

***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 ADDITIONAL QUESTIONS FROM THE ARBITRATOR FOLLOWING THE  
SUBSTANTIVE MEETING OF THE ARBITRATOR WITH THE PARTIES**

**September 3, 2018**

## TABLE OF REPORTS AND AWARDS

<b>Short Form</b>	<b>Full Citation</b>
<i>US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS217/ARB/EEC, 31 August 2004

## INTRODUCTION

1. In this document, the United States comments on Korea's responses to the Arbitrator's additional 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.

**94. To both parties: The arbitrators in *US – Offset Act (Byrd Amendment) (Article 22.6 – US)* adopted a formula in which the calculation of the level of suspension depends, inter alia, upon a coefficient.<sup>1</sup> With respect to the use of a formula and coefficient to possibly calculate nullification or impairment for non-LRW products, please comment on the following issues:**

- a. Deriving a formula similar to *US – Offset Act* based on either the perfect substitutes model or the Armington model to capture the trade effect of any future anti-dumping measure calculated on the basis of the W-T comparison methodology;**

### **Comment:**

2. The United States agrees with Korea that “the distinctions between the current arbitration and *US – Offset Act* would make it inappropriate to employ a coefficient in calculating the level of nullification or impairment as applicable for non-LRW products.”<sup>2</sup> Korea makes a number of cogent arguments in support of this conclusion in paragraphs 1 through 5 of its response to this question.

3. Korea goes on, however, to offer additional comments “should the Arbitrator decide to use a formula and coefficient similar to those used in *US – Offset Act*”.<sup>3</sup> Korea's additional comments are confusing, and ultimately they appear to present arguments against Korea's own original proposed approach for the calculation of the level of nullification or impairment for products other than large residential washers (“non-LRW products”).

4. After discussing the approach of the arbitrator in *US – Offset Act*, Korea posits that it would be necessary to derive two factors, which Korea describes. Korea concludes that, “should the Arbitrator decide to use a formula similar to *US – Offset Act* in which a coefficient is used, the following equation should be applied for products where the [U.S. Department of Commerce (“USDOC”)] is found to have imposed anti-dumping duties using the W-T method:  $[(total\ value\ of\ U.S.\ imports) * (share\ of\ Korean\ imports) * (margin\ of\ duty)] * [(supply\ elasticity) + (demand\ elasticity)]$ ”.<sup>4</sup> Korea expresses the following concerns about this coefficient-based formula:

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<sup>1</sup> Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, para. 3.80.

<sup>2</sup> Korea's Replies to Additional Questions from the Arbitrator After the Meeting with the Parties (August 29, 2018) (“Korea's Responses to Additional Post-Meeting Questions”), para. 5.

<sup>3</sup> Korea's Responses to Additional Post-Meeting Questions, para. 6.

<sup>4</sup> Korea's Responses to Additional Post-Meeting Questions, para. 13.

While the above formula presents the most appropriate option to approach the level of nullification or impairment caused by the USDOC’s continued use of the WTO-inconsistent W-T method through the use of a coefficient, Korea remains concerned whether a coefficient approach would meet the equivalence requirement under Article 22.4 of the DSU. The coefficient approach attempts to finalize and quantify the trade effect of the measure, regardless of the individual product. In the above formula, for example, a fixed coefficient based on the supply elasticity and demand elasticity (or the substitution elasticity) would have to be calculated when the value of these elasticities are not yet known, as it would not be possible to know in advance for which products the USDOC would apply the WTO-inconsistent method. Thus, applying a coefficient approach would cause distortions that do not reflect the actual situation of the product at issue.<sup>5</sup>

5. Once again, the formula in the preceding paragraph is that which Korea posits would be used for the coefficient-based approach referenced in the question. That formula, however, is identical to the formula presented in paragraph 49 of Korea’s methodology paper, which Korea originally proposed should be used to determine the level of nullification or impairment for non-LRW products (though, without a growth factor). Korea described its own proposed formula in its methodology paper as follows:

The formula for calculating the level of nullification or impairment resulting from “as such” violations in proceedings initiated subsequent to the expiration of the RPT is as follows:

$$\begin{aligned} & \text{Level of nullification or impairment at the end of RPT} = \\ & (\text{price changes by terminating the application of the second sentence of} \\ & \text{Article 2.4.2}) \times \\ & (\text{the import share of } \underline{\text{product}} \text{ from Korea one year before the year of} \\ & \text{non-compliance}) \times \\ & (\text{price elasticity of demand} + \text{price elasticity of supply}) \times \\ & (\text{the entire import value of } \underline{\text{product}} \text{ in the relevant reference period}) \times \\ & (1 + \text{growth rate})^t \\ & ({}^t = \text{number of years from the year of USDOC’s investigation/review} \\ & \text{based on non-compliance})^6 \end{aligned}$$

6. The table below matches up the elements of the formulas:

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<sup>5</sup> Korea’s Responses to Additional Post-Meeting Questions, para. 14.

<sup>6</sup> Methodology Paper of the Republic of Korea (February 23, 2018), para. 49.

Korea’s Coefficient-Based Formula	Korea’s Original Formula for non-LRWs
[(total value of U.S. imports)	(the entire import value of <u>product</u> in the relevant reference period) x
*(share of Korean imports)	(the import share of <u>product</u> from Korea one year before the year of non-compliance) x
*(margin of duty)]	(price changes by terminating the application of the second sentence of Article 2.4.2) x
*[(supply elasticity)+(demand elasticity)]	(price elasticity of demand + price elasticity of supply) x
	(1 + growth rate) <sup>t</sup>

7. Thus, Korea has proposed its own original formula for use as the coefficient-based formula, and then Korea has offered criticism of its own proposed approach. In particular, like Korea, the United States is “concerned whether a coefficient approach would meet the equivalence requirement under Article 22.4 of the DSU.”<sup>7</sup> The points Korea makes to demonstrate the shortcomings of a coefficient approach are well taken.<sup>8</sup> Of course, those points apply with equal force to Korea’s own proposed formula approach, which likewise “attempts to finalize and quantify the trade effect of the measure, regardless of the individual product”,<sup>9</sup> without regard for the individual characteristics of the market of the individual product, and without regard for whether the assumptions underlying the model or formula hold for the particular product. Korea’s proposed approach, too, would not meet the requirements of Article 22.4 of the DSU.

8. The United States also notes Korea’s discussion of the use of substitution elasticity versus supply and demand elasticities.<sup>10</sup> Korea indicates that, “[w]here the substitutability among products is not as high, Korea recognizes that it may be appropriate to apply substitution elasticity as a factor in the formula. However, even in these cases, the substitution elasticity should be used selectively *in addition to* the demand and supply elasticities.”<sup>11</sup> Korea does not explain how substitution elasticity would be used “in addition to the demand and supply elasticities”, nor does Korea explain how one would use substitution elasticity “selectively” (*i.e.*, what criteria would be applied to determine when to use substitution elasticity?). Korea’s comments, in this regard, confuse more than clarify the matter before the Arbitrator. Additionally, Korea repeats its flawed argument that, “in the case of LRWs, Korea has explained

<sup>7</sup> Korea’s Responses to Additional Post-Meeting Questions, para. 14.

<sup>8</sup> See Korea’s Responses to Additional Post-Meeting Questions, para. 14.

<sup>9</sup> Korea’s Responses to Additional Post-Meeting Questions, para. 14.

<sup>10</sup> See Korea’s Responses to Additional Post-Meeting Questions, para. 12.

<sup>11</sup> Korea’s Responses to Additional Post-Meeting Questions, para. 12 (emphasis in original).

that the level of substitutability is high enough to assume perfect substitutability.”<sup>12</sup> The United States has demonstrated that Korea’s argument in this arbitration is contrary to the findings of the U.S. International Trade Commission (“USITC”) and the position taken previously by Korean producers of LRWs.<sup>13</sup>

9. The U.S. response to this question explains why the approach referenced in the question – using a coefficient or coefficients – is not feasible because it cannot result in a level of suspension that is consistent with the DSU.<sup>14</sup> Furthermore, the United States raised concerns about the Arbitrator devising its own formula or other approach for calculating the level of nullification or impairment.<sup>15</sup> The United States refers the Arbitrator to the U.S. response.

**b. Using a single (as in *US – Offset Act*) vs. multiple (e.g. HS-Chapter specific) coefficient(s) to determine the level of suspension of concessions on non-LRW products;**

**Comment:**

10. The United States agrees with Korea that the use of a coefficient is not compatible with the economic models proposed by either party, nor would it be appropriate in calculating a level of suspension that is equivalent to the level of nullification or impairment in this arbitration.<sup>16</sup>

11. The United States does not agree with Korea that, “if the Arbitrator would adopt a formula that incorporates a coefficient,” using multiple coefficients “could better take into account the individual characteristics of the various products.”<sup>17</sup> The question contemplates multiple, “e.g. HS-Chapter specific,” coefficients. HS chapters are extensive and can include a broad range of products. It would not be possible to determine coefficients for entire HS chapters that could be used to calculate accurately the level of nullification or impairment for all of the different products in a given chapter. The use of multiple coefficients – versus using a single coefficient – would not increase the accuracy of the calculation of the level of nullification or impairment.

**c. Use the following data-sources to determine the magnitude of the coefficient(s):**

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<sup>12</sup> Korea’s Responses to Additional Post-Meeting Questions, para. 12.

<sup>13</sup> See, e.g., Written Submission of the United States of America (March 23, 2018), paras. 60-61, 110; Responses of the United States of America to the Advance Questions from the Arbitrator (May 14, 2018), response to question 25, paras. 90-98.

<sup>14</sup> See Responses of the United States of America to Additional Questions from the Arbitrator following the Substantive Meeting of the Arbitrator with the Parties (August 29, 2018) (“U.S. Responses to Additional Post-Meeting Questions”), paras. 1-2.

<sup>15</sup> See U.S. Responses to Additional Post-Meeting Questions, para. 3.

<sup>16</sup> See Korea’s Responses to Additional Post-Meeting Questions, para. 16.

<sup>17</sup> Korea’s Responses to Additional Post-Meeting Questions, para. 17.

- i. USITC Dataweb 2017 trade data on the Korean share of total United States' imports<sup>18</sup>;**

**Comment:**

12. The United States has no comment on Korea's response to this sub-question.

- ii. the Global Trade Analysis Project 2014 database for the share of imports in demand (domestic and imported) in the United States<sup>19</sup>;**

**Comment:**

13. For the reasons given in the U.S. response to this sub-question, the United States considers that it would not be appropriate to use the Global Trade Analysis Project ("GTAP") 2014 database for the share of imports of total demand (domestic and imported) in the United States.<sup>20</sup>

- iii. Hillberry and Hummels (2013) for the size of the supply elasticity<sup>21</sup>;**  
**iv. Reimer and Hertel (2004) for the size of demand elasticities<sup>22</sup>; and**  
**v. Soderbery (2015) for the size of substitution elasticities.<sup>23</sup>**  
**vi. In addition, the parties are invited to indicate alternative sources of data that, in their view, are more precise or have been updated more recently.**

**Comment:**

14. For the reasons given in the U.S. response to these sub-questions, the United States considers that elasticities estimated by the USITC are preferable to elasticities presented in the sources referenced in the sub-questions, and the United States reiterates its concerns about relying on elasticities from those sources, which are expressed in the U.S. response.<sup>24</sup>

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<sup>18</sup> Available at: [dataweb.usitc.gov](http://dataweb.usitc.gov).

<sup>19</sup> Available at: [www.gtap.org](http://www.gtap.org).

<sup>20</sup> See U.S. Responses to Additional Post-Meeting Questions, para. 5.

<sup>21</sup> Hillberry, Russell & Hummels, David (2013). "Trade Elasticity Parameters for a Computable General Equilibrium Model", Handbook of Computable General Equilibrium Modeling, Elsevier.

<sup>22</sup> J. Reimer and T.W. Hertel (2004). "International Cross-Section Estimates of Demand for US in the GTAP Model", GTAP Technical Paper No. 23. Center for Global Trade Analysis, West Lafayette, Indiana.

<sup>23</sup> Soderbery, Anson, "Estimating Import Supply and Demand Elasticities: Analysis and Implications", Journal of International Economics, 96(1), May 2015: pp 1-17.

<sup>24</sup> See U.S. Responses to Additional Post-Meeting Questions, paras. 6-8.

15. In its response to sub-question v., Korea likewise takes the position that the substitution elasticities presented by Soderbery would not be an appropriate source. Korea goes on, though, to discuss briefly an article by Feenstra et al. (2018).<sup>25</sup> The article Korea discusses, which Korea has provided to the Arbitrator as Exhibit KOR-69, is not responsive to sub-question v. or vi. The Feenstra et al. piece does not constitute an alternative source of data. The United States does not see how it is of assistance to the Arbitrator.

**95. To both parties: In 2017, what was the percentage share of exports from Korea to the United States made by Korean firms, assigned anti-dumping duty rates calculated on a W-T basis, in terms of the total amount of exports from Korea to the United States, subject to anti-dumping orders? Please provide the numbers used to arrive at this figure.**

**Comment:**

16. As explained in the U.S. response to this question, the information necessary to respond to the question does not yet exist, because antidumping duty rates have not yet been assigned to all exports from Korea to the United States for all months of the year 2017. Additionally, as further explained in the U.S. response, even if such antidumping duty rates had been assigned, the information requested in the question is not information that the USDOC or any other U.S. government agency collects in the ordinary course of business. Such information is not necessary for the purpose of administering the U.S. antidumping law, and administrative reviews for different periods are treated as separate segments of an antidumping proceeding, so the USDOC does not combine data from different administrative reviews periods as contemplated by the question.<sup>26</sup>

17. In its response to this question, Korea implicitly confirms that the information necessary to respond to the question does not exist. Rather than providing the information requested in the Arbitrator’s question, Korea proposes to provide alternative information. Specifically, Korea proposes “using the total amount of all of the identified firms’ exports subject to anti-dumping duty orders, compared to the total amount of exports subject to anti-dumping duty orders exported by those firms that were subject to margins calculated on a W-T basis.”<sup>27</sup> Korea’s proposed alternative would not be responsive to the question and, if used a proxy for the information requested, would grossly overstate the percentage referenced in the question.

18. Rather than providing “the percentage share of exports from Korea to the United States made by Korean firms, assigned anti-dumping duty rates calculated on a W-T basis, in terms of the total amount of exports from Korea to the United States, subject to anti-dumping orders” (emphasis added), for which the question asks, Korea proposes to provide the percentage share of exports of a small number of Korean companies that were mandatory respondents in

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<sup>25</sup> See Korea’s Responses to Additional Post-Meeting Questions, paras. 24-25.

<sup>26</sup> See U.S. Responses to Additional Post-Meeting Questions, paras. 9-11.

<sup>27</sup> Korea’s Responses to Additional Post-Meeting Questions, para. 26 (emphasis added).



proceedings for which the USDOC published preliminary or final determinations during 2017.<sup>28</sup> Korea’s proposed alternative approach is problematic. Korea’s proposed approach would not capture all exports from Korea to the United States in 2017 that were subject to antidumping measures. Nor would Korea’s approach reflect the percentage of the total value of Korean exports subject to antidumping measures that were subject to antidumping rates determined using the W-T methodology. Rather, by substantially reducing the denominator (*i.e.*, by using the total value of exports of mandatory respondents instead of the total value of exports from Korea subject to antidumping measures), Korea’s approach would greatly increase the percentage calculated. Ultimately, Korea’s proposed alternative approach simply bears no relationship whatsoever to the information requested in the Arbitrator’s question.

19. Additionally, while Korea expresses optimism that it could get permission from Korean interested parties to access and use confidential information that would be needed to calculate the alternative percentage it proposes,<sup>29</sup> the United States explained in comments on Korea’s responses to the Arbitrator’s first set of questions following the substantive meeting why there is no basis to assume that Korea would receive such cooperation from interested parties.<sup>30</sup>

**96. To both parties: In 2017, what was the percentage of Korean firms that exported products, subject to anti-dumping duty rates calculated on a W-T basis, into the United States, in terms of the total number of Korean firms subject to United States’ anti-dumping orders? Please provide the numbers used to arrive at this figure.**

**Comment:**

20. As the United States has explained, it is not possible to provide the information requested in this question.<sup>31</sup>

21. Korea implicitly confirms the U.S. position in its response to this question. Just as it proposes to do in response to question 95, Korea, in its response to this question, provides to the Arbitrator information other than that which is requested. In doing so, Korea has provided the Arbitrator a percentage that is grossly overstated and of no use at all.

22. The question asks: “In 2017, what was the percentage of Korean firms that exported products, subject to anti-dumping duty rates calculated on a W-T basis, into the United States, in terms of the total number of Korean firms subject to United States’ anti-dumping orders?” Korea explains that, based on determinations that the USDOC published during 2017, Korea has calculated the percentage of mandatory respondents for which antidumping duty rates were calculated on a W-T basis (either preliminary or final determinations), in terms of the total

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<sup>28</sup> See Korea’s Responses to Additional Post-Meeting Questions, paras. 29-30.

<sup>29</sup> See Korea’s Responses to Additional Post-Meeting Questions, paras. 27-28.

<sup>30</sup> See 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), paras. 19, 99-100, 104, 106-108.

<sup>31</sup> See U.S. Responses to Additional Post-Meeting Questions, paras. 12-13.

number of mandatory respondents identified in the selection of USDOC determinations. Korea’s response is problematic for numerous reasons.

23. First, the information Korea has provided does not cover all exports from Korea to the United States for 2017 that were subject to antidumping measures. Indeed, only one of the determinations identified by Korea even covers – partly – any exports from Korea to the United States entered during 2017.<sup>32</sup> The remaining determinations in administrative reviews were for periods prior to 2017.

24. Second, the determinations of sales at less than fair value, *i.e.*, determinations in original investigations, do not actually relate to the assessment, *i.e.*, collection of antidumping duties. The determination of any antidumping duties to be assessed/collected with regard to those products will occur sometime in the future if and only if both the USDOC and the USITC make affirmative final determinations, which result in the imposition of antidumping measures.

25. Third, Korea has relied on the preliminary results of administrative reviews. Margins of dumping calculated in preliminary results, including the comparison method used to calculate those margins, are not final and are subject to change in the final results of review based on comments received from interested parties.

26. Finally, as with its proposed alternative approach to question 95, Korea grossly overstates the percentage calculated, because Korea divides the number of mandatory respondents for which antidumping duty rates were calculated on a W-T basis by the total number of mandatory respondents, rather than by the total number of Korean companies subject to U.S. antidumping measures.<sup>33</sup> Thus, the percentage Korea provided bears no relationship whatsoever to the information requested in the Arbitrator’s question.

27. For these reasons, the Arbitrator should not rely on the information Korea has provided in response to question 96.

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<sup>32</sup> See Exhibit KOR-70, p. 1 (item No. 10).

<sup>33</sup> See Exhibit KOR-70, p. 3.