

comparing the value of the index in December 2019 with its value in December 2018.⁴⁶⁵ When making this calculation, Korea shall use the latest version of this index published as of 30 November 2020. If the index changed by 5% in calendar year 2019, then Korea can impose a level of suspension of concessions or other obligations equivalent to USD 10.5 million, which is 5% more than the amount authorized from 1 December 2019 to 30 November 2020.

4.129. Accordingly, the level of suspension of concessions by Korea to the United States must not exceed in US dollars, the amount resulting from the yearly application of this formula.

5 OVERALL AWARD OF THE ARBITRATOR

5.1. For Korea's request pertaining to LRWs, based on the reasons set out in section 3 above, the Arbitrator determines that the level of nullification or impairment caused by the WTO-inconsistent anti-dumping and countervailing duty measures at the end of the RPT amounts to USD 74.40 million and USD 10.41 million, respectively. These amounts may be adjusted for inflation for the year 2018 and on an annual basis thereafter. We suggest that Korea notify the DSB every year of the adjustment to the level of suspension.

5.2. For Korea's request in relation to non-LRWs, based on the reasons set out above in section 4, we decide that Korea may apply the following formula to calculate the level of nullification or impairment on non-LRWs if and when the United States applies definitive duties to specific exporters of a given non-LRW, based on margins calculated under the W-T comparison methodology, as found to be WTO-inconsistent by the Panel and the Appellate Body in the underlying dispute:

$$NI_i = c_s * vimp_i * \frac{\Delta t_i}{1+t_i} \quad (6)$$

5.3. The inputs for the formula are defined as follows: NI_i is the level of nullification or impairment of the non-LRW i ; c_s is a coefficient depending on the market share of the complaining party and the demand, supply, and substitution elasticities of the product under consideration; $vimp_i$ is the value of imports from Korean enterprises (inclusive of cost, insurance and freight but exclusive of duties) subject to WTO inconsistent duties; Δt_i is the difference between the WTO-inconsistent duty rate and zero; and, t_i is the level of the WTO-inconsistent duty rate. Δt_i and t_i are ad valorem duty rates, *not* measured in percentage terms. Finally, we suggest that Korea notify the DSB of the level of suspension that it calculates and of any adjustment on this level of suspension thereafter "for each year during the first quarter of the following year".⁴⁶⁶

6 CONCLUDING OBSERVATIONS

6.1. This is the first arbitration that was tasked with determining the level of nullification or impairment caused by essentially the same measures "as such" and "as applied". In view of these particular circumstances, the Arbitrator has striven to use a similar approach for both, to the extent possible. However, certain adjustments were unavoidable. We wish to briefly highlight the main similarities and differences characterizing the approaches adopted for LRWs and non-LRWs, in particular with respect to the counterfactuals, the economic model, the data employed, and the reference period. We shall then conclude with a few general remarks.

6.2. Our selection of the counterfactuals was driven by the notion of benefits accruing to Korea. Against this background, and for the reasons explained above, the proper counterfactual could not entail withdrawal of the orders. For the "as applied" measures, the appropriate counterfactual is a hypothetical scenario in which the USDOC would have relied on the normal comparison methodology in the first sentence of Article 2.4.2 of the Anti-Dumping Agreement for the determination of the anti-dumping duty. In principle, the same scenario could have been envisioned with respect to non-LRWs; however, uncertainties related to the availability of information in future anti-dumping investigations and administrative reviews obliged us to use the value of zero, as a proxy figure, to

⁴⁶⁵ The rate of inflation in calendar 2018 is to be calculated as follows: (Value of the producer price index for total manufacturing in December 2018 - Value of the producer price index for total manufacturing in December 2017)/ Value of the producer price index for total manufacturing in December 2017.

⁴⁶⁶ Korea's response to Arbitrator question No. 73, para. 59.

take the place of anti-dumping duty rates based on W-T margins in future anti-dumping orders on non-LRWs.

6.3. The Arbitrator then determined that it would be possible to apply a similar model – the Armington model – to calculate the level of nullification or impairment for LRWs and non-LRWs. This model is flexible, because the elasticity of substitution can vary depending on the nature of the product and the market. In contrast, the perfect substitutes partial equilibrium model assumes that the elasticity of substitution is infinite, and we had no evidence, in the LRW context, and necessarily no means to obtain evidence, in the non-LRW context, to make that assumption.

6.4. For LRWs, the reasons to use the Armington model are, *inter alia*, that LRWs are differentiated products and evidence provided by the parties support a finite value of 4 for the elasticity of substitution of LRWs. In the case of non-LRWs, the Armington model was deemed flexible to accommodate the different types of products and market settings where "as such" violations may occur. This flexibility arises from allowing the elasticity of substitution to vary depending on the nature of the non-LRW, instead of assuming, without any evidence, that it is infinite, as would be the case in the perfect substitutes model. Consequently, the size of the coefficient also varies, depending on the product and market under consideration. This approach ensures that the suspension of concessions will be equivalent to the level of nullification or impairment.

6.5. The Armington model requires data inputs such as the import share and the size of demand, supply, and substitution elasticities. For LRWs the choice of each of these variables and parameters was made by the Arbitrator based on extensive submissions, responses to questions, and comments on each other's responses by the parties. This type of exchange was not possible for the not-yet-identified non-LRWs. Consequently, a procedure was required to reduce ambiguity in sources of data and calculations as much as possible. It is for these reasons that we have adopted the use of a formula for non-LRWs using the data sources and methodology described in section 4.4.3.⁴⁶⁷

6.6. While there is no difference in the variables used in the calculations for LRWs and non-LRWs the sources of data used for these variables differ, in particular with respect to (i) the value of imports, and (ii) the import share or size of the market.⁴⁶⁸ First, the value of imports is at HS 10-digit level for LRWs, whereas it is either firm-level or product-level data for non-LRWs. The reason for this difference is that in LRWs, the evidence submitted by the parties and the ensuing debate between them has allowed the Arbitrator to make the appropriate determinations about the tariff lines concerned⁴⁶⁹, whereas this is not the case for the not-yet-identified non-LRWs. Second, the average import shares for the 98 HS chapters are employed for non-LRWs, whereas precise information on the value of sales of LRWs in the United States is used (i.e. AHAM data). The reason for this difference is that no uniform source of data can be prescribed by the Arbitrator that could provide the same level of precision for yet unidentified products.

6.7. The reference period to determine the value of imports that serve as input into the model differs for LRWs and non-LRWs. For LRWs the market share in 2011, prior to the imposition of the measure, is employed and adjusted based on the economic model to arrive at a hypothetical market share in 2017 representing a situation in which the WTO-inconsistent duties are in place. The level of nullification or impairment is calculated in a counterfactual where the WTO-inconsistent duties are removed at the end of the RPT in 2017. For non-LRWs "old cases", where the reference period is also the end of the RPT, we cannot adopt the same approach as for LRWs, because the information to undertake this analysis was not provided by Korea and the use of hypothetical import values for non-LRWs would be impractical and difficult to implement. For non-LRWs "new cases", the reference period is the calendar year prior to the application of the inconsistent anti-dumping duty measure.

⁴⁶⁷ More technically, in the case of LRWs, the Armington model is solved exactly: the system of non-linear equations defining the Armington model is solved to determine the impact of changes in duties on the value of imports. For non-LRWs, the system of equations defining the Armington model is first written in relative changes to arrive at one equation (i.e. the formula), which can be employed to determine the impact of changes in duties on the value of imports.

⁴⁶⁸ For LRWs data on the value of imports and the size of the market are used, whereas for non-LRWs data on the value of imports and the import share are employed. However, combining the value of imports with the import share generates the size of the market. Hence, the variables employed for LRWs and non-LRWs are equivalent.

⁴⁶⁹ See Section 3.3.4.6 above.

6.8. Notwithstanding the differences highlighted above, the use of the Armington model for both LRWs and non-LRWs will result in a similar approach to calculating the level of nullification or impairment. In addition, both approaches "create an opportunity to ensure full cooperation from the parties and, hence, more precise and credible results".⁴⁷⁰ Moreover, with a view to enhancing transparency, we suggested that Korea should notify the DSB every year of the amount of suspension resulting from the implementation of our Award.

6.9. Finally, we note that, should the United States consider that the application of the suspension by Korea exceeds the level of nullification or impairment sustained by Korea, the United States may have recourse to the appropriate dispute settlement procedures.⁴⁷¹

⁴⁷⁰ Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (EC)* (Article 22.6 – US), para. 3.79.

⁴⁷¹ Decisions by the Arbitrators, *EC – Hormones (US)* (Article 22.6 – EC), para. 38; *US – Offset Act (Byrd Amendment) (EC)* (Article 22.6 – US), para. 4.27; *US – 1916 Act (EC)* (Article 22.6 – US), para. 9.2.