

7.353. We concluded above that Korea has not established the factual basis of its claim that the USDOC discriminated against the Korean respondents by denying them an opportunity to provide rebuttal facts while providing that opportunity to the interested parties in the Turkish investigation.⁴⁵¹ Considering that Korea's Article I:1 claim rests on the same factual basis, we conclude that Korea has also failed to establish the factual basis of its claim under Article I:1 of the GATT 1994. Therefore, we reject Korea's claim under Article I:1 of the GATT 1994.⁴⁵²

7.11.5 Conclusion

7.354. For the foregoing reasons, we conclude that Korea's claims that the USDOC acted inconsistently with Article I:1 of the GATT 1994 because: (a) the underlying investigation was the only one in which the USDOC required questionnaire responses and on-site verification of companies that were not named as respondents, or identified as affiliates; and (b) the questionnaires issued to the Korean respondents were far more extensive than the questionnaires issued to the respondents in any of the other OCTG investigations, although the product at issue as well as the factors that the USDOC considered in reaching its final determination were largely identical, are not within our terms of reference.

7.355. We also conclude that Korea has not established that the USDOC acted inconsistently with Article I:1 of the GATT 1994 by discriminating against the Korean respondents because it gave interested parties in the Turkish investigation an opportunity to comment on the Tenaris financial statements but denied such an opportunity to the Korean respondents in the underlying investigation.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude that the United States acted inconsistently with:

- a. the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because the USDOC did not determine CV profit of the Korean respondents based on actual data pertaining to their sales of the like product in the home market;
- b. Articles 2.2.2(i) and (iii) of the Anti-Dumping Agreement because the USDOC relied on an impermissibly narrow definition of the "same general category of products" in concluding it could not determine CV profit under Article 2.2.2(i) and in concluding it could not calculate the profit cap required by Article 2.2.2(iii);
- c. Article 2.2.2(iii) of the Anti-Dumping Agreement because the USDOC failed to calculate and apply a profit cap as required by that provision, and as a consequence acted inconsistently with Article 2.2 of the Anti-Dumping Agreement by failing to use a reasonable amount for profits in the construction of normal value for the Korean respondents.

8.2. For the reasons set forth in this Report, we conclude that Korea has failed to demonstrate that the United States acted inconsistently with:

- a. Article 2.2 of the Anti-Dumping Agreement "as such" and "as applied" in connection with the "viability test";

⁴⁵¹ See paras. 7.332-7.333 above.

⁴⁵² In this regard, we note that the Appellate Body in *EC – Fasteners (China)* stated that in determining whether there was a violation of Article I.1 of GATT 1994, the panel should have considered, as part of its legal analysis, whether and under what circumstances an anti-dumping measure that is inconsistent with the Anti-Dumping Agreement may be reviewed under Article I.1 of the GATT 1994 in the absence of a review under Article VI of the GATT 1994. (Appellate Body Report, *EC – Fasteners (China)*, para. 395). We have concluded that Korea has not established the factual basis of its claim under Article I:1 and thus do not find it necessary to conduct this legal analysis in this particular case.

- b. Article 2.3 of the Anti-Dumping Agreement in connection with the USDOC's construction of NEXTEEL's export price where it appeared to the USDOC that NEXTEEL's export price was unreliable because of association;
- c. Article 2.2.1.1 of the Anti-Dumping Agreement in connection with the USDOC's rejection, for the purpose of constructing the normal value, of the price at which NEXTEEL purchased steel coils from POSCO;
- d. Article 6.2 of the Anti-Dumping Agreement in connection with the absence of notification by the USDOC to the Korean respondents, until its final determination, that it had accepted the Tenaris financial statements on the record;
- e. Article 6.4 of the Anti-Dumping Agreement in connection with the absence of notification by the USDOC to the Korean respondents until its final determination that it had accepted the Tenaris financial statements on the record and that it was using these statements in determining CV profit;
- f. Article 6.9 of the Anti-Dumping Agreement in connection with the absence of disclosure as an essential fact of the USDOC's decision to accept the Tenaris financial statements on the record and its reliance on the Tenaris financial statements to determine CV profit;
- g. Article 6.10 of the Anti-Dumping Agreement in connection with the USDOC's conclusion that and explanation why it would be impracticable to examine all known exporters and why it was limiting its examination to two exporters;
- h. Article 6.10.2 of the Anti-Dumping Agreement in connection with the USDOC's conclusion that and explanation why it would be unduly burdensome to individually examine voluntary respondents;
- i. Article 12.2.2 of the Anti-Dumping Agreement in connection with the USDOC's reasons for rejecting certain arguments;
- j. Article X:3(a) of the GATT 1994 in connection with the USDOC's administration of USDOC regulation 19 C.F.R. § 351.301;
- k. Article I:1 of the GATT 1994 in connection with the treatment of interested parties in the Turkish investigation and the treatment of the Korean respondents in the underlying investigation regarding the opportunity to comment on the Tenaris financial statements;
- l. Article 18.4 of the Anti-Dumping Agreement as a consequence of the alleged violation of Article 2.2 of the Anti-Dumping Agreement in connection with the "viability test";
- m. Article VI of the GATT 1994 as a consequence of alleged violations of the Anti-Dumping Agreement; and
- n. Article XVI:4 of the WTO Agreement as a consequence of alleged violations of the Anti-Dumping Agreement and Article VI of the GATT 1994.

8.3. For the reasons set forth in this Report, we find that the following claims asserted by Korea fall outside our terms of reference, and thus do not consider them:

- a. alleged violation of Article 2.2.2(iii) of the Anti-Dumping Agreement because the USDOC failed to use a reasonable method to determine the CV profit rate of the Korean respondents by basing this profit rate on the Tenaris financial statements;
- b. alleged violation of Article 6.4 of the Anti-Dumping Agreement because the USDOC failed to post certain communications to the record in a timely fashion;
- c. alleged violation of Article 6.9 of the Anti-Dumping Agreement because it failed to disclose these communications as essential facts;

- d. alleged violation of Article X:3(a) of the GATT 1994 because the USDOC failed to administer US laws and regulations in a uniform, impartial and reasonable manner by acting contrary to its established agency practice of determining CV profit on the basis of sources located in the home market of the exporter or producer under investigation, and because this decision was attributable to political influence;
- e. alleged violation of Article I:1 of the GATT 1994 because: (a) the underlying investigation was the only one in which the USDOC required questionnaire responses and on-site verification of companies that were not named as respondents, or identified as affiliates; and (b) the questionnaires issued to the Korean respondents were far more extensive than the questionnaires issued to the respondents in any of the other OCTG investigations.

8.4. For the reasons set forth in this Report, we find the USDOC's remand determination falls outside our terms of reference and therefore we do not consider Korea's claims in connection with it.

8.5. For the reasons set forth in this Report, we exercise judicial economy with respect to Korea's claims that the USDOC acted inconsistently with:

- a. the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because the USDOC did not determine CV profit of the Korean respondents based on actual data pertaining to their sales of the like product in third-country markets;
- b. Article 2.4 because the USDOC did not make a fair comparison between the export price and the constructed normal value by failing to make due allowance for the significant differences between the profit rates of the Korean respondents and that of Tenaris; and
- c. Articles 1 and 9.3 of the Anti-Dumping Agreement as a consequence of substantive violations of Articles 2.2.2, 2.2.2(i), and 2.2.2(iii) of the Anti-Dumping Agreement.

8.6. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Anti-Dumping Agreement, they have nullified or impaired benefits accruing to Korea under this agreement.

8.7. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under the Anti-Dumping Agreement.
