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)

CLOSING STATEMENT OF THE UNITED STATES OF AMERICA AT THE MEETING OF THE ARBITRATOR WITH THE PARTIES

June 6, 2018

Madame Chairperson, members of the Arbitrator:

1. Korea has spent the last two days discussing a host of issues that simply are irrelevant to this arbitration. The United States is presently out of compliance with its WTO obligations; and has acknowledged that. The rather benign and technical – and entirely factual – question before the Arbitrator is: what is the effect of continued U.S. non-compliance currently on Korea, and what effect is it expected to have going forward? And, is Korea's request for suspension equivalent to that effect?

2. These questions must be answered on the basis of the evidence before the Arbitrator. Korea, though, makes appeals to emotion and ignores the evidence.

3. The statements by Samsung and LG concerning their investments in the United States and their future production plans are evidence, and that evidence remains unrebutted. Korea has simply asserted that this is a state-to-state dispute settlement proceeding, or has suggested that the statements of the companies do not matter because the statements were made in domestic proceedings. Korea strenuously objected to the proposition that one implication of its official position in this arbitration is that Samsung and LG company officials lied under oath to the U.S. government. Yet, Korea nevertheless still would have the Arbitrator give no weight to the company statements, but Korea has failed to demonstrate why the Arbitrator should not accord them weight. Korea's position is not credible.

4. Also not credible is Korea's proposed methodology for determining the level of nullification or impairment for LRWs. Korea's methodology combines two inconsistent approaches – (1) applying a pre-measures import share to 2017 import data, and (2) removing the duties using a perfect substitutes partial equilibrium model. Korea cannot do both. The pre-measures import share, by definition, is not affected by the duties, so there should be no additional effect by the removal of the duties. Korea's proposed formula, since it does allegedly remove the impact of the duty, cannot also include the pre-measures import share.

5. Moreover, Korea's import share approach is not a model. **It is just an assumption** by Korea that the Korean import share would have been the same in 2017 as it was in 2011, in the absence of the U.S. antidumping and countervailing duty measures. But there is no evidence that this would have occurred. Rather, there is evidence that the opposite is true.

6. Korean companies shifted production to facilities outside of Korea in the interim, including to newly constructed production facilities in the United States. This has led to a reduction in the market share of Korean-made LRWs in the United States, and the significant reduction of production capacity in Korea – indeed, the virtual elimination of any excess production capacity in Korea. Korean LRWs producers – Samsung and LG – have acknowledged these facts, and Korea, in this proceeding, has acknowledged that many other factors go into Korean companies' business decisions. The evidence demonstrates that the import share of LRWs from Korea would not return to one hundred percent of the 2011 level, nor would it come anywhere close to that level.

7. Korea's formula approach could only be used with 2017 data (not with 2011-based 2017 data). However, Korea uses a formula that is incorrect. Korea's approach assumes that Korea

and the United States are the only players in the U.S. market, ignoring the existence and influence of third countries. When duties were placed on Korea, U.S. imports from other sources increased (as well as increased U.S. production). When duties are removed, imports from third countries will decrease (as well as decreased U.S. production). Secondly, Korea's formula argues that U.S. LRWs and Korean LRWs are perfect substitutes, ignoring evidence from the ITC and Korean companies, and Korea's own acknowledgement, that LRWs products are not perfect substitutes. Even appliances that are hidden in basements can be imperfect substitutes.

8. In reality, there are only two approaches that are before the Arbitrator, and only one of them uses a correct model. The Korean market share approach (based on assumption), and the U.S. economic imperfect substitutes model.

9. As mentioned this morning, the U.S. delegation heard Korea's delegate say yesterday afternoon that Korea chose to propose its hybrid approach, rather than proposing an imperfect substitutes partial equilibrium model, because the number was too small using the imperfect substitutes model. The Arbitrator can confirm this for itself using the recording of the meeting, of course, but that is what we heard. We recall that the statement was made by one of Korea's economists in response to perhaps questions 17, 18, or 19. It was toward the end of the day. This morning, Korea confirmed that it selected its proposed approach because the imperfect substitutes partial equilibrium model would "understate" the level of nullification or impairment. But Korea cannot know that a model would "understate" the level of nullification or impairment except by assuming that Korea would return to the import level it had in 2011. But that is simply an assumption, and not an assumption that is grounded in or consistent with the evidence.

10. Korea's approach – picking the model or approach that gets the higher number – is an entirely invalid and inappropriate basis for selecting the appropriate economic tool to use for the analysis in this proceeding. And the statements by Korea's delegates are consistent with what the United States has already demonstrated: Korea's proposed approach is disconnected from – and contrary to – the facts and the evidence before the Arbitrator. Korea's so-called model is thus not reasonable, not plausible, and not usable by the Arbitrator.

11. The U.S. proposal – an imperfect substitutes static partial equilibrium model – fits the facts and evidence before the Arbitrator. Korea argues that no Article 22.6 arbitrator has previously used such a model. But no Article 22.6 arbitrator has ever made a decision involving a trade remedy measure. In fact, no Article 22.6 arbitrator has ever made a decision involving modeling a tariff reduction. So, what previous arbitrators have done may provide some guidance here, but is not decisive.

12. With respect to Korea's request for suspension related to non-LRW products, the United States has established that Korea's proposed formula approach cannot work. In an intervention late today, Korea's delegate queried whether the United States is taking the position that it cannot trust Korea. The issue is not one of trust. Reasonable people – or reasonable WTO Members that are strong allies that enjoy a trading relationship that is mutually beneficial – can disagree from time to time about matters, for example the correctness of import statistics or trade elasticities. The point is that, after the Arbitrator has made its decision, there is no means for the parties to resolve any such disagreements. Article 22.7 of the DSU precludes the possibility of a

second arbitration under Article 22.6. So, the level of suspension, or any formula to be applied for the purpose of suspension, must be established in the Arbitrator's decision, and there can be left no possibility that such disagreements about data sources or accuracy might arise between the parties.

13. Finally, the United States reiterates that it has made a *prima facie* case that Korea's proposed formula approach for non-LRW products is necessarily not equivalent to the level of nullification or impairment and would result in a level of suspension that is contrary to the DSU. Korea cannot simply fail to meet its burden to rebut the *prima facie* case made by the United States – or, really, not even seriously attempt to rebut the U.S. case – and then expect the Arbitrator to come in and make Korea's case for it. That simply is not possible under the DSU.

14. So, in closing, for all the reasons the United States has given in this proceeding, the Arbitrator should find that the level of suspension of concessions requested by Korea is in excess of the appropriate level of nullification or impairment.

15. The United States once again thanks the Arbitrator, and the Secretariat staff assisting you, for your work in this proceeding.