

7.8 Turkey's claims under Articles 10 and 32.1 of the SCM Agreement

7.344. Turkey also alleges consequential violations of Articles 10 and 32.1 of the SCM Agreement based on its substantive claims under Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.4, 12.7, 14(d), and 15.3 of the SCM Agreement.⁵⁴²

7.345. Article 10 of the SCM Agreement reads:

Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.⁵⁴³

7.346. Article 32.1 of the SCM Agreement reads:

No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

7.347. We recall our finding above that the United States acted inconsistently with the obligations under Articles 1.1(a)(1), 2.1(c), 2.4, 12.7, and 15.3 of the SCM Agreement. We note that the Appellate Body has treated claims under Articles 10 and 32.1 of the SCM Agreement as consequential claims in the sense that, when the essential elements of the subsidy within the meaning of Article 1 of the SCM Agreement are not present, or the right to impose a countervailing duty has not been established, the countervailing duties imposed are inconsistent with Articles 10 and 32.1 of the SCM Agreement.⁵⁴⁴ Accordingly, to the extent that we have found that the USDOC's and USITC's determinations to be inconsistent with Articles 1.1(a)(1), 2.1(c), 2.4, 12.7, and 15.3 of the SCM Agreement, we also find that they are inconsistent with the United States' obligations under Articles 10 and 32.1 of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. Having considered the United States' request for preliminary rulings regarding the scope of these proceedings and the responses thereto, we conclude as follows:

- a. Turkey's challenge to an alleged practice related to the rejection of in-country prices in the assessment of benefit is within the Panel's terms of reference.
- b. Turkey's challenge to alleged practices related to the cumulation of subsidized and non-subsidized imports in the assessment of injury in original investigations and sunset reviews is within the Panel's terms of reference.
- c. With respect to the WLP investigation, Turkey's claims under Article 12.7 of the SCM Agreement concerning subsidy programmes other than the Provision of HRS for LTAR are outside the Panel's terms of reference.
- d. We decline to rule on the USDOC's initial OCTG final benefit determination in the context of addressing Turkey's as applied claims under Article 1.1(b) and Article 14(d) of the SCM Agreement, as we do not consider findings on this determination would aid in providing a positive resolution to the dispute.

⁵⁴² Turkey's first written submission, paras. 169, 170, 192, 211, 220, 232, 320-321, 330, 338, 346, 430-431, 442, 451, 459, 542-543, 552, and 562.

⁵⁴³ Fns omitted.

⁵⁴⁴ Appellate Body Reports, *US – Softwood Lumber IV*, para. 143; *US – Anti-Dumping and Countervailing Duties (China)*, para. 358.

8.2. For the reasons set forth in this Report, we conclude as follows:

- a. With respect to Turkey's claims under Article 1.1(a)(1) of the SCM Agreement relating to the OCTG, WLP, and HWRP countervailing duty investigations and the CWP sunset review, the United States acted inconsistently with Article 1.1(a)(1) because the USDOC failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation for its public body determinations regarding Erdemir and Isdemir.
- b. With respect to Turkey's "as such" claim under Article 14(d) relating to the OCTG countervailing duty investigation, Turkey has failed to establish that the USDOC has a practice, in assessing whether a good is provided for LTAR thereby conferring a benefit, of rejecting in-country prices as a benchmark based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good, with no consideration of whether in-country prices are distorted. Turkey has thus failed to establish that the United States acted inconsistently "as such" with Article 14(d) of the SCM Agreement.
- c. With respect to Turkey's claims under Articles 2.1(c) and 2.4 of the SCM Agreement relating to the OCTG, WLP, and HWRP countervailing duty investigations and the CWP sunset review:
 - i. The United States acted inconsistently with Articles 2.1(c) and 2.4 of the SCM Agreement because the USDOC failed to identify and clearly substantiate the existence of a so-called Provision of HRS for LTAR Programme based on positive evidence.
 - ii. The United States acted inconsistently with Article 2.1(c) of the SCM Agreement because the USDOC failed to consider the extent of diversification of economic activities within Turkey; and failed to properly evaluate the length of time in which the so-called Provision of HRS for LTAR Programme had been in operation.
- d. With respect to Turkey's claims under Article 12.7 of the SCM Agreement:
 - i. Turkey has failed to establish that the United States acted inconsistently with Article 12.7 of the SCM Agreement in the OCTG investigation because the USDOC failed to take into account difficulties experienced by Borusan in providing requested information in its questionnaire responses.
 - ii. The United States acted inconsistently with Article 12.7 of the SCM Agreement in the OCTG investigation because the USDOC failed to engage in a process of reasoning and evaluation in selecting facts available for missing price information for Borusan's Halkali and Izmit facilities and in calculating the quantity of the HRS purchases at Halkali and Izmit facilities.
 - iii. The United States acted inconsistently with Article 12.7 of the SCM Agreement in the WLP investigation because the USDOC failed to engage in a process of reasoning and evaluation in selecting the subsidy rate as a "reasonable replacement" for the missing necessary information for the so-called Provision of HRS for LTAR Programme.
 - iv. The United States acted inconsistently with Article 12.7 of the SCM Agreement in the HWRP investigation because the USDOC failed to engage in a process of reasoning and evaluation in selecting the subsidy rates as "reasonable replacements" for missing information relating to MMZ's and Ozdemir's use of certain subsidies.
- e. With respect to Turkey's claims under Article 15.3 of the SCM Agreement:
 - i. The United States acted inconsistently with Article 15.3 of the SCM Agreement by cumulatively assessing the effects of subsidized imports with those of dumped, non-subsidized imports for purposes of its injury determination in the OCTG, WLP, and HWRP countervailing duty investigations.

- ii. The USITC has a practice, in original investigations, of cumulatively assessing the effects of subsidized imports with those of dumped, non-subsidized imports from all countries as to which petitions were filed on the same day, if such imports compete with each other and with the like domestic product in the United States. This practice is inconsistent "as such" with the United States' obligations under Article 15.3 of the SCM Agreement.
- iii. Turkey has failed to establish that the United States acted inconsistently with Article 15.3 of the SCM Agreement, either "as such" or as applied in connection with the CWP sunset review, because an investigating authority is not mandated to follow the provisions of Article 15 of the SCM Agreement when making a likelihood-of-injury determination under Article 21 of the SCM Agreement.
- f. As a consequence of the inconsistencies with Articles 1.1(a)(1), 2.1(c), 2.4, 12.7, and 15.3 of the SCM Agreement, the United States also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement.
- g. We exercise judicial economy with regard to Turkey's claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

8.3. 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 the SCM Agreement, they have nullified or impaired benefits accruing to Turkey under that Agreement.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under the SCM Agreement.
