

***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)**

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA  
AT THE MEETING OF THE ARBITRATOR WITH THE PARTIES**

**June 5, 2018**

## TABLE OF REPORTS AND AWARDS

Short Form	Full Citation
<i>EC – Bananas III (US) (Panel)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States</i> , WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R
<i>EC – Bananas III (US) (Article 22.6 – EC)</i>	Decision by the Arbitrators, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS27/ARB, 9 April 1999
<i>EC – Hormones (Canada) (Article 22.6 – EC)</i>	Decision by the Arbitrators, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS48/ARB, 12 July 1999
<i>EC – Hormones (US) (Article 22.6 – EC)</i>	Decision by the Arbitrators, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS26/ARB, 12 July 1999
<i>Japan – Agricultural Products II (AB)</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999
<i>US – 1916 Act (EC) (Article 22.6 – US)</i>	Decision by the Arbitrators, <i>United States – Anti-Dumping Act of 1916, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS136/ARB, 24 February 2004
<i>US – Gambling (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS285/ARB, 21 December 2007
<i>US – Washing Machines (Panel)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/R, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R

<b>Short Form</b>	<b>Full Citation</b>
<i>US – Washing Machines (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R, adopted 26 September 2016

**TABLE OF EXHIBITS**

<b>Exhibit No.</b>	<b>Description</b>
USA-22	<i>Memorandum to Dana S. Mermelstein from Milton Koch Re: Large Residential Washers from the Republic of Korea: Affirmative Countervailing Duty Determination: Application of Adverse Facts Available to Daewoo Electronics Corporation (December 18, 2012)</i>

Madame Chairperson, members of the Arbitrator:

1. On behalf of the U.S. delegation, I would like to thank you, and the Secretariat staff assisting you, for your ongoing work in this arbitration. The United States appreciates this opportunity to meet with you and present its views.
2. The United States agrees with Korea that, in determining the level of nullification or impairment, the Arbitrator needs to rely, as much as possible, on credible, factual, and verifiable information. The Arbitrator's decision must be based on evidence, not speculation.<sup>1</sup> Yet, again and again, as the United States will highlight throughout this opening statement, Korea asks the Arbitrator to ignore the evidence, and instead base its decision on Korea's unsubstantiated assertions or Korea's unwarranted assumptions. Clearly, the approach that Korea proposes is not appropriate.
3. The United States also agrees with Korea that the remedies available to Members through WTO dispute settlement are prospective in nature.<sup>2</sup> But the United States does not agree with Korea's additional views on what Korea calls "the temporal scope of nullification or impairment."<sup>3</sup> WTO remedies are not punitive.<sup>4</sup> Suspension of concessions or other obligations is not meant to provide damages for past harm, as Korea suggests.<sup>5</sup> The obligation in the DSU<sup>6</sup> is for a Member concerned to bring the measure at issue into conformity with the relevant covered agreement.<sup>7</sup> The DSU does not require a Member concerned to reverse the trade effects of the inconsistent measure, nor does the DSU guarantee that outcome to a complaining Member.
4. One objective of the suspension of concessions is to encourage compliance. However, since compliance does not include an obligation to restore trade to the *status quo ante*, then providing for an element of the level of suspension of concessions unrelated to compliance would not accord with this purpose of the suspension of concessions. Taking into account "the impact of the WTO-inconsistent measure on the market that has led to the market taking on the characteristics as they exist at the end of the RPT," as Korea asks the Arbitrator to do,<sup>8</sup> would not be related to compliance. That would go well beyond what would be achieved by compliance. Korea is not entitled to a counterfactual based on more than it would get from U.S. compliance with its WTO obligations, but that is precisely what Korea is seeking.

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<sup>1</sup> 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.

<sup>2</sup> See Korea's Replies to Questions from the Arbitrator (May 14, 2018) ("Korea's Responses to the Arbitrator's Advance Questions"), paras. 36-37.

<sup>3</sup> Korea's Responses to the Arbitrator's Advance Questions, para. 36.

<sup>4</sup> See *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.22.

<sup>5</sup> See, e.g., Korea's Responses to the Arbitrator's Advance Questions, paras. 36-38, 53, 68, 73-76.

<sup>6</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

<sup>7</sup> See, e.g., DSU, Art. 19.1 ("Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.").

<sup>8</sup> Korea's Responses to the Arbitrator's Advance Questions, para. 36.

5. When we talk about concessions or other obligations, ultimately we are talking about market access and trade flows. At its core, that is what the WTO is all about. Members have agreed to abide by a set of rules and expand access to their markets. It is expected that compliance with those rules by all Members will lead to increased trade. It is reasonable to presume that when a Member is in breach of a covered agreement, that will have an effect on trade. In other words, it is logical to presume that, where the covered agreement is a goods agreement, the value of the complaining Member's exports of goods to the Member concerned is reduced as a result of a breach, and Article 3.8 of the DSU expressly provides for that very presumption.

6. It is possible, however, that a Member might be in breach of one of the covered agreements, but that breach has no effect on the exports of the complaining Member. This was contemplated in the *EC – Bananas* dispute. The panel in that dispute found that there is no requirement in the DSU for a "legal interest" in order for a Member to bring a dispute.<sup>9</sup> In the arbitration under Article 22.6 of the DSU in that dispute, the arbitrator referred back to the original panel's findings and explained that, "even if no compensation were due, an infringement finding could be made."<sup>10</sup>

7. So, one can conceive of a situation where a Member's exports are not reduced as a result of another Member's measure – for example, the complaining Member may not even produce the good covered by the measure, or the Member may not be subject to the measure. But the complaining Member still might bring a WTO dispute and get a finding that the responding Member has breached a covered agreement. At the end of the RPT, however, even if the responding Member has not brought its measure into compliance, the complaining Member would not be entitled to suspend concessions or other obligations, because the complaining Member's exports are not reduced by the continuing breach. That is, the level of nullification or impairment would be zero.

8. In this arbitration, the United States has not yet brought the inconsistent measures into compliance with the DSB's recommendations following the expiration of the RPT. That is not disputed. Indeed, it is the condition precedent for any arbitration under Article 22.6 of the DSU. The question before the Arbitrator is: what effect does the ongoing breach by the United States have on the value of Korea's exports? Put another way, what would happen to the value of Korea's exports if the United States were to bring the inconsistent measures into compliance with the covered agreements? If the evidence establishes that there would be no increase in the value of Korea's exports, then there is no justification under Article 22.4 of the DSU for Korea to suspend concessions or other obligations. And that is, indeed, the situation here with respect to large residential washers (or "LRWs").

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<sup>9</sup> *EC – Bananas III (US) (Panel)*, para. 7.47 *et seq.*

<sup>10</sup> *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.9.

**A. The Evidence before the Arbitrator Establishes that the Level of Nullification or Impairment Resulting from the Maintenance of the WTO-Inconsistent Aspects of the U.S. Antidumping and Countervailing Duty Measures on LRWs from Korea beyond the Expiration of the RPT Is Zero**

9. The United States has demonstrated with evidence that it is highly unlikely – actually, it is virtually inconceivable – that Samsung and LG would resume production of LRWs in Korea for export to the U.S. market if the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea were removed.<sup>11</sup> In other words, the evidence establishes that there would be no increase in the value of Korea’s exports of LRWs, and thus the level of nullification or impairment is zero.

10. Indeed, the evidence demonstrates that, even in the absence of the U.S. antidumping and countervailing duty measures, Samsung and LG still would produce LRWs for the U.S. market at their newly constructed factories, which are located in the United States. The evidence establishing this consists of public statements made by Samsung and LG themselves. Korea has not rebutted this evidence.

11. Instead, Korea simply asserts, without any support, that it would be “reasonable” for the Arbitrator to assume in this situation that Samsung and LG would abandon the brand new U.S. facilities, in which they have just recently invested a combined total of \$630 million,<sup>12</sup> and the companies would resume exporting LRWs to the United States from Korea at the levels that existed before the antidumping and countervailing duty measures were imposed.<sup>13</sup> Korea’s position is contrary to the evidence and simply not credible at all.

12. Indeed, the evidence before the Arbitrator establishes that it would not even be possible for Samsung and LG to respond to the United States bringing the measures into compliance as Korea predicts. That is because Samsung “has virtually eliminated production capacity in Korea”.<sup>14</sup> This is evidenced by a statement made by Samsung itself. Also, “[t]here is no significant excess capacity in Korea that could be shipped to the United States”,<sup>15</sup> and LG’s

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<sup>11</sup> See, e.g., Written Submission of the United States of America (March 23, 2018) (“U.S. Written Submission”), paras. 39-52.

<sup>12</sup> See U.S. International Trade Commission, *Large Residential Washers*, Investigation No. TA-201-076, Publication 4745 (December 2017) (“USITC LRWs 201 Report”), pp. 59-60 (pp. 68-69 of the PDF of Exhibit KOR-25). See also *id.*, pp. 26, 70 (pp. 35, 79 of the PDF of Exhibit KOR-25).

<sup>13</sup> See Korea’s Responses to the Arbitrator’s Advance Questions, para. 81.

<sup>14</sup> Samsung’s Substantive Response to ITC Notice of Institution (February 1, 2018) (“Samsung 2018 USITC LRWs Sunset Initiation Response”), p. 10 (p. 16 of the PDF version of Exhibit USA-2).

<sup>15</sup> LG Electronics’ Response to Commission’s Notice of Institution for Washer Sunset Review Certain Large Residential Washers from Korea and Mexico Investigation No. 701-TA-488 and 731-TA-1199-1200 (Review) (February 2, 2018) (“LG 2018 USITC LRWs Sunset Initiation Response”), p. 4 (p. 10 of the PDF version of Exhibit USA-6).

“Korean manufacturing facility is already operating at full capacity.”<sup>16</sup> That is evidenced by statements made by LG.

13. Korea has not even attempted to explain why the Arbitrator should not believe the statements made by Samsung and LG to which the United States has drawn the Arbitrator’s attention. A number of the statements were made to the U.S. government in the context of a sunset review proceeding where the question is: what would happen if the antidumping and countervailing duty measures were terminated? That is the very question that is before the Arbitrator, at least as Korea has formulated it. And the accuracy of the statements made by Samsung and LG was certified by company officials and legal counsel.<sup>17</sup> 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.<sup>18</sup> The Arbitrator has every reason to view the statements of the companies as true, and no reason not to.

14. The United States recalls that the Arbitrator asked the parties directly what the production capacity is for Samsung, LG, and any other producers of LRWs in Korea.<sup>19</sup> The United States explained that it does not have that information to provide to the Arbitrator.<sup>20</sup> Samsung and LG, on the other hand, certainly know the production capacity of their own facilities in Korea. Korea could have asked Samsung and LG for the information and provided it to the Arbitrator, but Korea did not do so. Instead, Korea made general assertions about the production activities of Samsung and LG in Korea; assertions for which Korea has offered no proof.<sup>21</sup> Korea’s assertions are not evidence. The statements made by Samsung and LG about their production capacity in Korea, to which the United States has referred, are evidence; strong evidence.

15. Furthermore, the United States recalls that, as of the end of the RPT, LG was subject to a zero percent antidumping duty cash deposit rate, and LG has never been subject to the

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<sup>16</sup> LG 2018 USITC LRWs Sunset Initiation Response, p. 4 (p. 10 of the PDF version of Exhibit USA-6).

<sup>17</sup> See, e.g., Company Representative Certification of Jangmuk Park, Vice-President, Samsung, and Counsel Certification of Lynn M. Fischer Fox, in *Large Residential Washers from Korea and Mexico Inv. Nos. TA-701-488 & 731-TA-1199-1200 (1st Review)*, Samsung 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).

<sup>18</sup> See 18 U.S.C. § 1001.

<sup>19</sup> See Questions from the Arbitrator to the Parties before the Meeting (April 27, 2018), question 36.

<sup>20</sup> See Responses of the United States of America to the Advance Questions from the Arbitrator (May 14, 2018) (“U.S. Responses to the Arbitrator’s Advance Questions”), paras. 125-126.

<sup>21</sup> See Korea’s Responses to the Arbitrator’s Advance Questions, para. 105.



countervailing duty measures on LRWs from Korea.<sup>22</sup> Therefore, even terminating the antidumping and countervailing duty measures would not change anything for LG, in terms of LG's cost to export LRWs from Korea to the United States. That is another reason, grounded in the evidence, to conclude that LG would not increase shipments of LRWs from Korea to the United States if the antidumping and countervailing duty measures were brought into compliance with the DSB's recommendations.

16. It is not necessary, nor would it be "reasonable," for the Arbitrator to make the assumptions for which Korea argues concerning Samsung's and LG's likely response if the U.S. measures were brought into compliance.<sup>23</sup> The Arbitrator can and should rely on the evidence before it.

17. That evidence supports the conclusion that the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea beyond the expiration of the RPT is zero. Thus, the level of suspension of concessions requested by Korea is not equivalent to the level of nullification or impairment.

**B. Modification of the Antidumping and Countervailing Duty Measures Is a Reasonable and Plausible Counterfactual; Termination of the Measures Is Not**

18. Turning now to the appropriate counterfactual in this situation, Korea's complaints about the U.S. proposed counterfactual create confusion and do not help clarify the issues before the Arbitrator.

19. As an initial matter, the United States has proposed an alternative to the counterfactuals proposed by Korea only with respect to the "as applied" findings adopted by the DSB, which concern the USDOC's antidumping and countervailing duty investigations of LRWs from Korea. With respect to the "as such" findings adopted by the DSB, the United States agrees with Korea that an appropriate counterfactual for the purposes of this proceeding is that "the United States ceased to use [the differential pricing methodology] and zeroing when applying the [average-to-transaction] comparison methodology" after the expiration of the RPT.<sup>24</sup>

20. Korea's assertion that the United States is "ignoring the DSB's 'as such' findings" simply is not true.<sup>25</sup> Korea made a separate request for authorization to suspend concessions related to U.S. "non-compliance with [the] 'as such' recommendations and rulings," and that request is

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<sup>22</sup> See Methodology Paper of the Republic of Korea (February 23, 2018) ("Korea's Methodology Paper"), paras. 42-43.

<sup>23</sup> See, e.g., Korea's Responses to the Arbitrator's Advance Questions, para. 81.

<sup>24</sup> Korea's Methodology Paper, para. 23.

<sup>25</sup> Korea's Responses to the Arbitrator's Advance Questions, para. 66.

“[i]n addition” to Korea’s request concerning the “as applied” findings.<sup>26</sup> The United States has responded to Korea’s separate requests on the same terms on which Korea made them. And the United States has demonstrated that Korea’s request for suspension in relation to the “as such” findings, *i.e.*, in relation to non-LRW products, is not equivalent to the level of nullification or impairment.<sup>27</sup> The United States has not ignored the DSB’s “as such” findings at all.

21. With respect to the “as applied” findings, the evidence before the Arbitrator establishes that modification – not termination – of the U.S. antidumping and countervailing duty measures on LRWs from Korea is a “reasonable” and “plausible” counterfactual in this situation.<sup>28</sup> A counterfactual that assumes termination of the measures is not reasonable or plausible at all.

22. As the United States has explained, in the original antidumping and countervailing duty investigations of LRWs from Korea, Daewoo, a Korean producer of LRWs examined by the USDOC, was assigned a margin of dumping and a countervailing duty rate based on the application of facts available.<sup>29</sup> The margin of dumping and countervailing duty rate assigned to Daewoo are not the subject of any recommendations adopted by the DSB.

23. Korea has misrepresented to the Arbitrator the source of the countervailing duty rate that the USDOC determined for Daewoo. Korea has asserted that “Daewoo’s countervailing duty margin was determined using the highest calculated program-specific rates determined for the cooperating companies.”<sup>30</sup> Therefore, Korea asserts, “a 0.00% countervailing duty margin as applied to LG and Samsung would result in a 0.00% margin for Daewoo, in turn, resulting in termination of the countervailing duty measures as a whole.”<sup>31</sup> Korea’s assertion is false.

24. The USDOC explained that:

In CVD proceedings the [USDOC] computes a total [facts available] rate for the non-cooperating company using the highest calculated program-specific rates determined for the cooperating

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<sup>26</sup> WT/DS464/18.

<sup>27</sup> See U.S. Written Submission, paras. 129-144.

<sup>28</sup> *US – Gambling (Article 22.6 – US)*, para. 3.27.

<sup>29</sup> See *Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,988 (December 26, 2012) (“LRWs AD Investigation Final Determination”), p. 75,992 (Exhibit KOR-5); *Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 Fed. Reg. 75,975 (Dep’t of Commerce December 26, 2012) (“LRWs CVD Investigation Final Determination”), p. 75,977 (Exhibit KOR-6).

<sup>30</sup> Korea’s Written Submission, para. 27.

<sup>31</sup> Korea’s Written Submission, para. 27.

respondents in the instant investigation, or, if not available, rates calculated in prior CVD cases involving the same country.<sup>32</sup>

25. The United States is providing to the Arbitrator as Exhibit USA-22 the final memorandum explaining the sources of the facts available on which the USDOC relied to determine the countervailing duty rate applied to Daewoo in the original investigation. Only a very small part of Daewoo’s 72.30 percent countervailing duty rate is based on rates determined for Samsung and LG in the countervailing duty investigation of LRWs from Korea. The largest part of the rate applied to Daewoo is attributable to findings made by the USDOC in earlier countervailing duty proceedings involving other products from Korea, but which concerned similar subsidy programs that were found, as facts available, to benefit Daewoo. Even if the rates determined for Samsung and LG in the LRWs investigation were excluded, the countervailing duty rate applied to Daewoo still would be more than 66 percent.<sup>33</sup> Korea did not challenge these aspects of the countervailing duty rate applied to Daewoo in this dispute, and the DSB adopted no recommendations concerning them.

26. Similarly, the dumping margin assigned to Daewoo also was determined on the basis of facts available, and that margin has no connection whatsoever to the dumping margins determined for Samsung and LG, which are the subject of recommendations adopted by the DSB. Rather, the margin applied to Daewoo was a “rate alleged in the petition (as adjusted at initiation).”<sup>34</sup>

27. Accordingly, the evidence before the Arbitrator establishes that it is neither reasonable nor plausible to assume that the U.S. antidumping and countervailing duty measures on LRWs from Korea simply would be terminated to bring the WTO-inconsistent aspects of those measures into compliance with the DSB’s recommendations in this dispute.

28. Further, the evidence before the Arbitrator establishes that the appropriate counterfactual involves reducing – not eliminating – the dumping margin determined for LG, because that is a reasonable and plausible means of implementation that would be consistent with U.S. WTO obligations and the DSB’s recommendations in this dispute.

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<sup>32</sup> *Memorandum to Paul Piquado from Gary Taverman re: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea* (December 18, 2012), p. 7 (Exhibit KOR-31).

<sup>33</sup> *See Memorandum to Dana S. Mermelstein from Milton Koch Re: Large Residential Washers from the Republic of Korea: Affirmative Countervailing Duty Determination: Application of Adverse Facts Available to Daewoo Electronics Corporation* (December 18, 2012), pp. 3-4 (Exhibit USA-22).

<sup>34</sup> *See Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,988 (December 26, 2012) (“LRWs AD Investigation Final Determination”), p. 75,990 (Exhibit KOR-5).

29. Korea’s criticism of the U.S. proposed counterfactual in this regard is incoherent.<sup>35</sup> For example, Korea asserts that “[s]imply replacing LG’s margin with a different margin calculated under Article 2.4.2, first sentence, does not amount to implementation because it does not address the violations that were found by the Panel and Appellate Body.”<sup>36</sup> That makes no sense at all.

30. The original Panel and the Appellate Body found that, in the antidumping investigation of LRWs from Korea, the USDOC acted inconsistently with the second sentence of Article 2.4.2 of the AD Agreement<sup>37</sup> when it determined margins of dumping for Samsung and LG using the alternative, average-to-transaction comparison methodology. The original Panel and the Appellate Body found that the USDOC did not properly establish that the conditions for using the alternative comparison methodology had been met; the USDOC applied the alternative comparison methodology to transactions outside of the “pattern” that it had identified; and the USDOC used zeroing, which was found to be inconsistent with Articles 2.4 and 2.4.2 of the AD Agreement.<sup>38</sup>

31. If the USDOC were to re-determine LG’s margin of dumping using the “normal[.]” average-to-average comparison methodology provided in the first sentence of Article 2.4.2 of the AD Agreement, without using zeroing, that would eliminate the inconsistencies identified by the original Panel and the Appellate Body. Such a margin of dumping would be in compliance with the recommendations adopted by the DSB in this dispute, and would be entitled to the general presumption of WTO consistency. The United States has explained what the result of such a re-determination would be.<sup>39</sup> LG’s margin of dumping would be reduced, but not eliminated.

32. With regard to Samsung’s margin of dumping, contrary to Korea’s false assertion, the United States does not “ignore[.]” it at all.<sup>40</sup> Rather, the United States agrees with Korea that, for the purposes of the analysis of a counterfactual in this proceeding, Samsung’s antidumping duty rate should be reduced to zero.<sup>41</sup> The United States also agrees with Korea that Samsung’s

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<sup>35</sup> See Korea’s Responses to the Arbitrator’s Advance Questions, paras. 63-67.

<sup>36</sup> Korea’s Responses to the Arbitrator’s Advance Questions, para. 66.

<sup>37</sup> *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

<sup>38</sup> See *US – Washing Machines (Panel)*, paras. 8.1.a.i, iii, xiv, and xv. See also *US – Washing Machines (AB)*, paras. 6.2-6.11 (The ultimate implication of the Appellate Body’s findings is that the original panel’s finding that the USDOC acted inconsistently in the antidumping investigation of LRWs from Korea by using a targeted dumping methodology with zeroing was sustained.).

<sup>39</sup> See U.S. Written Submission, paras. 5, 27-28, and Exhibit USA-3 (BCI). See also U.S. Responses to the Arbitrator’s Advance Questions, paras. 34-35,

<sup>40</sup> Korea’s Responses to the Arbitrator’s Advance Questions, para. 67.

<sup>41</sup> See U.S. Written Submission, footnote 24.

countervailing duty rate should be reduced to zero for the purposes of the analysis of the counterfactual.<sup>42</sup>

33. The United States does not agree with Korea's assertion that re-determining LG's margin of dumping could have "further repercussions," such as "impact to the injury determination or any changes in the USDOC's calculation methodology in subsequent reviews."<sup>43</sup> Korea did not challenge in this dispute the injury determination made by the U.S. International Trade Commission ("USITC") in the original investigations, and the USITC's injury determination is not subject to any recommendations adopted by the DSB. The DSB recommendations do not require the United States to revisit or revise the USITC's injury determination in the process of bringing the challenged antidumping and countervailing duty measures into compliance with U.S. WTO obligations. As a result, Korea's argument is based on speculation – "maybe" *x* might happen, or "there is a possibility" that *y* could happen. But an arbitrator's decision is not to be based on speculation.<sup>44</sup>

34. Additionally, the DSB adopted no recommendations concerning the final determinations of margins of dumping in subsequent reviews in the LRWs antidumping proceeding. Further, as a practical matter, LG received a zero percent dumping margin and cash deposit rate in a recent administrative review of the LRWs antidumping order, and Samsung, since the first administrative review, has been assigned a cash deposit rate based on facts available – not based on a targeted dumping analysis or zeroing. Korea offers no explanation at all for why subsequent reviews would be of any relevance whatsoever to the Arbitrator's identification of an appropriate counterfactual in this proceeding. Korea's arguments simply confuse matters.

35. Korea further confuses matters when it refers to the preliminary determination issued by the USDOC in the CVD section 129 proceeding, in which "the USDOC found that no modifications to the outcome of the countervailing duty investigation were needed."<sup>45</sup> Korea argues that the USDOC's preliminary determination contradicts the plausibility and reasonableness of the United States' proposed counterfactual, which, Korea notes, "is to apply a 0.00 percent countervailing duty rate."<sup>46</sup> Once again, Korea's argument makes no sense. The U.S. proposal is the same as Korea's proposal in this regard. Thus, Korea is arguing that its own proposed counterfactual – termination of the countervailing duty measure – is not plausible or reasonable.

36. In any event, the United States is not asking the Arbitrator to take into account the USDOC's preliminary determination in the CVD section 129 proceeding. For the purposes of the analysis of a counterfactual in this arbitration, the United States continues to suggest a very

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<sup>42</sup> See U.S. Written Submission, paras. 30, 113, 115.

<sup>43</sup> Korea's Responses to the Arbitrator's Advance Questions, para. 67.

<sup>44</sup> See *US – 1916 Act (EC) (Article 22.6 – US)*, para. 6.10.

<sup>45</sup> Korea's Responses to the Arbitrator's Advance Questions, para. 48.

<sup>46</sup> Korea's Responses to the Arbitrator's Advance Questions, para. 48.

conservative counterfactual wherein the weighted-average countervailing duty rate is reduced from 0.58 percent to zero percent.<sup>47</sup>

37. Finally, Korea’s proposed counterfactual is not reasonable because it assumes that the United States must do more in implementation than the United States is obligated to do under the WTO agreements. Korea relies on the arbitrator’s decision in *US – Gambling (Article 22.6 – US)*, but Korea misunderstands that decision.<sup>48</sup> The arbitrator in that dispute concluded that “Antigua’s counterfactual is not reasonable” because, *inter alia*, “the United States may have had a range of WTO-consistent means at its disposal in order to implement the recommendations and rulings in [that] dispute, not limited to a complete opening of its remote gambling and betting services market.”<sup>49</sup> The arbitrator found that the DSB recommendations in that dispute “did not necessarily require [the United States] to ‘withdraw’ the measures by removing entirely the restrictions it maintained on remote gambling and betting services.”<sup>50</sup> Likewise, here, the DSB’s recommendations do not necessarily require the United States to terminate the antidumping and countervailing duty measures on LRWs from Korea. Korea’s proposed counterfactual is not reasonable because it assumes termination of the measures, which goes beyond what the United States is obligated to do under the WTO Agreement.

38. For these reasons, the counterfactual proposed by the United States – modification of the U.S. antidumping and countervailing duty measures on LRWs from Korea – is reasonable and plausible. The counterfactual Korea proposes – termination of the measures – is not.

**C. An Imperfect Substitutes Static Partial Equilibrium Model Is the Correct Analytical Tool To Use in this Situation; It Is Not Reasonable To Use a Perfect Substitutes Static Partial Equilibrium Model**

39. In addition to proposing a counterfactual that is not reasonable or plausible, Korea also proposes that the Arbitrator use an economic model that is not at all suitable for determining the level of nullification or impairment in this situation. Once again, Korea’s arguments confuse more than clarify the issues before the Arbitrator.

40. The United States has demonstrated why it is reasonable to use an Armington-based, imperfect substitutes static partial equilibrium model here, and why the perfect substitutes static partial equilibrium model proposed by Korea is not reasonable.<sup>51</sup> Korea’s economic model is premised on two assumptions that simply are contrary to the evidence before the Arbitrator: (1) that the United States and Korea are the only two countries that produce and sell LRWs in the U.S. market, and (2) that there is perfect substitution between LRWs imported from Korea and

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<sup>47</sup> See U.S. Written Submission, para. 30.

<sup>48</sup> See Korea’s Responses to the Arbitrator’s Advance Questions, para. 17.

<sup>49</sup> *US – Gambling (Article 22.6 – US)*, para. 3.49.

<sup>50</sup> *US – Gambling (Article 22.6 – US)*, para. 3.45.

<sup>51</sup> See U.S. Written Submission, paras. 58-67.

U.S. LRWs and, implicitly, no substitution at all between imports from Korea and non-subject imports.

41. The evidence before the Arbitrator establishes that the United States and Korea are not the only two countries that produce and sell LRWs in the U.S. market; and evidence further establishes that LRWs from Korea, the United States, and third countries are imperfect substitutes.<sup>52</sup> Korea itself even agrees that “there is at least a moderately high degree of substitutability among domestic and imported LRWs.”<sup>53</sup> That was precisely the conclusion of the USITC,<sup>54</sup> when it found that U.S.-produced LRWs and imported LRWs are imperfect substitutes and the elasticity of substitution between them “is likely to be in the range of 3 to 5.”<sup>55</sup>

42. Korea has given the Arbitrator no reason to use an economic model that assumes perfect substitution when the Arbitrator has before it an economic model that correctly assumes imperfect substitution, which accords with the evidence on the record of this arbitration. In response to questions from the Arbitrator, the United States has addressed Korea’s criticisms of the Armington-based, imperfect substitutes static partial equilibrium model that the United States has proposed, and has demonstrated that Korea’s criticisms are unfounded and disconnected from the issues before the Arbitrator.<sup>56</sup>

43. In Korea’s responses to the Arbitrator’s advance questions, Korea argues that “the partial equilibrium model remains the more reasonable model,”<sup>57</sup> and, “[c]ompared to the small level of deviation from the assumptions made in the partial equilibrium model, the assumptions upon which the Armington model relies are much more extreme.” Korea also asserts that “greater flexibility for using the elasticity of substitution is not the decisive factor to determine which is a more appropriate economic model between the static partial equilibrium and the Armington specification.”<sup>58</sup>

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<sup>52</sup> See U.S. Written Submission, paras. 59-61.

<sup>53</sup> Korea’s Responses to the Arbitrator’s Advance Questions, para. 85.

<sup>54</sup> See USITC LRWs 201 Report, pp. 81 and V-9 (Exhibit KOR-25) (emphasis added). The USITC made similar findings concerning the substitutability of U.S.-produced LRWs and imported LRWs in other investigations. See, e.g., Large Residential Washers from China, Investigation No. 731-TA-1306 (Final), USITC Publication 4666 (January 2017), pp. 19 and II-24-II-25 (Exhibit KOR-18); *Certain Large Residential Washers from Korea and Mexico*, Inv. Nos. 701-TA-488 and 731-TA-1199-1200 (Final), USITC Pub. 4378 (Feb. 2013), pp. 16, 23-26, and II-22 (available on the Internet at [https://www.usitc.gov/publications/701\\_731/pub4378.pdf](https://www.usitc.gov/publications/701_731/pub4378.pdf)).

<sup>55</sup> USITC LRWs 201 Report, p. V-19 (Exhibit KOR-25).

<sup>56</sup> See U.S. Responses to the Arbitrator’s Advance Questions, paras. 76-85, 90-98.

<sup>57</sup> Korea’s Responses to the Arbitrator’s Advance Questions, para. 85.

<sup>58</sup> Korea’s Responses to the Arbitrator’s Advance Questions, para. 83.

44. Korea’s arguments are nonsense. The economic model proposed by the United States is – just like Korea’s own model – a static<sup>59</sup> partial equilibrium<sup>60</sup> model. The U.S. model states the assumptions upon which it rests,<sup>61</sup> and does not incorporate any of the purportedly “very exceptional Armington specifications” about which Korea complains.<sup>62</sup> Rather, the U.S. model simply is a “basic industry-specific model”<sup>63</sup> that assumes “three varieties of products in the industry that are imperfect substitutes in demand.”<sup>64</sup> Unlike Korea’s model, though, the assumptions on which the U.S. imperfect substitutes static partial equilibrium model rests are consistent with the evidence before the Arbitrator.

45. And finally, we recall that the model proposed by the United States was placed before the Arbitrator by Korea.<sup>65</sup> In its methodology paper, Korea described the benefits of using a static partial equilibrium model, noting, *inter alia*, that “[b]y disaggregating economic effects, a partial equilibrium model is adopted to show short and mid-term economic impacts caused by complicated market mechanisms.”<sup>66</sup> As support for this proposition, Korea cited two sources, one of which is the paper by Hallren and Riker that describes the imperfect substitutes static partial equilibrium model now proposed by the United States.<sup>67</sup> Korea has provided to the Arbitrator the best tool to use for economic analysis in this arbitration – the Hallren and Riker imperfect substitutes static partial equilibrium model – but Korea now asks the Arbitrator not to use that tool.

46. Korea has given the Arbitrator no reason not to use the U.S. imperfect substitutes static partial equilibrium model. The U.S. model is the correct economic tool with which to analyze the U.S. LRWs market and estimate the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea after the expiration of the RPT. Korea’s model rests on incorrect assumptions that are contrary to the evidence before the Arbitrator, and Korea’s model grossly overstates the level of nullification or impairment. Accordingly, Korea’s perfect substitutes static partial equilibrium model is unreasonable and would result in a level of suspension contrary to the DSU.

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<sup>59</sup> See R. Hallren and D. Riker, “An Introduction to Partial Equilibrium Modeling of Trade Policy,” Economic Working Paper Series (Working Paper 2017-07-B), U.S. International Trade Commission (July 2017) (“Hallren and Riker (2017)”), p. 11 (Exhibit KOR-15).

<sup>60</sup> See Hallren and Riker (2017), p. 2 (Exhibit KOR-15).

<sup>61</sup> See Hallren and Riker (2017), pp. 3-13 (Exhibit KOR-15).

<sup>62</sup> Korea’s Responses to the Arbitrator’s Advance Questions, para. 82.

<sup>63</sup> Hallren and Riker (2017), p. 3 (Exhibit KOR-15).

<sup>64</sup> Hallren and Riker (2017), p. 4 (Exhibit KOR-15).

<sup>65</sup> See Korea’s Methodology Paper, para. 29, footnote 24, and Exhibit KOR-15.

<sup>66</sup> Korea’s Methodology Paper, para. 29.

<sup>67</sup> See Korea’s Methodology Paper, para. 29, footnote 24, and Exhibit KOR-15.



**D. Korea’s Request To Suspend Concessions for Products Other than LRWs on the Basis of a Formula Is Conceptually Flawed and Contrary to the DSU**

47. The United States has demonstrated that Korea’s proposed level of suspension for products other than LRWs is contrary to the DSU.<sup>68</sup> The problem is not that Korea proposes a formula. The problem is that the formula Korea proposes is purely speculative and not based on sound economic theory and analysis.

48. If a Member proposes to suspend concessions on the basis of a formula, that formula must be shown to fit the facts of the situation. The formula that Korea proposes to use suffers from the same conceptual flaws and data input problems whether it is applied to LRWs or imports other than LRWs. As the United States has shown, the formula Korea proposes to apply grossly overstates the level of nullification or impairment resulting from the maintenance of the WTO-inconsistent aspects of the U.S. antidumping and countervailing duty measures on LRWs from Korea after the expiration of the RPT. The same would be true if that formula were applied for products other than LRWs.

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

50. The United States also has identified another operational challenge associated with Korea’s proposed approach, namely that Korea evidently intends to apply its formula indiscriminately to imports that may be affected by the USDOC’s use of a differential pricing analysis and zeroing, as well as to imports unaffected by any WTO-inconsistent measures.<sup>69</sup> Korea’s proposed approach therefore necessarily overstates the level of nullification or impairment.

51. The United States has met its burden to make a *prima facie* case in this arbitration that the level of suspension of concessions requested by Korea is not equivalent to the level of nullification or impairment. Accordingly, it is for Korea “to submit arguments and evidence

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<sup>68</sup> See U.S. Written Submission, paras. 130-145; U.S. Responses to the Arbitrator’s Advance Questions, paras. 146-147, 150-154; U.S. Responses to the Arbitrator’s Additional Advance Questions, paras. 2-13.

<sup>69</sup> See Responses of the United States of America to the Additional Advance Questions from the Arbitrator (May 25, 2018) (“U.S. Responses to the Arbitrator’s Additional Advance Questions”), paras. 5-8.

sufficient to rebut” the *prima facie* case that the United States has made.<sup>70</sup> The United States recognizes that, if the Arbitrator considers that Korea’s proposed level of suspension of concessions is not equivalent to the level of nullification or impairment, the Arbitrator might feel “called upon to go further” and “estimate the level of suspension [it] consider[s] to be equivalent to the impairment suffered.”<sup>71</sup> However, it is primarily Korea’s duty to present evidence and argument supporting its estimation of the appropriate level of suspension.<sup>72</sup> If Korea fails in its duty, it would not be appropriate for the Arbitrator to make Korea’s case for it.<sup>73</sup>

## **E. Conclusion**

52. For the reasons given in the U.S. written submission, the U.S. responses to the Arbitrator’s advance questions, and in this oral statement, the United States respectfully requests that the Arbitrator find that the level of suspension of concessions requested by Korea is in excess of the appropriate level of nullification or impairment.

53. The U.S. delegation would welcome the opportunity to respond to additional questions from the Arbitrator.

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<sup>70</sup> See *EC – Hormones (US) (Article 22.6 – EC)*, para. 9; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 9.

<sup>71</sup> *EC – Hormones (US) (Article 22.6 – EC)*, para. 12; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 12.

<sup>72</sup> See *EC – Hormones (US) (Article 22.6 – EC)*, para. 11; *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 11.

<sup>73</sup> See, e.g. *Japan – Agricultural Products II (AB)*, para. 129.