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)

COMMENTS OF THE UNITED STATES OF AMERICA ON KOREA'S RESPONSES TO QUESTIONS FROM THE ARBITRATOR FOLLOWING THE SUBSTANTIVE MEETING OF THE ARBITRATOR WITH THE PARTIES

June 28, 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
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 – Tuna II (Mexico) (Article 22.6)	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

INTRODUCTION

1. In this document, the United States comments on Korea's responses to the Arbitrator's written questions following the substantive meeting of the Arbitrator with the parties. The absence of a U.S. comment on an aspect of Korea's response to any particular question should not be understood as agreement with Korea's response.

1 GENERAL ISSUES

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>Comment:</u>

2. Korea asserts that the determination made by the U.S. Department of Commerce ("USDOC") in the proceeding under section 129 of the *Uruguay Round Agreements Act* ("URAA") concerning the countervailing duty investigation of large residential washers ("LRWs") from Korea ("CVD section 129 determination") is not relevant to this proceeding, in which the Arbitrator is examining the level of nullification or impairment after the end of the reasonable period of time for compliance ("RPT").

3. While the United States has not argued that the Arbitrator should review the CVD section 129 determination in this proceeding,[1] it is striking that Korea asserts that it "maintains the right to suspend concessions until and unless a compliance panel finds the post-RPT measures to bring the WTO-inconsistent measures into conformity,"[2] and then subsequently states, "[h]aving said that, in response to the Arbitrator's question, Korea does not believe that the outcome of the Section 129 determination brings the U.S. measures into compliance."[3]

4. Korea appears to be asserting that, regardless of whether Korea accepts that a U.S. measure taken to comply brings the United States into compliance with the recommendations concerning the countervailing duty measure on LRWs that were adopted by the Dispute Settlement Body ("DSB"), or with U.S. obligations under the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"),[4] Korea would be able to continue to suspend concessions until the outcome of a separate compliance proceeding. The United States does not agree with Korea.

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[1] Among other things, as the United States has explained, further steps would be necessary as part of the implementation process. *See* Responses of the United States of America to Questions from the Arbitrator following the Substantive Meeting of the Arbitrator with the Parties (June 21, 2018) ("U.S. Responses to Post-Meeting Questions"), para. 18.

[2] Korea's Replies to Questions from the Arbitrator After the Meeting with the Parties (June 21, 2018) ("Korea's Responses to Post-Meeting Questions"), para. 1.

[3] Korea's Responses to Post-Meeting Questions, para. 2.

[4] *See* Korea's Responses to Post-Meeting Questions, para. 2.

5. As Article 22.8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") makes clear, the "suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached." If there is no disagreement as to compliance, then there would be no basis for a compliance proceeding and Korea would not retain authorization to suspend concessions.

6. Additionally, the USDOC's CVD section 129 determination could be relevant to these proceedings in that it exemplifies the possibility for compliance with the DSB's recommendations concerning the U.S. countervailing duty measure on LRWs. Compliance with those recommendations, whether accepted by Korea or found in subsequent proceedings, would mean that Korea does not have the right to suspend concessions with respect to the United States concerning the U.S. countervailing duty measure on LRWs.

7. In that situation, it would be most helpful to the parties to have from the Arbitrator a separate finding on the amount of nullification or impairment resulting from the maintenance of the countervailing duty measure on LRWs, as distinct from the amount of nullification or impairment resulting from the maintenance of the antidumping duty measure on LRWs. Such separate findings would inform and provide clarity to the parties in case the United States achieves partial compliance prior to achieving full compliance, and possibly could result in the avoidance of some additional dispute settlement proceedings.

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>Comment:</u>

8. In its response to this question, Korea makes a number of assertions about arguments made by the United States during the arbitration under Article 21.3(c) of the DSU in this dispute, and Korea makes additional assertions about what is required under U.S. law for implementation of the recommendations related to the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") that were adopted by the DSB in this dispute.[5] The United States has addressed Korea's arguments previously in the U.S. response to question 56.[6] Rather than repeat those arguments here, the United States refers the Arbitrator to that U.S. response.

[5] *See* Korea's Responses to Post-Meeting Questions, paras. 6-11.

[6] *See* U.S. Responses to Post-Meeting Questions, paras. 23-28.

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>Comment:</u>

9. Korea states that it "does not consider the United States' proposed counterfactual, which simply hypothesizes the recalculation of LG's anti-dumping margin using the first sentence of Article 2.4.2, to be 'plausible' or 'reasonable.'"[7] The margin of dumping for LG determined using the weighted average-to-weighted average comparison methodology ("W-W margin of dumping"), without zeroing, is not hypothetical at all. LG's W-W margin of dumping is known. It is evidenced by documentation that is before the Arbitrator. As explained in the U.S. response to question 70.b, LG's W-W margin of dumping was disclosed to LG, and LG had a full opportunity to comment on and present arguments concerning the W-W margin of dumping, including opportunities to identify errors in the calculation.[8]

10. Korea argues that LG's W-W margin of dumping cannot be used as a counterfactual "because it does not take into account the DSB's 'as such' findings."[9] Korea's argument does not make sense. The "as applied" and "as such" findings adopted by the DSB concern different measures: on the one hand, the antidumping investigation of LRWs from Korea, and on the other hand, the so-called differential pricing methodology ("DPM") and zeroing methodology applied by the USDOC. Implementation concerning these separate measures will be separate undertakings, and it is not correct to link the counterfactuals employed by the Arbitrator in the way that Korea suggests.

11. Additionally, the U.S. responses to questions 56 and 67[10] demonstrate that Korea is incorrect when it asserts that it would be a "legal impossibility" for the USDOC to apply the W-W margin of dumping to LG without first concluding implementation related to the "as such" findings adopted by the DSB.[11] The United States refers the Arbitrator to those U.S. responses.

[7] Korea's Responses to Post-Meeting Questions, para. 13.

[8] *See* U.S. Responses to Post-Meeting Questions, paras. 60-68.

[9] Korea's Responses to Post-Meeting Questions, para. 14.

[10] *See* U.S. Responses to Post-Meeting Questions, paras. 23-28, 54.

[11] *See* Korea's Responses to Post-Meeting Questions, paras. 14-15.

12. Here, the United States adds that, in the arbitration under Article 21.3(c) of the DSU, the United States explained its expectation at the time that, under the URAA, it would be appropriate to sequence implementation of the "as such" and "as applied" findings adopted by the DSB to some extent, given the United States' anticipation that the USDOC would, in the section 129 determination, "apply a number of the revised approaches and methodologies that will be developed in the section 123 determination."[12] However, in the context of establishing the appropriate counterfactual in this Article 22.6 arbitration, that proposed sequencing is irrelevant. It appears that Korea misunderstands the nature of a "counterfactual." After all, one plausible result of implementation of the "as applied" findings concerning the antidumping investigation of LRWs is that the USDOC would apply the W-W margin of dumping to LG, regardless of whether and how the USDOC might consider application of the alternative weighted average-to-transaction ("W-T") comparison methodology for LG under the second sentence of Article 2.4.2 of the AD Agreement.

13. Korea also is incorrect when it argues that "it cannot be assumed that the United States' application of the first sentence of Article 2.4.2 would be done in a WTO-consistent manner."[13] As the arbitrator in *EC – Hormones (US) (Article 22.6 – EC)* explained, "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."[14] Consistent with this general presumption of WTO consistency, the Arbitrator should utilize in the counterfactual analysis the W-W margin of dumping determined for LG in the original antidumping investigation. Korea has not at any point in this arbitration actually demonstrated that any aspect of LG's W-W margin of dumping is inconsistent with the AD Agreement. Korea has not even suggested anything specific about LG's W-W margin of dumping that <u>might be</u> inconsistent with the AD Agreement. Rather, Korea simply is engaging in speculation about the WTO consistency of LG's W-W margin of dumping.

14. Furthermore, in its response to this question, Korea once again repeats its assertion that "withdrawal of the anti-dumping and countervailing duties would be an appropriate counterfactual as it is 'plausible' and 'reasonable' that the United States would withdraw the WTO-inconsistent measure."[15] However, neither the original Panel nor the Appellate Body in this dispute found that there was no injurious dumping of LRWs. Rather, the findings concerned the way in which the margins of dumping were determined. As a result, in urging a counterfactual in which the antidumping measures are withdrawn, Korea is assuming that it is "plausible" and "reasonable" that a Member being subjected to injurious dumping by entities in another Member would not address that dumping. This is neither "plausible" nor "reasonable."[16]

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[12] Korea's Responses to Post-Meeting Questions, para. 7 (quoting "U.S. Written Submission, Article 21.3(c) Proceedings, para. 26 (Exhibit KOR-54)").

[13] Korea's Responses to Post-Meeting Questions, para. 16.

[14] *EC – Hormones (US) (Article 22.6 – EC)*, para. 9 (emphasis in original).

[15] Korea's Responses to Post-Meeting Questions, para. 19.

[16] The same is true with respect to the U.S. countervailing duty measures on LRWs from Korea. Neither the original Panel nor the Appellate Body in this dispute found that there was no injurious subsidization of LRWs.

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>Comment:</u>

15. For the reasons given in the U.S. response to this question, the United States disagrees with Korea that the same counterfactual should be used for LRWs and non-LRW products in this dispute. The United States does not otherwise have any additional comments on Korea's response to this question.

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>Comment:</u>

16. Korea's response to this question confirms that the concerns raised by the United States in paragraph 153 of the U.S. response to question 50 are well founded. There, the United States asked:

> If, in a future proceeding involving a non-LRW product, the USDOC employs a differential pricing analysis and zeroing to determine the antidumping duty rate for one or more Korean exporters, but, in the same proceeding, determines the antidumping duty rate for other Korean exporters without using a differential pricing analysis and without using zeroing, how would Korea's proposed formula be applied in such a situation? What tariff rate reduction would be modeled? To what value of imports would that tariff rate reduction be applied? The total value of imports or just the value of the imports for which an antidumping duty rate was determined using a differential pricing analysis and zeroing? How could that latter value be established accurately?[17]

17. Korea states that it "considers that the use of DPM and zeroing when applying the W-T comparison methodology in a proceeding itself would invalidate the dumping margins calculated in that proceeding, regardless of whether the USDOC applies the WTO-inconsistent methodology to one or more of the examined companies."[18] It is legally incorrect that a margin of dumping determined for one company using the W-W comparison methodology could be inconsistent with the AD Agreement simply because the USDOC used the DPM and zeroing when determining a margin of dumping for another company in the same antidumping

[17] Responses of the United States of America to the Advance Questions from the Arbitrator (May 14, 2018) ("U.S. Responses to Advance Questions (May 14, 2018)"), para. 153.

[18] Korea's Reponses to Post-Meeting Questions, para. 21.

proceeding. However, it is not necessary for the Arbitrator to address that legal question in this arbitration.

18. A key issue is Korea's explicitly stated intention to "exclude from the calculation of nullification and impairment caused to non-LRW products margins calculated based on total adverse facts available ('AFA') rates,"[19] and Korea's implicit intention to include in its calculation W-W margins, including W-W margins that might be determined without even having first employed the DPM.[20] By modeling a tariff reduction to zero for all margins of dumping – including margins of dumping determined using the W-W comparison methodology – Korea has acknowledged that its proposed approach would overstate the level of nullification or impairment by including margins of dumping that are not inconsistent with the recommendations adopted by the DSB in this dispute.

19. Additionally, referring to its responses to questions 84 and 90, Korea indicates that it "would propose calculating the level of nullification or impairment for non-LRW products using the weighted-average dumping margin calculated by the USDOC as the 'all others' rate, and Korea's total import share of the products in question excluding the import volumes of the 'total AFA' companies."[21] Below, in the U.S. comments on Korea's responses to questions 84 and 90, the United States demonstrates that the approach proposed by Korea is not viable. Korea's approach is dependent on exporters being fully cooperative in agreeing to the disclosure and use of their business confidential information, but there is no basis to assume that Korea will receive such cooperation. Indeed, in this arbitration, in connection with Korea's preparation of responses to the Arbitrator's post-meeting questions, Samsung and LG "declined to disclose business proprietary information and Korea is not able to compel production."[22] Thus, there is no basis for the Arbitrator to find that Korea necessarily would be able to obtain all the data required to apply its proposed approach.

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

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

Comment:

20. The United States has no comments on Korea's response to this question.

60. [9.] To Korea: 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.

[19] Korea's Reponses to Post-Meeting Questions, para. 22.

[20] *See* Korea's Reponses to Post-Meeting Questions, para. 21.

[21] Korea's Reponses to Post-Meeting Questions, para. 22.

[22] Korea's Responses to Post-Meeting Questions, para. 50.

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".

Comment:

21. Korea's response to this question repeats arguments that Korea has made previously. The United States refers the Arbitrator to the U.S. arguments presented, *inter alia*, in the U.S. comments above on Korea's response to question 55.

22. Additionally, the United States notes Korea's statement that: "The United States does not contest that withdrawal of the measures in their entirety could result in a WTO-inconsistent outcome."[23] The United States assumes that this is a typographical error and should refer to "a WTO-consistent outcome." However, to be clear, the United States would contest that withdrawal of the measures could result in a WTO-inconsistent outcome.

62. [12.] To Korea: 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?

Comment:

23. Korea has not explained how the Arbitrator's understanding is incorrect. 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, Korea is, indeed, calculating 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. Korea's approach has no foundation in economic theory or logic.

[23] Korea's Responses to Post-Meeting Questions, para. 30.

24. Additionally, Korea once again incorrectly asserts that the method it proposes "was used by the United States to calculate its level of nullification and impairment in *India – Agricultural Products*."[24] The United States has addressed this falsehood already. This is not a matter of differing opinions or views among the parties. Korea is wrong, and the United States has demonstrated that Korea is wrong. The United States refers the Arbitrator to the U.S. response to question 28.a.[25]

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?

<u>Comment:</u>

25. In its response to this question, Korea represents that it "is not aware of any other relevant changes in market conditions."[26] Earlier this year, however, Samsung and LG expressed a different view in submissions made to the U.S. International Trade Commission ("USITC") in connection with the ongoing sunset review of the antidumping and countervailing duty measures on LRWs from Korea. Samsung asserted that "[t]here have been significant changes in the market for LRWs that have occurred in the United States since the orders went into effect."[27] LG likewise discussed changes in supply and demand conditions since the imposition of the U.S.

[24] Korea's Responses to Post-Meeting Questions, para. 31.

[25] U.S. Responses to Advance Questions (May 14, 2018), paras. 101-108.

[26] Korea's Responses to Post-Meeting Questions, para. 32.

[27] Samsung's Substantive Response to ITC Notice of Institution (February 1, 2018) ("Samsung 2018 USITC LRWs Sunset Initiation Response"), p. 10 (p. 15 of the PDF version of Exhibit USA-2).

measures.[28] Chief among the changes in market conditions that Samsung and LG discussed is their business decisions to locate LRWs production outside of Korea, including by constructing new LRWs production facilities in the United States.[29] Korea's proposed calculation of the level of nullification or impairment ignores these significant changes in the market conditions for LRWs in the United States since the imposition of the U.S. measures.

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

27. Korea asserts that "the Bown & Ruta model isolates the trade impact to only the impact of the trade remedy measure."[30] That is true of all partial equilibrium analysis, including the imperfect substitutes partial equilibrium model proposed by the United States. Ironically, it is actually totally untrue of Korea's proposed approach, due to the ways in which Korea's approach departs from the Bown & Ruta model. In particular, by incorporating into its calculation a hypothetical value for the 2017 value of LRWs imports from Korea that is derived using Korea's 2011 import share, Korea is positing that no other market changes have occurred in the interim that could have affected the decline in Korea's market share. Rather than holding any other factors equal to "isolate[] the trade impact of the trade remedy measure,"[31] Korea is assuming that any other factors contributed nothing. But there is no evidence that justifies making such an assumption.

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

[28] *See* LG Electronics' Response to Commission's Notice of Institution for Washer Sunset Review Certain Large Residential Washers from Korea and Mexico Investigation No. 701-TA-488 and 731-TA-1199-1200 (Review) (February 2, 2018) ("LG 2018 USITC LRWs Sunset Initiation Response"), pp. 11-12 (pp. 16-17 of the PDF version of Exhibit USA-6).

[29] *See* Samsung 2018 USITC LRWs Sunset Initiation Response, p. 10 (p. 15 of the PDF version of Exhibit USA-2); LG 2018 USITC LRWs Sunset Initiation Response, pp. 11-12 (pp. 16-17 of the PDF version of Exhibit USA-6).

[30] Korea's Responses to Post-Meeting Questions, para. 32.

[31] Korea's Responses to Post-Meeting Questions, para. 87.

value of imports is already not affected by the U.S. measures. So, in effect, Korea is modeling a tariff reduction on an import value figure that is not subject to the tariffs.

29. In actuality, due to the significant degree to which Korea's economic model is incorrect (for example, by incorrectly assuming perfect substitution and only two countries that produce LRWs), Korea does far more than double count the level of nullification or impairment. Korea's estimation of the level of nullification or impairment is utterly divorced from reality.

30. If one were to use a partial equilibrium model – although doing so would mean ignoring the fact that Korea will no longer be supplying LRWs, and the United States has already explained why that means the level of nullification or impairment going forward is zero – then the correct approach would be to take Korea's actual 2017 import value and use a partial equilibrium model that makes correct economic assumptions (*e.g.*, imperfect substitutability and three sources of LRWs (Korea, the United States, and the rest of the world)) to model the tariff reduction. That approach would take all other factors that resulted in the 2017 value of Korea's imports into account, hold them equal for the purpose of the analysis, and provide the estimated effect of the counterfactual tariff reduction (though, it would not take into account LG's and Samsung's shifting of production to the United States going forward). Korea's approach comes nowhere close to accomplishing the task that is the purpose of this arbitration.

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?

Comment:

31. Korea argues that its proposed calculation does not grossly overstate the level of nullification or impairment due to the assumption of perfect substitutability among LRWs.[32] Korea suggests, as it has previously, that "[t]he model proposed by the United States in *US – Tuna II* and the model proposed by the United States in *India – Agricultural Products* also assumed perfect substitutability." Thus, in Korea's view, "[t]he use of this model in prior arbitrations confirms that it does not 'grossly overstate' the level of nullification or impairment."[33] Every aspect of Korea's argument is incorrect.

32. First, as demonstrated in the U.S. response to question 86,[34] and discussed further below in the U.S. comment on Korea's response to question 86, in *US – Tuna II (Mexico) (Article 22.6 – US)*, Mexico proposed the use of a partial equilibrium model.[35] The United States offered some positive comments about the use of partial equilibrium analysis, in general, and explained

[32] *See* Korea's Responses to Post-Meeting Questions, para. 35.

[33] Korea's Responses to Post-Meeting Questions, para. 35.

[34] *See* U.S. Responses to Post-Meeting Questions, paras. 96-100.

[35] *See US – Tuna II (Mexico) (Article 22.6 – US)*, U.S. Written Submission, para. 81 (https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.fin.PUBLIC.pdf).

how such analysis might have been used in that arbitration.[36] 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.[37] Korea simply is wrong to continue to suggest that the United States proposed the use of a partial equilibrium model in *US – Tuna II (Mexico) (Article 22.6 – US)*, let alone one that assumed perfect substitutability.

33. Second, as demonstrated in the U.S. response to question 28.a, the economic model proposed by the United States in *India – Agricultural Products* is not the same as the approach Korea proposes here.[38] Additionally, the assumption of perfect substitution was appropriate in *India – Agricultural Products* because chicken leg quarters are a homogenous, commodity product. India did not challenge that assumption. LRWs, on the other hand, are not a homogenous product. Again, it was the Korean producers that argued to the USITC that "[t]his is not a commodity product case" and "[t]he Commission must therefore approach its analysis of highly differentiated, branded consumer products differently than its analysis of commodity intermediate goods like steel, or pipe, or chemicals."[39] And the USITC agreed with the Korean producers, finding that "there is a moderately high degree of substitutability between domestically produced LRWs and imported LRWs."[40] Yet now, Korea asks the Arbitrator to approach its analysis of highly differentiated, branded consumer products in precisely the same way that it would approach the analysis of commodity intermediate goods like steel, or pipe, or chemicals, or chicken leg quarters.

34. Korea also argues that the statements by Samsung and LG concerning their intention to produce LRWs for the U.S. market at their new U.S. production facilities do not support the U.S. argument that the level of nullification or impairment resulting from the maintenance of the U.S. antidumping and countervailing duty measures on LRWs from Korea after the expiration of the RPT is zero.[41] Korea suggests that the statements of the companies "are just that – descriptions of the companies' plans to commence manufacturing LRWs in the United States, *in light of the circumstances that they faced at the time that they made the statements*. They do not, as the United States claims, lead to the conclusion that the exporters would not have the intention or capacity to resume export to the United States."[42] Korea asserts that "[i]t is reasonable that the

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

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

[38] Korea's Responses to Post-Meeting Questions, para. 31. *See also supra*, U.S. comment on Korea's response to question 62.

[39] In the Matter of Large Residential Washers from China Investigation No. 731-TA-1306 (Final), Pre-Hearing Brief of Samsung and LG (December 1, 2016) ("Samsung and LG 2016 LRWs from China USITC Pre-Hearing Brief"), p. 17 (Exhibit USA-8). *See also id.*, pp. 17-23 and footnote 39 (discussing the appropriate elasticity of substitution).

[40] U.S. International Trade Commission, *Large Residential Washers*, Investigation No. TA-201-076, Publication 4745 (December 2017) ("USITC LRWs 201 Report"), pp. 27, 81, V-9 (Exhibit KOR-25).

[41] *See* Korea's Responses to Post-Hearing Questions, paras. 41-42.

[42] Korea's Responses to Post-Hearing Questions, para. 41 (emphasis in original).

exporters would describe their business plans based on the circumstances and the future that they could foresee – continuation of the anti-dumping and countervailing duty orders."[43]

35. Korea grossly mischaracterizes the statements made by Samsung and LG. The statements by Samsung and LG on which the United State relies come from, *inter alia*, submissions to the USITC made by the companies just five months ago in a sunset proceeding. Specifically, Samsung argued that "[r]evocation of the AD/CVD orders is not likely to result in the continuation or recurrence of material injury to the domestic industry."[44] Samsung further explained in that submission that, "[a]s washer production ramps up at Samsung's South Carolina facility, its imports will decline by an equal amount. U.S. imports of LRWs will decline precipitously as a result of Samsung entry into U.S. production."[45] Additionally, Samsung represented that, "[w]hen Samsung and LG's new plants are both operating in 2019, imports will decline to less than 10 percent of U.S. market share. By 2020, import share of the LRW market is predicted to be less than four percent."[46]

36. LG likewise provided what are, in LG's view, "various facts demonstrating why revocation of the antidumping duty order on certain large residential washers ('LRWs') from Korea and Mexico would not be likely to lead to a recurrence of material injury within a reasonably foreseeable time."[47] Among other things, LG explained that its "Korean manufacturing facility is already operating at full capacity. In December 2016, one of the front load manufacturing lines was demolished, thereby decreasing the capacity of the facility. Instead of adding additional washer capacity, LGE is expanding production of dryers for the Korean market. These situations sequentially lead to the conclusion that there will be no increase of inventories in the Korean facility or the U.S. warehouse"[48] if the U.S. antidumping and countervailing duty measures are terminated. LG further explained that "supply side conditions demonstrate no significant increase in LRW imports from Korea or Mexico with revocation of the Orders."[49]

37. The statements by Samsung and LG were made precisely in the context of an examination of what would happen if the U.S. antidumping and countervailing duty measures were terminated – not under the assumption of "continuation of the anti-dumping and

[43] Korea's Responses to Post-Hearing Questions, para. 42.

[44] Samsung 2018 USITC LRWs Sunset Initiation Response, p. 2 (p. 7 of the PDF version of Exhibit USA-2) (emphasis in original).

[45] Samsung 2018 USITC LRWs Sunset Initiation Response, p. 3 (p. 8 of the PDF version of Exhibit USA-2).

[46] Samsung 2018 USITC LRWs Sunset Initiation Response, p. 4 (p. 9 of the PDF version of Exhibit USA-2).

[47] LG 2018 USITC LRWs Sunset Initiation Response, p. 3 (p. 8 of the PDF version of Exhibit USA-6) (emphasis added).

[48] LG 2018 USITC LRWs Sunset Initiation Response, p. 4 (p. 9 of the PDF version of Exhibit USA-6) (emphasis added).

[49] LG 2018 USITC LRWs Sunset Initiation Response, p. 12 (p. 17 of the PDF version of Exhibit USA-6).

countervailing duty orders."[50] This is plain on the face of the documents that the United States has placed before the Arbitrator.

38. Korea surely must know this, and yet Korea misrepresents to the Arbitrator the contents of the documents. This is not a productive approach and makes the Arbitrator's work considerably more difficult, as the Arbitrator must sort out what is true and what is not true. The assertions that the United States has made are all based on evidence placed before the Arbitrator, rather than on unsubstantiated assertions or, worse, plain misrepresentations of the evidence.

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?

Comment:

39. The United States has demonstrated that withdrawal of the antidumping duty measure on LRWs from Korea is not a plausible or reasonable counterfactual. The United States refers the Arbitrator to paragraphs 24-30 of the U.S. written submission, paragraphs 18-38 of the U.S. opening statement at the substantive meeting of the Arbitrator with the parties, and the U.S. response to question 8.

40. Furthermore, as discussed above in the U.S. comment on Korea's response to question 55, Korea's argument rests on a flawed premise. Korea expresses the view that "an anti-dumping measure that is taken in a manner inconsistent with the provisions of the Anti-Dumping Agreement cannot stand," and that, "[t]herefore, for the purposes of the counterfactual, it is 'plausible' and 'reasonable' that an anti-dumping duty order that was issued as a result of a WTO-inconsistent method would be terminated."[51] Korea's approach is that, if any aspect of an antidumping measure has been found WTO-inconsistent, then the only "reasonable" and "plausible" course of action for a WTO Member is to take no action to address dumped imports, and the Member should permit the resulting injury to its domestic producers. This is neither "plausible" nor "reasonable." Article VI:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") provides that Members recognize that dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a" Member. Thus, the WTO Agreement does not support Korea's approach.

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."

[50] Korea's Responses to Post-Hearing Questions, para. 42.

[51] Korea's Responses to Post-Meeting Questions, paras. 45-46.

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

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

Comment:

41. The U.S. responses to questions 56 and 67[52] demonstrate that Korea is incorrect when it asserts that "a counterfactual in which the W-T methodology is simply replaced with the W-W methodology would not be plausible or reasonable under domestic U.S. procedures without first modifying the DPM in accordance with the DSB's 'as such' findings."[53] The United States refers the Arbitrator to those U.S. responses.

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

a. To Korea: 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?

Comment:

42. The United States has no comment on Korea's response to this question.

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

Comment:

43. As explained in the U.S. response to this question,[54] in the hypothetical, counterfactual scenario that assumes WTO compliance, it is reasonable and plausible to assume that the

[52] *See* U.S. Responses to Post-Meeting Questions, paras. 23-28, 54.

[53] Korea's Responses to Post-Meeting Questions, para. 48.

[54] *See* U.S. Responses to Post-Meeting Questions, paras. 69-74.

USDOC would apply the "normal[]"[55] 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, or a margin of dumping of "0.00 percent,"[56] 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.

44. Korea is incorrect when it asserts that "any dumping margin that is calculated using that WTO-inconsistent methodology is not valid, as the use of the WTO-inconsistent method means that the United States has not met the conditions to permit application of anti-dumping duties."[57] While this is not an issue to be resolved in this proceeding, the United States notes here that Korea's position is illogical and contrary to the text of the AD Agreement.

45. The first sentence of Article 2.4.2 of the AD Agreement provides that an investigating authority shall "normally" use the W-W or T-T[58] comparison methodology to determine the margin of dumping. It is only if the investigating authority intends to use the W-T comparison methodology provided in the second sentence of Article 2.4.2 of the AD Agreement that it must establish that certain conditions have been met. If an investigating authority determines a margin of dumping using the W-W comparison methodology, even if it first considered whether it would be appropriate to use the W-T comparison methodology by employing the DPM, that W-W margin of dumping is not inconsistent with the AD Agreement merely by virtue of the investigating authority's analysis using the DPM. The ultimate result, application of a W-W margin of dumping, would be the same even if the investigating authority had <u>not</u> used the DPM. Korea's position, in this regard, is not consistent with Article 2.4.2 of the AD Agreement.

72. [**] <u>To Korea</u>: 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?

<u>Comment:</u>

46. While the United States and Korea may disagree about the reason for doing so, the parties agree that, for the purposes of the counterfactual analysis in this proceeding, it is appropriate to model the reduction of the antidumping and countervailing duty rates determined in the original

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

[56] Korea's Responses to Post-Meeting Questions, para. 52.

[57] Korea's Responses to Post-Meeting Questions, para. 52.

[58] Transaction-to-transaction comparison methodology.

investigations, which are the subject of findings made by the original Panel and the Appellate Body, and recommendations adopted by the DSB.

47. With regard to Korea's comments concerning what may "constitute nullification or impairment,"[59] the United States has already responded to Korea's argument. The United States refers the Arbitrator to the U.S. response to question 61, as well as paragraph 3 of the U.S. opening statement at the substantive meeting of the Arbitrator with the parties.

73. [**] <u>To Korea</u>: 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.

<u>Comment:</u>

48. As explained above in the U.S. comment on Korea's response to question 71, Korea is incorrect when it argues that, "whether the USDOC ultimately applies the W-T methodology or the W-W methodology as a result of this examination, the use of DPM itself would constitute a violation of WTO obligations, for which Korea is entitled to suspend concessions."[60] That legal question, though, is not one that the Arbitrator is called upon to resolve in this arbitration.

49. As a factual – or rather counterfactual – matter, if the USDOC applies a W-W margin of dumping, even after using the DPM to assess whether it would be appropriate to apply a W-T margin of dumping, the ultimate result would be no different than the situation wherein the USDOC applies a W-W margin of dumping without having even considered the possibility of applying the alternative comparison methodology. In that case, there can be no nullification or impairment resulting from the application of a W-W margin of dumping to a non-LRW product, because the effect on Korea is the same either way, whether there is or is not, in Korea's view, a breach of the AD Agreement due to the mere consideration of applying the W-T methodology using the DPM.

[59] Korea's Responses to Post-Meeting Questions, para. 55.

[60] Korea's Responses to Post-Meeting Questions, para. 57.

50. While Korea referred during the substantive meeting to some other possible harm to Korea or its exporters that could result from the USDOC's mere consideration of applying the alternative comparison methodology using the DPM, Korea's proposed approach to determining the level of nullification or impairment does not even purport to quantify such harm. Instead, Korea's approach would overstate the level of nullification or impairment by including in the calculation margins of dumping determined using the W-W comparison methodology, even though such margins would have no adverse economic impact on 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>Comment:</u>

51. As Korea notes in its response to this question, the USDOC's CVD section 129 determination resulted in no change to the countervailing duty rate that was determined in the original countervailing duty investigation of LRWs from Korea.[61] If the DSB were to find that the U.S. countervailing duty measure, as modified by the USDOC's CVD section 129 determination, is not inconsistent with U.S. WTO obligations, that would be confirmation that Korea does not have the right to suspend concessions with respect to the United States concerning the U.S. countervailing duty measure on LRWs.

52. Korea acknowledges in its response that, if the result of an Article 21.5 proceeding is a finding that the USDOC's re-determination is not inconsistent with the SCM Agreement, "Korea would then be required to modify the level of suspension of concessions through Article 22 of the DSU based on the United States' 'partial compliance.'"[62] In that situation, it would be most helpful to the parties to have from the Arbitrator a separate finding on the amount of nullification or impairment resulting from the maintenance of the countervailing duty measure on LRWs, as distinct from the amount of nullification or impairment resulting from the maintenance of the antidumping duty measure on LRWs. Such separate findings would provide clarity, assist the parties going forward, and possibly could result in the avoidance of some further dispute settlement proceedings.

[61] *See* Korea's Responses to Post-Meeting Questions, para. 60.

[62] Korea's Responses to Post-Meeting Questions, para. 62.

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 consumption is based on the level of consumption, C^{AI}. 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, Y^{AI}. 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?

<u>Comment:</u>

53. Korea's assertion in its response to question 28 that Korea's proposed formula is equivalent to the formulas employed in the U.S. methodology paper in the *India – Agricultural Products* Article 22.6 arbitration is incorrect. The economic model employed by the United States in *India – Agricultural Products* was set up to estimate the change in consumer demand due to a change in price (when the measure is removed) plus the change in domestic producer supply due to a change in price (when the measure is removed). The sum of these two changes in demand and supply is equivalent to the change in imports.

54. Korea's proposed formula purports to estimate the change in consumer demand based on Korea's imports. This is not equivalent to estimating the change in consumer demand based on the level of consumption. Similarly, Korea's model purports to estimate the change in domestic producer supply based on Korea's imports. Again, this is not equivalent to estimating the change in domestic supply based on the level of production. There is no underlying economic theory for Korea's use of the value of Korean LRWs imports as a proxy for the value of consumption of LRWs and domestic supply of LRWs in the U.S. market, or for using the value of Korean LRWs imports with demand and supply elasticities to estimate the change in consumer demand and change in domestic supply due to price changes.

55. In its response to this question, Korea begins by asserting that, "[i]n both equations, the 'import share of Korea x total import quantity' is equivalent to the 'level of consumption.'"[63] Korea's assertion is ultimately just an assumption that using the 2011 Korean import share to

[63] Korea's Responses to Post-Meeting Questions, para. 64.

derive the 2017 Korean import value is equivalent to the 2017 value of consumption of Korean LRWs. There is no evidence to support Korea's assumption.

56. In addition, the assumption that import volumes (in the LRW market) are a good proxy for consumption and domestic production data is incorrect. Further, multiplying Korean import data by demand and supply elasticities (which determine the sensitivity of consumer demand and domestic supply, respectively) to changes in prices of LRWs is totally wrong, mathematically and conceptually. Korea compounds a number of mathematical and conceptual errors, rendering its model estimates to be meaningless and not grounded in economic theory, while grossly overstating the level of nullification and impairment (as compared to the correct application of an appropriate imperfect substitutes partial equilibrium model using the correct data and parameters).

57. Finally, Korea concedes that, "if it would be the Arbitrator's preference to use consistent factors, Korea does not object to the use of 'level of consumption' instead of 'level of imports.'" This would be appropriate if Korea's model were based on valid assumptions. However, the United States has demonstrated that Korea's perfect substitutes partial equilibrium model is based on incorrect assumptions for the LRWs market and is invalid for use in estimating the level of nullification or impairment in this dispute. Merely substituting "level of consumption" for "level of imports" in Korea's formula would not correct the fundamental flaws in Korea's proposed approach.

77. [19.*] <u>To Korea</u>: 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?

<u>Comment:</u>

58. In this question, the Arbitrator asks Korea whether there is any evidence that shows that even when products are not perfect substitutes, the perfect substitutes partial equilibrium framework proposed by Korea can be appropriate to calculate the impact of a change in tariffs. In its response, Korea does not point to any evidence at all.

59. Instead, Korea makes baseless assertions about prior arbitrations. For instance, Korea once again asserts that the United States proposed the use of the partial equilibrium model in *US*

– Tuna II (Mexico) (Article 22.6 – US).[64] In the U.S. response to question 86,[65] the United States explained that, in *US – Tuna II (Mexico) (Article 22.6 – US)*, it was Mexico that proposed the use of a partial equilibrium model.[66]

60. Additionally, Korea's suggestion that the arbitrator in *US – Tuna II (Mexico) (Article 22.6 – US)* simply applied a perfect substitutes partial equilibrium model even when the products were not perfect substitutes does not accurately reflect that arbitrator's analysis.[67] The arbitrator there considered "how to model consumer preferences among different varieties of a good" and determined that, "[t]o simplify the model and allow for its numerical simulations, different varieties of the good (in this case, different varieties of canned tuna) may need to be treated as a composite good."[68] After considering the arguments of the parties and examining evidence concerning consumer preferences for different varieties for the product, that arbitrator determined that it could "model the demand for canned tuna in both the United States and Mexico as a consumer decision between two products, canned yellowfin and canned generic tuna".[69] The arbitrator did not assume that those two products were perfect substitutes. Instead, the arbitrator examined "[c]onsumer preferences for yellowfin versus generic tuna" and considered how to model those preferences.[70] The arbitrator in *US – Tuna II (Mexico) (Article 22.6 – US)* described an analysis that bears no resemblance whatsoever to the approach Korea proposes here.[71]

61. Korea also asserts that the products at issue in *India – Agricultural Products (Article 22.6 – India)* were not perfect substitutes.[72] No decision has yet been issued in *India – Agricultural Products (Article 22.6 – India)*, but it is evident from the public submissions of the United States in that arbitration[73] that the partial equilibrium model proposed by the United States assumed perfect substitutability of chicken leg quarters and also assumed only two countries supply chicken leg quarters (India and the United States).[74] The arbitrator there asked the United States about the two-country assumption, but did not ask about the assumption of perfect

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[64] *See* Korea's Responses to Post-Meeting Questions, para. 68.

[65] *See* U.S. Responses to Post-Meeting Questions, paras. 96-100. *See also infra*, U.S. comment on Korea's response to question 86.a.

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

[67] *See* Korea's Responses to Post-Meeting Questions, para. 68.

[68] *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 6.2. *See also id.*, paras. 6.3-6.12.

[69] *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 6.12.

[70] *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 6.13.

[71] *See US – Tuna II (Mexico) (Article 22.6 – US)*, paras. 6.13-6.77.

[72] *See* Korea's Responses to Post-Meeting Questions, para. 69.

[73] All the U.S. submissions in *India – Agricultural Products (Article 22.6 – India)* are available on the Internet at https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes-3.

[74] *See* U.S. Responses to Advance Questions (May 14, 2018), paras. 106-107.

substitutability.[75] The U.S. submissions also reflect that India did not object to the assumption of perfect substitutability of chicken leg quarters.

62. Korea's assertions simply have no credence whatsoever. Korea has not demonstrated that a perfect substitutes partial equilibrium model such as the Bown & Ruta model can be appropriately used in this situation, where the products at issue are not perfect substitutes. Such a model simply does not fit the facts here as it rests on incorrect assumptions that are contrary to the evidence before the Arbitrator.

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

Comment:

63. Korea offers no support for the assertion that its model is not sensitive to individual factors such as the values of the demand and supply elasticities. Korea has not, for example, conducted sensitivity analyses that demonstrate the validity of its statement. Korea bears the burden of substantiating its factual claims, including the claim that its model is not sensitive to individual factors. Korea has not even attempted to substantiate its assertion with evidence.

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?

Comment:

64. Korea declined to provide the Arbitrator with alternative estimates of the elasticity of substitution for LRWs beyond those supplied by the United States. Instead, Korea makes a number of arguments against the elasticity of substitution proposed by the United States. None of Korea's arguments has any merit.

65. First, Korea asserts that "[t]he elasticities that the United States proposes to use in calculating the level of nullification or impairment through the Armington model (i.e., the elasticities provided in the USITC report) would not be appropriate," and Korea refers to them as "rough estimates of elasticities."[76] Yet, Korea itself "applied the same elasticities of demand and supply for price used by the USITC in its investigation on LRWs from China."[77] Korea is not being consistent.

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[75] *See, e.g., India – Agricultural Products (Article 22.6 – India)*, Responses of the United States of America to the Advance Questions from the Arbitrator (November 15, 2017), U.S. Response to Question 2, paras. 7-12 (https://ustr.gov/sites/default/files/enforcement/DS/US.Ans.to.Adv.Q.pdf).

[76] Korea's Responses to Post-Meeting Questions, para. 73.

[77] Methodology Paper of the Republic of Korea (February 23, 2018) ("Korea's Methodology Paper"), para. 45.

66. Second, Korea asserts that the USITC elasticities "are suitable for use in the Bown & Ruta model, which is not sensitive to rough estimates of elasticities," but "they would result in severely distorted results if used in the Armington model, which is highly sensitive to minor adjustments in elasticities."[78] Korea, however, fails to demonstrate that the U.S. imperfect substitutes partial equilibrium model is more sensitive to variations in the elasticities than Korea's version of the Bown & Ruta model. Korea observes that there would be "sharp double-digit fluctuations in trade effect when the substitution elasticity is adjusted by a single digit."[79] Korea attempts to demonstrate this in Exhibit KOR-52, showing that when the elasticity of substitution is changed from 3 to 4, there is a 37 percent change in the calculated trade effect, and when the elasticity of substitution is changed from 4 to 5, there is a 23 percent change in the calculated trade effect. But this is simply a function of math.

67. By Korea's logic, Korea's proposed formula is <u>far more</u> sensitive to changes in the elasticities used. Korea's methodology paper notes that "[t]he USITC published the elasticity of supply as 6-8 (median of 7) and the elasticity of demand as (-0.3) – (-0.8) (median of -0.55)."[80] The table below presents the different calculations of the trade effect (*i.e.*, the level of nullification or impairment) that would result using Korea's proposed formula incorporating the low, median, and high estimates of supply and demand elasticities put forward by Korea.[81]

Elasticity of Demand	**Elasticity of Supply**	**Nullification or Impairment (million dollars)**	**Change Percentage**
-0.3	6	$593	N/A
-0.55	7	$711	19.9%
-0.8	8	$828	16.5%

As can be seen, Korea's proposed model similarly yields "double-digit" percentage changes when the elasticities of demand and supply are changed. Of course, Korea's proposed model yields <u>triple-digit</u> changes in the dollar amount of the estimated level of nullification or impairment, changing by more than $100 million depending on the elasticities used. Korea's argument that the U.S. imperfect substitutes partial equilibrium model is more sensitive to

[78] Korea's Responses to Post-Meeting Questions, para. 73.

[79] Korea's Responses to Post-Meeting Questions, para. 75.

[80] Korea's Methodology Paper, para. 45.

[81] The calculations presented in the table result from the application of the formula set forth in paragraph 39 of Korea's methodology paper using the low (6 and -0.3), median (7 and -0.55), and high (8 and -0.8) estimates for supply and demand elasticity presented in paragraph 45 of Korea's methodology paper. Thus:

1,764,569,000 x (0.3 + 6) x 0.429 x (0.1186 + 0.0058) = $593 million;

1,764,569,000 x (0.55 + 7) x 0.429 x (0.1186 + 0.0058) = $711 million; and

1,764,569,000 x (0.8 + 8) x 0.429 x (0.1186 + 0.0058) = $828 million.

changes in elasticities than Korea's proposed formula is belied by Korea's own analysis, and is utterly without foundation.

68. Third, substitution elasticities estimated in the economic literature are lower or within the range of the substitution elasticity of 3 to 5 that the USITC estimated. Korea's Exhibit KOR-51 presents a USITC working paper from January 2004 that estimated an Armington substitution elasticity of 1.9 for Household Laundry Equipment.[82] Recently, in 2015, Soderberry estimated a substitution elasticity for this product of 4.3, and replicated an approach by Broda-Weinstein that yielded a substitution elasticity of 2.2.[83] Using the USITC estimate of 3 to 5, with the median being 4, benefits Korea because the substitution elasticity is higher than estimates in the economic literature. Also, interested parties have had opportunities to comment in multiple USITC investigations on the substitution elasticity estimated by the USITC for LRWs, and that elasticity estimate is for the specific product, LRWs, not for a broader product category.

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.

Comment:

69. Korea incorrectly asserts that "[t]he USITC report provides a rough estimation of the elasticities to show the 'like or directly competitive' relationship among the products at issue in order to determine whether imported and domestically produced LRWs are in the same domestic industry for the purposes of Article 2.1 of the Agreement on Safeguards."[84] It is telling that Korea does not cite to any portion of the USITC report as support for this incorrect assertion. In the December 2017 report on its global safeguard investigation of LRWs, the USITC discusses the domestic "Like or directly competitive articles" beginning at page I-10.[85] As the USITC explained there:

> When assessing what constitutes the product(s) that is/are like or directly competitive with the imported article(s), the Commission takes into account such factors as (1) the physical properties of the article, (2) its customs treatment, (3) its manufacturing process (i.e., where and how it is made), (4) its uses, and (5) the marketing channels through which the product is sold.[86]

[82] William A. Donnelly et al., "Revised Armington Elasticities of Substitution for the USITC Model and the Concordance for Constructing a Consistent Set for the GTAP Model," U.S. International Trade Commission, Office of Economics Research Note (January 2004), p. 13 (Exhibit KOR-51).

[83] Soderbery, Anson, "Estimating Import Supply and Demand Elasticities: Analysis and Implications," Journal of International Economics, 96(1), May 2015: pp 1-17; http://web.ics.purdue.edu/~asoderbe/Site/Elasticities_LIML.html.

[84] Korea's Responses to Post-Meeting Questions, para. 76.

[85] *See* USITC LRWs 201 Report, pp. I-10 to I-24 (Exhibit KOR-25).

[86] USITC LRWs 201 Report, p. I-10 (Exhibit KOR-25).

Nowhere in its discussion of the domestic like product does the USITC discuss elasticity of substitution. Elasticity of substitution is discussed later in the report in a separate section.[87] It is likewise incorrect that the USITC discusses and relies upon elasticity of substitution when discussing the domestic like product in antidumping and countervailing duty investigations.[88]

70. Regarding Korea's suggestion that the elasticity of substitution is a "rough estimation," the United States refers the Arbitrator to the U.S. response to question 39, which discusses how the USITC arrives at the estimated elasticities it publishes in its reports. The elasticity of substitution that the United States proposes the Arbitrator use, like the elasticities of demand and supply that Korea proposes be used, are estimates made by the USITC after analyzing responses from purchasers, producers, and importers to questionnaires concerning the LRWs market, as well as arguments made by interested parties.[89] These estimated elasticities were published very recently and they are for the specific product at issue, LRWs. That makes them particularly well suited for use in a model to estimate the level of nullification or impairment in this dispute.

71. The U.S. comment on Korea's response to the preceding sub-question demonstrates that Korea's assertions about the purportedly greater sensitivity of the U.S. imperfect substitutes partial equilibrium model to changes in elasticities utterly lack merit. If anything, it is Korea's model that is more sensitive to such changes since, based on Korea's own logic, Korea's model would yield estimations of the level of nullification or impairment that differ by more than $100 million depending on the elasticities used.

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>Comment:</u>

72. The United States notes that Korea acknowledges that "both proxies," the rate of inflation and U.S. nominal GDP, "do not correlate to the actual growth rate of the industry."[90] Yet, Korea nevertheless "does not object" to using the rate of inflation or the change in U.S. nominal GDP as a proxy for a growth factor for non-LRW products.[91] As explained in the U.S. response to this

[87] *See* USITC LRWs 201 Report, p. V-19 (Exhibit KOR-25).

[88] *See*, *e.g.*, Large Residential Washers from China, Investigation No. 731-TA-1306 (Final), USITC Publication 4666 (January 2017), pp. I-25 to I-28 (discussing the domestic like product) and pp. II-24 to II-25 (separately discussing the elasticity of substitution) (Exhibit KOR-18).

[89] USITC LRWs 201 Report, pp. 27-32, 81, and V-9 to V-19.

[90] Korea's Responses to Post-Meeting Questions, para. 82.

[91] Korea's Responses to Post-Meeting Questions, para. 82.

question,[92] there is no evidentiary basis for using the rate of inflation or change in U.S. nominal GDP as a proxy for the growth rate for non-LRW products. Doing so would amount to speculation and could not be considered to accurately represent the level of nullification or impairment. An Article 22.6 arbitrator's decision cannot be based on speculation.[93]

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?

Comment:

73. The United States welcomes Korea's agreement that it is possible for the Arbitrator "to adjust AHAM data to reflect the size of the LRWs market."[94]

74. The United States does not agree with Korea's reliance on data in Exhibit USA-10, which presents the "U.S. Recreation of Incorrect U.S. Import Value of LRWs, as Queried by Korea Using USITC DataWeb, by Country and by HTS Code". On its face, Exhibit USA-10 is intended to present incorrect data as a confirmation of the errors in the data query undertaken by Korea.

75. Likewise, Korea's reliance on Exhibit USA-21 **(BCI)** is misplaced. Exhibit USA-21 **(BCI)** presents data on the value of imports from Korea of certain specified tariff lines that were subject to the U.S. antidumping and countervailing duty measures on LRWs from Korea for each year from 2011 to 2017, which the Arbitrator requested in question 33. The United States made two important observations – in the nature of caveats – when it provided the data in Exhibit USA-21 **(BCI)**.

76. First, the requested data were compiled by U.S. Customs and Border Protection ("USCBP") using an internal U.S. government system known as ACE. The ACE system operates on a fiscal year basis; the U.S. government fiscal year is October 1 to September 30. Other trade data that the parties have provided to the Arbitrator is presented on a calendar year basis.[95] Accordingly, there is not a direct correspondence between the two sets of data.

77. Second, the antidumping and countervailing duty measures at issue in this dispute apply only to LRWs from Korea. If the CBP data in Exhibit USA-21 **(BCI)** were used together with other data provided by the parties, which was queried using the USITC's DataWeb, that would not be an apples-to-apples comparison. The trade data for Korea would cover LRWs within the

[92] *See* U.S. Responses to Post-Meeting Questions, paras. 84-87.

[93] *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.

[94] Korea's Responses to Post-Meeting Questions, para. 83.

[95] *See* Exhibit KOR-8, Exhibit USA-9, and Exhibit USA-10.

scope of the U.S. antidumping and countervailing duty measures, but the data for other countries would include washing machines other than LRWs as well.

78. It appears that Korea engages in precisely the kind of comparison against which the United States warned when it provided Exhibit USA-21 **(BCI)** to the Arbitrator. Korea is comparing data that do not correspond to the same time periods, and the comparison is not apples-to-apples, as explained above. The result is that, for some years, Korea estimates that the percentage of the total value of washing machine imports accounted for by LRWs (a subset of the total) is more than one hundred percent of the total.[96] That is a logical impossibility.

79. 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.[97] It simply would be necessary to adjust the data appropriately so that the total value of the market utilized in the model is a better estimate of the size of the relevant LRWs market at issue in this dispute. 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.[98] 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.

80. 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.[99] As the United States has demonstrated, Korea's approach is fundamentally flawed.[100] 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, and Korea has now agreed that it is possible to adjust the AHAM data for this purpose.[101]

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.

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[96] *See* Exhibit KOR-62 **(BCI)**.

[97] *See* Written Submission of the United States of America (March 23, 2018) ("U.S. Written Submission"), para. 102.

[98] *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).

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

[100] *See* U.S. Written Submission, section III.D.3.b.i.

[101] *See* Korea's Responses to Post-Meeting Questions, para. 83.

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?

Comment:

81. The United States explained in the U.S. comment on Korea's response to question 63 that Korea's proposed calculation of the level of nullification or impairment cannot seriously be called a partial equilibrium model because it is not based on sound economic theory or analysis. The United States refers the Arbitrator to that comment, which is also relevant to Korea's response to this question.

82. The United States recalls that, during the substantive meeting, no fewer than five Korean delegates attempted to respond to this question. Ultimately, Korea gave up trying and indicated that it would explain its approach in a written response. Korea's written response to this question still fails to explain why Korea uses imports as a proxy for consumption, why Korea calculates the value of U.S. imports from Korea in 2017 by multiplying the import share in 2011 with the total U.S. imports in 2017, and why Korea then feeds that value into an inappropriate economic model.

83. Indeed, Korea simply does not respond to the question that the Arbitrator has asked, despite offering the Arbitrator ten paragraphs of non-responsive discussion. Instead, Korea asserts, for example, that it "employed an economic model developed based on the research of Bown & Ruta."[102] But the Bown & Ruta model does not call for incorporating into that model import data from before the imposition of the tariff for which the trade effect is to be estimated using the model. Korea suggests that it is necessary here to use hypothetical, pre-measure import data derived based on Korea's 2011 import share because the 2017 data "includes several other factors that are unrelated to the measures at issue".[103] As noted above in the U.S. comment on Korea's response to question 63, Korea is positing that no other market changes have occurred since the imposition of the U.S. measures that could have affected the decline in Korea's market share and, rather than holding any other factors equal to "isolate[] the trade impact of the trade remedy measure,"[104] Korea is assuming that any other factors contributed nothing. There is, however, no evidence before the Arbitrator that supports making such an assumption.

84. As the United States has demonstrated, Korea's approach has no foundation in economic theory or logic, nor in the evidence before the Arbitrator. More troublesome than that, Korea, in effect, more than double counts the level of nullification or impairment, because Korea starts with the share of imports of LRWs from Korea in 2011 multiplied by 2017 total import value, *i.e.*, an assumption of what the value would be unaffected by the U.S. measures. Korea then applies its incorrect economic model to that figure to estimate how much that figure would increase if the U.S. measures were removed. But again, the 2011 value of imports is already not

[102] Korea's Responses to Post-Meeting Questions, para. 85.

[103] Korea's Responses to Post-Meeting Questions, para. 87.

[104] Korea's Responses to Post-Meeting Questions, para. 33.

affected by the U.S. measures. So, in effect, Korea is modeling a tariff reduction on a hypothetical import value figure derived from an import share Korea argues is not subject to the tariffs.

85. In actuality, due to the significant degree to which Korea's economic model is incorrect (for example, by incorrectly assuming perfect substitution and only two countries that produce LRWs), Korea does far more than double count the level of nullification or impairment. Korea's estimation of the level of nullification or impairment is utterly divorced from reality.

86. Korea's response to this question does nothing to clarify its approach, nor does Korea's response demonstrate that Korea's approach is logical or suitable for use in estimating the level of nullification or impairment in this dispute.

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.

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?

Comment:

87. In this question, the Arbitrator asks Korea for information concerning the production capacity of LRWs producers in Korea, as the Arbitrator did previously in question 36. Once again, Korea has declined to provide the requested information.

88. Korea reiterates that Samsung and LG, which possess information concerning their own production capacity, and the change in their production capacity in Korea since 2011, consider that information to be confidential. Despite the Arbitrator's adoption of *Additional Working Procedures of the Arbitrator Concerning Business Confidential Information* ("BCI Working Procedures"), and Samsung's and LG's earlier authorization to disclose to the Arbitrator business confidential information from the USDOC's administrative proceeding,[105] Samsung and LG now decline to provide to the Arbitrator information about their production capacity.

89. Instead, in its response to this question, Korea makes general statements concerning Samsung's and LG's production capacity, which are purportedly based on "explanations" provided to Korea by the companies.[106] These "explanations" should be given no weight.

[105] *See* Letters from Samsung, LG, and the Republic of Korea Authorizing the Parties to Access and Provide to the Arbitrator Information Treated as Business Confidential Information During the Underlying Proceedings (Exhibit USA-13).

[106] *See* Korea's Responses to Post-Meeting Questions, paras. 96-97.

90. First, the explanations provided by Korea are unsupported by any evidence, neither actual production capacity data nor signed nor sworn statements from the companies. Second, the explanations are contradicted by other evidence before the Arbitrator, *i.e.* signed and sworn statements made by Samsung and LG company officials in a context other than this arbitration.

91. Samsung represented to the USITC in February 2018 that it "has virtually eliminated production capacity in Korea and Mexico."[107] That was just five months ago, and Samsung made that statement in connection with the USITC's sunset review of the antidumping and countervailing duty measures on LRWs from Korea and Mexico. In the same submission in which Samsung made that statement, Samsung argued that "[r]evocation of the AD/CVD orders is not likely to result in the continuation or recurrence of material injury to the domestic industry."[108] Samsung further explained in that submission that "[a]s washer production ramps up at Samsung's South Carolina facility, its imports will decline by an equal amount. U.S. imports of LRWs will decline precipitously as a result of Samsung entry into U.S. production."[109] Additionally, Samsung represented that, "[w]hen Samsung and LG's new plants are both operating in 2019, imports will decline to less than 10 percent of U.S. market share. By 2020, import share of the LRW market is predicted to be less than four percent."[110] In other words, Samsung is arguing in a contemporaneous proceeding that termination of the U.S. antidumping and countervailing duty measures on LRWs from Korea will have virtually no effect on the level of imports of LRWs to the United States from Korea, while Korea is simultaneously arguing that termination of the measures would result in the value of imports increasing by more than 700 million dollars.

92. Samsung's statements to the USITC, including that it "has virtually eliminated production capacity in Korea,"[111] cannot be reconciled with Korea's statement to the Arbitrator that Samsung "has maintained all of its production facilities in Korea, and has simply redirected the LRW production through these facilities to the domestic market or to new third country markets."[112] Both statements cannot be true.

93. In the same USITC sunset proceeding, LG provided what are, in LG's view, "various facts demonstrating why revocation of the antidumping duty order on certain large residential washers ('LRWs') from Korea and Mexico would not be likely to lead to a recurrence of material injury within a reasonably foreseeable time."[113] Among other things, LG explained that its "Korean manufacturing facility is already operating at full capacity. In December 2016, one

[107] Samsung 2018 USITC LRWs Sunset Initiation Response, p. 10 (p. 15 of the PDF version of Exhibit USA-2) (emphasis added).

[108] Samsung 2018 USITC LRWs Sunset Initiation Response, p. 2 (p. 7 of the PDF version of Exhibit USA-2) (emphasis in original).

[109] Samsung 2018 USITC LRWs Sunset Initiation Response, p. 3 (p. 8 of the PDF version of Exhibit USA-2).

[110] Samsung 2018 USITC LRWs Sunset Initiation Response, p. 4 (p. 9 of the PDF version of Exhibit USA-2).

[111] Samsung 2018 USITC LRWs Sunset Initiation Response, p. 10 (p. 15 of the PDF version of Exhibit USA-2) (emphasis added).

[112] Korea's Responses to Post-Meeting Questions, para. 96.

[113] LG 2018 USITC LRWs Sunset Initiation Response, p. 3 (p. 8 of the PDF version of Exhibit USA-6).

of the front load manufacturing lines was demolished, thereby decreasing the capacity of the facility. Instead of adding additional washer capacity, LGE is expanding production of dryers for the Korean market. These situations sequentially lead to the conclusion that there will be no increase of inventories in the Korean facility or the U.S. warehouse"[114] if the U.S. antidumping and countervailing duty measures are terminated. LG further explained that "supply side conditions demonstrate no significant increase in LRW imports from Korea or Mexico with revocation of the Orders."[115] Again, LG has made an argument to the USITC that is directly contrary to the argument that Korea is making to the Arbitrator.

94. And again, LG's explanation to the USITC that it reduced production capacity in Korea, including by demolishing one of the front load manufacturing lines, and LG's statement that its "Korean manufacturing facility is already operating at full capacity,"[116] cannot be reconciled with Korea's statement to the Arbitrator that "LG has maintained its production facilities in Korea, but has been operating its facilities at lower capacity in light of the reduced exports to the United States."[117] Both statements cannot be true.

95. The United States again recalls that the accuracy of the statements made by Samsung and LG to the USITC and the USDOC was certified by company officials and legal counsel.[118] It would be a felony under U.S. law if Samsung and LG company officials and their legal counsel knowingly and willfully made false statements to the U.S. government.[119] The Arbitrator has every reason to view the statements made by the companies earlier this year as true, and no reason not to.

96. On the other hand, there is no basis for the Arbitrator to give weight to the general statements made by Korea on behalf of the companies in its response to this question. This is especially true since one implication of Korea relaying the "explanations" purportedly provided by the companies[120] is that Samsung and LG evidently falsely certified the statements they made to the USITC and the USDOC earlier this year. In that case, the companies lack any credibility

[114] LG 2018 USITC LRWs Sunset Initiation Response, p. 4 (p. 9 of the PDF version of Exhibit USA-6) (emphasis added).

[115] LG 2018 USITC LRWs Sunset Initiation Response, p. 12 (p. 17 of the PDF version of Exhibit USA-6).

[116] LG 2018 USITC LRWs Sunset Initiation Response, p. 4 (p. 9 of the PDF version of Exhibit USA-6).

[117] Korea's Responses to Post-Meeting Questions, para. 97.

[118] *See*, *e.g.*, Company Representative Certification of Jangmuk Park, Vice-President, Samsung, and Counsel Certification of Lynn M. Fischer Fox, in Samsung 2018 USITC LRWs Sunset Initiation Response (pp. 3-4 of the PDF version of Exhibit USA-2); Company Certification of Namsu Kim, Senior Manager for Trade Team, LG, and Certificate of Accuracy and Completeness of Daniel L. Porter, in LG Electronics' Notice of Intent to Participate and Substantive Response to Notice of Initiation of Sunset Review – Large Residential Washers from Korea (February 5, 2018) ("LG 2018 Commerce LRWs Sunset Initiation Response") (pp. 5-6 of the PDF version of Exhibit USA-4); Counsel Certification of Daniel L. Porter in LG 2018 USITC LRWs Sunset Initiation Response (p. 3 of the PDF version of Exhibit USA-6).

[119] *See* 18 U.S.C. § 1001.

[120] *See* Korea's Responses to Post-Meeting Questions, paras. 96-97.

and the supposed representations of the companies to Korea are deserving of no evidentiary weight.[121]

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?

Comment:

97. The United States observes, for the purpose of clarification, that Korea did not "calculate the average duty rate for the subject product" at all.[122] Rather, as Korea explains, "[t]he anti-dumping duty rate used was the weighted average dumping rate of the examined respondents excluding any *de minimis* or total AFA rates, which equates to the 'all others' rate calculated by the USDOC."[123] In other words, for the "average duty rate for the subject product," Korea simply used the "all others" rate calculated by the USDOC.

98. The USDOC calculated a dumping margin for only one examined respondent, LG Chem, Ltd. The other two examined respondents were assigned dumping margins determined on the basis of facts available. Korea asserts that it "would be able to calculate the import values attributable only to the companies that were included in the calculation of the weighted-average dumping margin" by relying, as it explains in response to question 90, on the cooperation of those companies in agreeing to the use and disclosure of their business confidential information for that purpose.[124]

99. As explained below in the U.S. comment on Korea's response to question 90, there is no basis for Korea's optimism that companies will consent or cooperate concerning the release of their business confidential information. In this arbitration, in connection with Korea's preparation of responses to the Arbitrator's post-meeting questions, Samsung and LG "declined to disclose business proprietary information and Korea is not able to compel production."[125] In the example given in Korea's response to Arbitrator question 48.(a), two of three Korean

[121] Even if the Arbitrator has reason to question the credibility of statements made or explanations purportedly given by Samsung and LG, an Internet search reveals numerous press reports concerning the new LRWs production facilities constructed by Samsung and LG in the United States. *See, e.g.*, https://www.reuters.com/article/us-samsung-elec-washers-usa/samsung-electronics-u-s-washing-machine-factory-starts-production-idUSKBN1F1254?il=0; http://clarksvillenow.com/local/lg-electronics-plant-of-clarksville-hosting-informational-job-fair/. It defies economic or business logic that Samsung and LG would abandon those brand new investments in favor of resuming production of LRWs in Korea for export to the U.S. market.

[122] Arbitrator question 84, emphasis added.

[123] Korea's Responses to Post-Meeting Questions, para. 102.

[124] Korea's Responses to Post-Meeting Questions, para. 101.

[125] Korea's Responses to Post-Meeting Questions, para. 50.

companies were assigned dumping margins on the basis of facts available because they refused to cooperate in the investigation. Korea gives no reason to expect greater cooperation from those companies in the future. Nor, if the companies did choose to cooperate, would there be any apparent mechanism for both parties to verify any information that the companies provided. Such a mechanism would be necessary to ensure that any information relied upon was accurate and complete.

100. Korea does not explain how the parties would proceed in the event that other Korean companies likewise decline to disclose their business confidential information in the future. As the approach proposed by Korea is dependent on exporters being fully cooperative, there is no justification for the Arbitrator to view Korea's proposed approach as viable.

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 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.

Comment:

101. Korea's response to this question is totally incorrect. As support for the proposition that the United States proposed in *US – Tuna II (Mexico) (Article 22.6 – US)* that the arbitrator there "adopt essentially the same economic framework" that Korea proposes here, Korea cites to one paragraph of the arbitrator's decision in *US – Tuna II (Mexico) (Article 22.6 – US)*, which Korea misreads and takes out of context.[126] Quoting from paragraph 5.11 of the *US – Tuna II (Mexico) (Article 22.6 – US)* arbitrator's decision, Korea asserts that:

> In fact, the United States explained that "where a partial equilibrium analysis is used to model the removal of a particular non-tariff barrier (NTB), the generally-accepted method is to calculate a tariff equivalent, or 'price wedge', of the NTB and then model its removal."[127]

Korea fails to note that, in the preceding paragraph of the *US – Tuna II (Mexico) (Article 22.6 – US)* arbitrator's decision, the arbitrator explained that "the United States contends that Mexico's election to use a partial equilibrium model is inappropriate because sufficient data do not exist to construct a correctly specified model."[128] Korea also ignores the subsequent two paragraphs of the arbitrator's decision, which summarize the U.S. argument concerning the data that would be necessary to apply the partial equilibrium model proposed by Mexico,[129] and which further

[126] *See* Korea's Responses to Post-Meeting Questions, para. 103.

[127] Korea's Responses to Post-Meeting Questions, para. 103.

[128] *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 5.10.

[129] *See US – Tuna II (Mexico) (Article 22.6 – US)*, paras. 5.12-5.13.

explain that, "[f]or the United States, it appears to be undisputed that this level of data concerning the US tuna product market is not available."[130] Indeed, all of the above is presented in a section of the arbitrator's decision entitled "United States' arguments regarding Mexico's model."[131]

102. In the U.S. response to this question,[132] the United States explained that, in *US – Tuna II (Mexico) (Article 22.6 – US)*, Mexico proposed the use of a partial equilibrium model.[133] 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.[134] 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.[135]

103. The United States has substantiated the assertions in the preceding paragraph by reference to the U.S. written submission in *US – Tuna II (Mexico) (Article 22.6 – US)*, which is publicly available on the website of the Office of the U.S. Trade Representative. Korea previously has demonstrated its knowledge of and ability to access and make use of publicly available U.S. submissions from prior proceedings. Yet, Korea failed to do so in this instance.

4 NON-LRW PRODUCTS

90. [23.*] To Korea: 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?

Comment:

104. In its response to this sub-question, Korea suggests that it could rely on export data collected by Korea's customs authorities and import data collected by U.S. Customs and Border Protection, and that the parties could confer to ensure that both parties agree to the accuracy of the data.[136] Korea recognizes that these data are "confidential" but suggests that it would "obtain consent to release the information to the United States."[137] There is no basis for Korea's optimism that companies will consent or cooperate concerning the release of their business

[130] *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 5.13.

[131] *US – Tuna II (Mexico) (Article 22.6 – US)*, section 5.1.2 heading (emphasis added).

[132] *See* U.S. Responses to Post-Meeting Questions, paras. 96-100.

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

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

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

[136] *See* Korea's Responses to Post-Meeting Questions, paras. 107-108.

[137] Korea's Responses to Post-Meeting Questions, para. 107.

confidential information. In this arbitration, in connection with Korea's preparation of responses to the Arbitrator's post-meeting questions, Samsung and LG "declined to disclose business proprietary information and Korea is not able to compel production."[138] Korea does not explain how the parties would proceed in the event that other Korean companies likewise decline to disclose their business confidential information in the future.

105. Furthermore, there is no basis for Korea's optimism that "Korea's export data for the products in question should also match the U.S. customs authority's import data."[139] Trade data queried from different sources often do not match. Indeed, the Arbitrator has before it U.S. import data on LRWs queried using the USITC's DataWeb and the CBP ACE system, but those data do not match because, as the United States has explained, the ACE system operates on a fiscal year basis (October 1 to September 30) while the DataWeb data before the Arbitrator are presented on a calendar year basis. Korea does not explain how the parties would proceed in the event that Korean export data and U.S. import data do not match.

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?

Comment:

106. In its response to this sub-question, Korea again suggests an approach that depends on exporters being "fully cooperative in providing the relevant information."[140] Korea reasons that:

> As the exporters in question would be subject to anti-dumping duties, they would have an interest in cooperating with the Korean government in efforts to induce the United States to bring its WTO-inconsistent measures into compliance. Moreover, the export data will not be released to private parties, and will not subject exporters to the risk of disclosing their confidential business information.[141]

107. Again, Samsung and LG "declined to disclose business proprietary information"[142] even though those companies are subject to U.S. antidumping and countervailing duty measures, and presumably share Korea's interest in inducing compliance, and even though the information would only be shared with the United States, the Arbitrator, and the secretariat staff, subject to the BCI Working Procedures adopted by the Arbitrator. Korea's optimism about receiving full cooperation from Korean producers of non-LRW products is not warranted based on the experience with Samsung and LG during this arbitration. As the "method" proposed by Korea is

[138] Korea's Responses to Post-Meeting Questions, para. 50.

[139] Korea's Responses to Post-Meeting Questions, para. 108.

[140] Korea's Responses to Post-Meeting Questions, para. 111.

[141] Korea's Responses to Post-Meeting Questions, para. 111.

[142] Korea's Responses to Post-Meeting Questions, para. 50.

dependent on exporters being "fully cooperative," there is no justification for the Arbitrator to view Korea's proposed approach as viable.[143]

108. And again, if the companies did choose to cooperate, there would not be any apparent mechanism for both parties to verify any information that was provided. Such a mechanism would be important to provide confidence that any information relied upon was accurate and complete, especially since Korea is relying on companies' self-interest as the basis for obtaining information.

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

Comment:

109. In its response to this sub-question, Korea indicates simply that it "remains confident that this information can be obtained for all products."[144] Korea describes, in general, the kinds of sources from which such information might be obtained, but does not specify particular sources.

110. Korea's approach introduces a high degree of uncertainty and is not viable. Korea and the United States may disagree on the appropriate source of data, but the parties would not be able to seek guidance from the Arbitrator to resolve such a disagreement, as Article 22.7 of the DSU precludes the possibility of a party seeking a second arbitration.

111. The DSB cannot authorize Korea to make decisions unilaterally concerning the sources of data to be used to calculate the level of suspension. To do so would be inconsistent with the requirement in Article 22.4 of the DSU that "[t]he level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment."

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

Comment:

112. In its response to this sub-question, Korea explains that, "[i]n many instances, Korea will be able to obtain elasticity values through the USITC report that is issued as part of the anti-dumping investigation."[145] Korea's response acknowledges the possibility that, in a future antidumping proceeding concerning a non-LRW product from Korea, the USITC may not publish elasticities. The United States explained in response to question 89 that the USITC is not required under U.S. law to publish elasticities any time it makes a determination.[146]

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[143] Korea's Responses to Post-Meeting Questions, paras. 110, 111.

[144] Korea's Responses to Post-Meeting Questions, para. 112.

[145] Korea's Responses to Post-Meeting Questions, para. 113.

[146] *See* U.S. Responses to Post-Meeting Questions, paras. 109-113.

113. Korea suggests that, "in rare instances" when information is not available through public sources, then "Korea will obtain the information through requests to reputable economic consulting companies."[147] This approach is untenable. Will Korea select the economic consulting company? Will Korea pay for the analysis? Will the economic consulting company consider Korea to be its client? What role, if any, would the United States play in informing the analysis and conclusions of the economic consulting company? Would the economic consulting company, if hired and paid by Korea, be objective as between the two parties? What if the United States disagrees with the ultimate conclusions concerning the elasticities? Korea makes no attempt to grapple with these serious – and self-evident – questions that would arise under its proposed approach. This is another indication that Korea's approach simply is not viable.

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>Comment:</u>

114. In its response to this question, Korea agrees that "an actual growth rate could be used to calculate the level of future suspension with respect to non-LRW products."[148] Korea does not explain, however, what would be the source of the market size data for non-LRW products such that the "actual growth rate" could be known.

115. In its response to question 90.c, when asked how Korea would obtain data on the total value of demand (*i.e.*, total market value), Korea indicates simply that it "remains confident that this information can be obtained for all products."[149] Korea describes, in general, the kinds of sources from which such information might be obtained, but does not specify particular sources.

116. Korea's approach introduces a high degree of uncertainty and is not viable. Korea and the United States may disagree on the appropriate source of data, but the parties would not be able to seek guidance from the Arbitrator to resolve such a disagreement, as Article 22.7 of the DSU precludes the possibility of a party seeking a second arbitration.

117. The DSB cannot authorize Korea to unilaterally make decisions about the sources of data to be used to calculate the level of suspension. To do so would be inconsistent with the requirement in Article 22.4 of the DSU that "[t]he level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment."

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

[147] Korea's Responses to Post-Meeting Questions, para. 114.

[148] Korea's Responses to Post-Meeting Questions, para. 115.

[149] Korea's Responses to Post-Meeting Questions, para. 112.

***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.**

Comment:

118. The parties agree that the approach described in the question would not be appropriate in this situation.[150] Indeed, the approach in *US – Offset Act (Byrd Amendment) (Article 22.6 – US)* was based on the payment of subsidies (distribution of duties), not the collection of duties. The situation there, and that arbitrator's approach, is distinct from the situation in this proceeding, and thus that approach is not appropriate here.

119. Furthermore, as explained in the U.S. response to this question and the U.S. response to question 80, 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.[151] Indeed, Korea itself acknowledges that "both proxies do not correlate to the actual growth rate of the industry."[152]

[150] *See* Korea's Responses to Post-Meeting Questions, para. 116; U.S. Responses to Post-Meeting Questions, paras. 118-121.

[151] *See* U.S. Responses to Post-Meeting Questions, para. 84-87, 118.

[152] Korea's Responses to Post-Meeting Questions, para. 82.