluding that the level of nullification or impairment is zero.

## 4 NON-LRW PRODUCTS

**89. [22.*] <u>To the United States</u>: Could the United States please:**

**a. Confirm that in any of its anti-dumping and countervailing duty investigations, the agency (or agencies) involved would be required to:**

[79] *See* "Samsung Kicks Off U.S. Production of Premium Home Appliances," Samsung Newsroom (January 12, 2018), in Samsung's Substantive Response to ITC Notice of Institution (February 1, 2018) ("Samsung 2018 USITC LRWs Sunset Initiation Response"), Exhibit 2 (p. 33 of the PDF version of Exhibit USA-2); 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. 2-3 (pp. 11-12 of the PDF Version of Exhibit USA-4).

[80] *See*, *e.g.*, U.S. Written Submission, paras. 31-52.

[81] *See* Responses of the United States of America to the Advance Questions from the Arbitrator (May 14, 2018), paras. 137-138 (U.S. response to question 43) and 141-144 (U.S. response to question 45).

[82] USITC LRWs 201 Report, p. 70 (p. 79 of the PDF version of Exhibit KOR-25).

**i. Identify the specific HS subheadings that are the subject of the investigation;**

**ii. Calculate the value of imports of the products that are the subject of the investigation, disaggregated by country of origin and by firm;**

**iii. Calculate the value of domestic sales of the products that are the subject of the investigation;**

**iv. Provide estimates of demand, supply, and substitution (Armington) elasticities of the products that are the subject of the investigation.**

**b. Is the information in (i)-(iv) publicly available?**

**Response:**

109. Neither the USDOC nor the USITC is required by any U.S. statute or regulation to identify, calculate, or provide the specific information described in the sub-questions. To the extent that either the USDOC or the USITC has published such information in the past in connection with antidumping and countervailing duty determinations, it cannot be guaranteed that the information would be published in connection with future determinations.

110. In particular, when the USDOC publishes an antidumping or countervailing duty order, the USDOC is required by statute to include as part of the order "a description of the subject merchandise, in such detail as the administering authority deems necessary," but the governing statutes do not specify that the USDOC must include HS subheadings in such a description.[83] The USITC does not publish antidumping or countervailing duty orders, and is not otherwise required to identify the specific HS subheadings that are the subject of an investigation.

111. When the USDOC and the USITC make a preliminary determination in an antidumping or countervailing duty investigation, they are required by statute to "notify the petitioner, and other parties to the investigation" of the determination, and describe "the facts and conclusions on which its determination is based".[84] The governing statutes do not specify in greater detail than that the information that the USDOC and the USITC are required to include in their determinations.

112. When the USDOC and the USITC make a final determination in an antidumping or countervailing duty investigation, they are required by statute to "notify the petitioner, other parties to the investigation, and the other agency of its determination and of the facts and conclusions of law upon which the determination is based, and it shall publish notice of its determination in the Federal Register."[85] The governing statutes do not specify in greater detail

[83] 19 U.S.C. § 1671e(a)(2) (for countervailing duties) and 19 U.S.C. § 1673e(a)(2) (for antidumping duties).

[84] 19 U.S.C. § 1671b(f) (for countervailing duties) and 19 U.S.C. § 1673b(f) (for antidumping duties).

[85] 19 U.S.C. § 1671d(d) (for countervailing duties) and 19 U.S.C. § 1673d(d) (for antidumping duties).

than that the information that the USDOC and the USITC are required to include in their determinations.

113. Finally, company-specific business confidential information cannot be disclosed in the determinations published by the USDOC or the USITC.

**90. [23.*] <u>To Korea</u>: With respect to either model discussed by the parties for the calculation of the level of nullification or impairment on non-LRWs products, a number of inputs are necessary.**

**a. With respect to a calculation of the average WTO-consistent anti-dumping duty rate, how can Korea find the amount of exports of each affected firm?**

**b. For cases in which the product scope does not coincide with the HS 10-digit classification used in the USITC Dataweb, how would Korea determine the value of Korean imports into the United States?**

**c. How would Korea obtain data on the total value of demand in the United States in each case?**

**d. How would Korea estimate elasticities of demand, supply and substitution, if the information would not appear in the USITC reports?**

**<u>Response:</u>**

114. This question is directed to Korea.

**91. [24.*] <u>To the United States</u>: Beyond "data input issues", are there reasons that would render the application of the Armington-based partial equilibrium model inappropriate to calculate the level of nullification or impairment related to non-LRW products? Would the same reasons apply to the partial equilibrium model?**

**<u>Response:</u>**

115. The selection of an appropriate economic model or formula is based on a number of critical factors, such as the appropriate estimation technique to apply (simulation or econometrics), substitutability of products, and other variables that could affect market demand and supply conditions. It is not feasible to determine whether it is appropriate to use a single model or formula (Armington or perfect substitutes partial equilibrium model, or some other analysis) to calculate the level of nullification or impairment related to non-LRW products without first examining the different industries that produce those products, and the different markets in which those products are traded, to determine if the model assumptions hold for the different products. Korea has not even attempted to establish the basis for determining that the same formula – premised on the same economic assumptions, which are flawed in the case of LRWs – could be used to analyze all of the non-LRW products at issue in this dispute. And it necessarily would be impossible to do the required analysis for potential future antidumping measures on other non-LRW products about which there is literally no information before the

Arbitrator. Such an approach could not accurately estimate the level of nullification or impairment. This is a key reason why Korea's proposed formula approach cannot result in a level of suspension that is consistent with the DSU.

116. This is true both for the formula approach that Korea proposes as well as for the imperfect substitutes partial equilibrium model proposed by the United States for use in connection with LRWs. The economic model proposed by the United States fits the facts of the LRWs market, and the data necessary to apply the model proposed by the United States for LRWs are all before the Arbitrator. The same cannot be said for non-LRWs products. Given that the non-LRWs products are unknown, it cannot be known whether the U.S. model fits the facts. Also, necessary data, in particular market share data, may not be available or the source of such data may not be credible. This simply cannot be known at this point, when it is unknown what the non-LRW products may be.

**92. [25.] <u>To Korea</u>: With respect to its request for LRW products, Korea indicates that it "does not object to the use of the actual growth rate to calculate the level of future suspension from 2018 onwards". Would Korea agree that an actual growth rate could be used to calculate the level of future suspension with respect to non-LRW products?**

**<u>Response:</u>**

117. This question is directed to Korea.

**93. [39.*] <u>To both parties</u>: With respect to Korea's request on non-LRW products, please provide your comments to an approach similar to that of the arbitrators in US – Offset Act (Byrd Amendment) (Article 22.6 – US), whereby the level of suspension of concessions depends upon tariff revenues collected as a result of applying the WTO-inconsistent duties on non-LRW products and where future growth adjustments to the level of suspension of concessions depends on the growth in nominal United States GDP or inflation.**

**<u>Response:</u>**

118. In response to question 80 above, the United States explained that using the growth in U.S. nominal GDP or inflation as a proxy for a growth factor for non-LRW products, some of which are unknown at this time, would not be appropriate, as there is no evidentiary basis for doing so, and that would amount to speculation. There is no basis to assume at this point any correlation at all between the level of nullification or impairment and nominal GDP or inflation, let alone be able to determine a precise level of correlation.

119. Additionally, the United States observes that, in *US – Offset Act (Byrd Amendment)*, the amount of distributions on which the calculation of the level of suspension was based was published annually. Under the approach contemplated in the question, it would be necessary to have data on tariffs collected from particular importers that were subject to antidumping duties determined using DPM and zeroing. However, information on tariff revenues for particular

importers subject to antidumping duties is business confidential information, so it is unclear what would be the source of such information.

120. Furthermore, even if they could be known, it is unclear what the relationship would be between tariffs collected and the level of nullification or impairment, or how to establish what the relationship would be.

121. Finally, this is not an approach that either Korea or the United States has proposed in this arbitration.