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REPORT OF THE PANEL

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TUR-165	US Court of International Trade, Guangdong v. United States	United States Court of International Trade, Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States, (2nd Fed. Supp. 2013), pp. 1381-1382
TUR-187	USITC Final Determination on circular welded carbon-quality steel pipe from India, Oman, the United Arab Emirates, and Viet Nam	USITC, circular welded carbon-quality steel pipe from India, Oman, the United Arab Emirates, and Viet Nam, Final Determination (December 2012)
TUR-205	Court of Appeals for the Federal Circuit decision, Bingham & Taylor v. United States	US Court of Appeals for the Federal Circuit decision, Bingham & Taylor v. United States, No. 86-1440 (2nd Fed. Rep. 1987)
TUR-240	CWP CVD Final Determination Memorandum	Decision Memorandum dated 5 October 2015 from the USDOC on the final results in the countervailing duty administrative review of certain welded carbon steel pipe and tube from Turkey
TUR-242	USITC Final Determination on stainless steel wire rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Chinese Taipei	USITC, stainless steel wire rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Chinese Taipei, Final Determination (December 1998)
TUR-243	USITC Preliminary Determination on certain cut-to-length steel plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia	USITC, certain cut-to-length steel plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia, Preliminary Determination (April 1999)

Exhibit	Short Title (if any)	Description
TUR-244	USITC Preliminary Determination on carbon and certain alloy steel wire rod from Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela	USITC, carbon and certain alloy steel wire rod from Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela, Preliminary Determination (October 2001)
USA-1	OCTG Remand Redetermination	Final Results of Remand Redetermination, Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States, Maverick Tube Co. v. United States, Consol. Ct. No. 14-00229 (31 August 2015)
USA-4	TESEV study	Ĭ. Akça, *Military-Economic Structure in Turkey: Present Situation, Problems, and Solutions*, TESEV Publications (Istanbul, July 2010)
TUR-9/TUR-63 (excerpts) USA-5 (full version)	Erdemir 2012 Annual Report	Erdemir 2012 Annual Report
USA-6	Medium Term Programme	GOT, *Medium Term Programme (2012-2014)* (Ankara, October 2011)
TUR-28/TUR-105 (excerpts) USA-7 (full version)	Erdemir 2013 Annual Report	Erdemir 2013 Annual Report
USA-8	Erdemir's Articles of Association	Erdemir's Articles of Association
USA-12	USDOC's letter on extension request	Letter dated 10 September 2013 from the USDOC to Borusan on extension request for oil country tubular goods from Turkey
USA-20	USDOC's letter on WLP verification	Letter dated 28 April 2015 from the USDOC to Borusan on the verification of welded line pipe from Turkey
USA-35	Exhibit 4 of Maverick's comments	Excerpt from Maverick's comments on the Government of Turkey's third supplemental questionnaire response (10 March 2015), Exhibit 4
USA-36	Final Determination Memorandum on truck and bus tires from China	Issues and Decision Memorandum dated 19 January 2016 for the Final Determination in the Countervailing Duty Investigation of truck and bus tires from the People's Republic of China
USA-37	Final Determination Memorandum on cold-rolled steel from Russia	Issues and Decision Memorandum dated 20 July 2016 for the final determination of certain cold-rolled steel flat products from the Russian Federation
USA-38	Expedited Review Memorandum on supercalendered paper from Canada	Issues and Decision Memorandum dated 17 April 2017 for the final results of expedited review of the countervailing duty order on supercalendered paper from Canada
USA-43	Excerpt from GOT's WLP initial questionnaire response	Excerpt from GOT initial questionnaire response on welded line pipe from Turkey (20 January 2015)
USA-44	Excerpt from GOT's HWRP initial questionnaire response	Excerpt from GOT initial questionnaire response on heavy walled rectangular welded carbon steel pipes and tubes from Turkey (28 October 2015)
USA-45	Excerpt from GOT's CWP initial questionnaire response	Excerpt from GOT initial questionnaire response on certain welded carbon steel pipe and tube from Turkey (10 December 2014)

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
BCI	Business Confidential Information
Borusan	Borusan Istikbal Ticaret and Borusan Mannesmann Boru Sanayi
CBERA	Caribbean Basin Economic Recovery Act
CWP	circular welded carbon steel pipes and tubes
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Erdemir	Eregli Demir ve Celik Fabrikalari T.A.S.
GATT 1994	General Agreement on Tariffs and Trade 1994
GOT	Government of Turkey
HRS	hot rolled steel
HWRP	heavy walled rectangular welded carbon steel pipes and tubes
Isdemir	Iskenderun Iron & Steel Works Co.
LTAR	less than adequate remuneration
MMZ	MMZ Onur Boru Profil uretim San Ve Tic. A.S.
OCTG	oil country tubular goods
OYAK	Ordu Yardimlasma Kurumu
Ozdemir	Ozdemir Boru Profil San ve Tic. Ltd. Sti.
POI	period of investigation
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TESEV	Turkish Economic and Social Studies Foundation
TPA	Turkish Privatization Authority
USDOC	US Department of Commerce
USITC	US International Trade Commission
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WLP	welded line pipe
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Turkey

1.1. On 8 March 2017, Turkey requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 28 April 2017. These consultations failed to settle the dispute.

1.2 Panel establishment and composition

1.3. On 11 May 2017, Turkey requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 19 June 2017, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Turkey in document WT/DS523/2, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered Agreements cited by the parties to the dispute, the matter referred to the DSB by Turkey in document WT/DS523/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those Agreements.[4]

1.5. On 4 September 2017, Turkey requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 14 September 2017, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Guillermo Valles
Members:	Ms Luz Elena Reyes de la Torre Mr José Antonio de la Puente León

1.6. Brazil, Canada, China, the European Union, Japan, Kazakhstan, the Republic of Korea, Mexico, the Russian Federation, the Kingdom of Saudi Arabia, and the United Arab Emirates notified their interest in participating in the Panel proceedings as third parties.[5]

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, on 8 November 2017, the Panel adopted its Working Procedures[6], Additional Working Procedures on Business Confidential Information (BCI)[7], and timetable. The Panel revised its timetable on 5 March and 22 June 2018 after consulting the parties.

1.8. The Panel held a first substantive meeting with the parties on 28 February and 1 March 2018. A session with the third parties took place on 1 March 2018. The Panel held a second substantive meeting with the parties on 29 and 30 May 2018. On 17 July 2018, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 14 September 2018. The Panel issued its Final Report to the parties on 20 November 2018.

[1] Request for consultations by Turkey, WT/DS523/1 (Turkey's consultations request).
[2] Request for the establishment of a panel by Turkey, WT/DS523/2 (Turkey's panel request).
[3] DSB, Minutes of Meeting held on 19 June 2017, WT/DSB/M/398, p. 8.
[4] Constitution note of the Panel, WT/DS523/3.
[5] Constitution note of the Panel, WT/DS523/3/Rev.1.
[6] See the Panel's Working Procedures in Annex A-1.
[7] See the Panel's Additional Working Procedures on Business Confidential Information in Annex A-2.

1.3.2 Preliminary ruling request

1.9. With its first written submission on 20 December 2017, the United States requested a preliminary ruling pursuant to paragraph 6 of the Panel's Working Procedures that certain measures and claims are outside the Panel's terms of reference, because (a) certain measures were not identified in Turkey's request for consultations; (b) certain claims raised in Turkey's first written submission were not identified in Turkey's panel request; and (c) a measure ceased to have legal effect prior to the Panel's establishment.[8]

1.10. At the Panel's invitation, on 17 January 2018, Turkey submitted a written response to the United States' request for a preliminary ruling.[9] The Panel also posed questions to both parties concerning the United States' request following the first substantive meeting.[10] Furthermore, both parties made additional comments regarding the United States' preliminary ruling request in their subsequent submissions.[11]

1.11. The Panel addresses the United States' request for a preliminary ruling in its findings below.[12]

2 FACTUAL ASPECTS

2.1. This dispute concerns certain countervailing duty measures that the United States imposed in connection with its investigations of Turkish imports of certain oil country tubular goods (OCTG); welded line pipe (WLP); and heavy walled rectangular welded carbon steel pipes and tubes (HWRP); and in connection with a 2011 sunset review and 2013 administrative review of the countervailing duty order on Turkish imports of circular welded carbon steel pipes and tubes (CWP).

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Turkey requests that the Panel find that[13]:

a. The countervailing duty measures imposed on imports of OCTG are inconsistent with the United States' obligations under the following provisions of the SCM Agreement:

   i. Article 1.1(a)(1), as applied, because the US Department of Commerce (USDOC) failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation of its public body determinations with regard to Ordu Yardimlasma Kurumu (OYAK), Eregli Demir ve Celik Fabrikalari T.A.S. (Erdemir) and Iskenderun Iron & Steel Works Co. (Isdemir).

   ii. Articles 1.1(b) and 14(d), as applied, because of the USDOC's practice of rejecting in-country prices based solely on evidence of substantial government involvement and determination to reject Turkish prices with no consideration whether there was evidence those prices are actually distorted, and such practice is also inconsistent as such with Article 14(d).

   iii. Article 12.7, as applied, because the USDOC failed to take account of the difficulties Borusan Istikbal Ticaret and Borusan Mannesmann Boru Sanayi (Borusan) experienced in providing requested information and because the USDOC applied an adverse inference for the purpose of punishing Borusan for its supposed failure to cooperate.

   iv. Articles 2.1(c) and 2.4, as applied, because the USDOC failed to identify, or substantiate based on positive evidence on the record, a subsidy "programme" related

[8] United States' first written submission, paras. 7-49.
[9] Turkey's response to the United States' request for a preliminary ruling (17 January 2018).
[10] Panel's questions to the parties after the first substantive meeting Nos. 1-6.
[11] See, e.g. Turkey's statement at the second meeting of the Panel, paras. 7-8; United States' opening statement at the second meeting of the Panel, paras. 3-9; and United States' second written submission, paras. 7-46, 136, and 143.
[12] See Sections 7.3.1, 7.3.2, 7.5.1, 7.5.2, and 7.6.2 below.
[13] Turkey's first written submission, para. 563.

to the provision of hot rolled steel (HRS), and because the USDOC failed to consider the two factors specified in the last sentence of Article 2.1(c).

v. Article 15.3, as applied, because of the US International Trade Commission (USITC)'s practice of cumulating subsidized and non-subsidized imports for purposes of its material injury analysis, and because the USITC chose to cumulate imports of OCTG from countries subject to both antidumping and countervailing duty investigations (India and Turkey) with imports from countries subject to only antidumping investigations (Korea, Ukraine, and Viet Nam). Such practice is also inconsistent as such with Article 15.3.

vi. Articles 10 and 32.1, as applied, because the United States applied countervailing duties on the basis of determinations that are inconsistent with Articles 1, 2, 12, 14, and 15 of the SCM Agreement.

b. The countervailing duty measures imposed on imports of WLP are inconsistent with the United States' obligations under the following provisions of the SCM Agreement:

i. Article 1.1(a)(1), as applied, because the USDOC failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation on its public body determinations with regard to OYAK and Erdemir and Isdemir.

ii. Article 12.7, as applied, because the USDOC applied an adverse inference for the purpose of punishing Borusan and which resulted in an inaccurate subsidization determination that has no factual connection to the alleged subsidy programmes investigated.

iii. Articles 2.1(c) and 2.4, as applied, because the USDOC failed to identify, or substantiate based on positive evidence on the record, a subsidy "programme" related to the provision of HRS, and because the USDOC failed to consider the two factors specified in the last sentence of Article 2.1(c).

iv. Article 15.3, as applied, because of the USITC's practice of cumulating subsidized and non-subsidized imports for purposes of its material injury analysis, and because the USITC chose to cumulate Turkish imports of WLP, which were subject to both antidumping and countervailing duty investigations, with Korean imports of WLP, which were subject to only an antidumping investigation. Such practice is also inconsistent as such with Article 15.3.

v. Articles 10 and 32.1, as applied, because the United States applied countervailing duties on the basis of determinations that are inconsistent with Articles 1, 2, 12, and 15 of the SCM Agreement.

vi. Article 19.4 and Article VI:3 of the GATT 1994, as applied, because the United States applied countervailing duties in excess of the amount of subsidization attributable to WLP.

c. The countervailing duty measures imposed on imports of HWRP are inconsistent with the United States' obligations under the following provisions of the SCM Agreement:

i. Article 1.1(a)(1), as applied, because the USDOC failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation of its public body determinations with regard to OYAK and Erdemir and Isdemir.

ii. Article 12.7, as applied, because the USDOC applied adverse inferences for the purpose of punishing MMZ Onur Boru Profil uretim San Ve Tic. A.S. (MMZ) and Ozdemir Boru Profil San ve Tic. Ltd. Sti. (Ozdemir) and which resulted in inaccurate subsidization determinations that have no factual connection to the alleged subsidy programmes investigated.

iii. Articles 2.1(c) and 2.4, as applied, because the USDOC failed to identify, or substantiate based on positive evidence on the record, a subsidy "programme" related to the provision of HRS, and because the USDOC failed to consider the two factors specified in the last sentence of Article 2.1(c).

iv. Article 15.3, as applied, because of the USITC's practice of cumulating subsidized and non-subsidized imports for purposes of its material injury analysis, and because the USITC chose to cumulate imports of HWRP from Turkey, which were subject to both antidumping and countervailing duty investigations, with imports from countries subject to only antidumping investigations, Mexico and Korea. Such practice is also inconsistent as such with Article 15.3.

v. Articles 10 and 32.1, as applied, because the United States applied countervailing duties on the basis of determinations that are inconsistent with Articles 1, 2, 12, and 15 of the SCM Agreement.

vi. Article 19.4 and Article VI:3 of the GATT 1994, as applied, because the United States applied countervailing duties in excess of the amount of subsidization attributable to HWRP.

d. The countervailing duty measures imposed on imports of CWP are inconsistent with the United States' obligations under the following provisions of the SCM Agreement:

i. Article 1.1(a)(1), as applied, because the USDOC failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation of its public body determinations with regard to OYAK and Erdemir and Isdemir.

ii. Articles 2.1(c) and 2.4, as applied, because the USDOC failed to identify, or substantiate based on positive evidence on the record, a subsidy "programme" related to the provision of HRS, and because the USDOC failed to consider the two factors specified in the last sentence of Article 2.1(c).

iii. Article 15.3, as applied, because of the USITC's practice of cumulating subsidized and non-subsidized imports for purposes of its material injury analysis, and because the USITC chose to cumulate imports of *CWP from Turkey*, which were subject to both antidumping and countervailing duty orders, with imports of CWP from Brazil, India, Korea, Mexico, Chinese Taipei, and Thailand, which were subject only to antidumping duty orders. Such practice is also inconsistent as such with Article 15.3.

iv. Articles 10 and 32.1, as applied, because the United States applied countervailing duties on the basis of determinations that are inconsistent with Articles 1, 2, and 15 of the SCM Agreement.

3.2. The United States requests that the Panel reject Turkey' claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries that were provided to the Panel in accordance with paragraph 18 of the Working Procedures (see Annex B).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, European Union, Japan and Mexico are reflected in their executive summaries that were provided to the Panel in accordance with paragraph 19 of the Working Procedures (see Annexes C-1, C-2, C-3, and C-4).

6 INTERIM REVIEW

6.1. On 14 September 2018, the Panel issued its Interim Report to the parties. On 28 September 2018, Turkey and the United States submitted their written requests for review. In addition to its written request, the United States also requested the Panel to hold an interim review

meeting with the parties. On 5 October 2018, Turkey submitted comments on the United States' written request for review. The Panel held an interim review meeting with the parties on 13 November 2018.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-3.

7 FINDINGS

7.1 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered Agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.[14]

7.1.2 Standard of review

7.2. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered Agreements.

7.3. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the authority provided a reasoned and adequate explanation as to (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.[15]

7.4. The Appellate Body has also stated that a panel reviewing an investigating authority's determination may not undertake a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the authority during the investigation and must consider all such evidence submitted by the parties to the dispute.[16] At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[17]

7.1.3 Burden of proof

7.5. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[18] Therefore, Turkey bears the burden of demonstrating that the challenged measures are inconsistent with the SCM Agreement. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, without effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[19] Each party asserting a fact should provide proof thereof.[20]

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[14] Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 104.
[15] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.
[16] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[17] Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; *US – Lamb*, paras. 106-107.
[18] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, p. 337.
[19] Appellate Body Report, *EC – Hormones*, para. 104.
[20] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, p. 335.

7.2 Turkey's claim under Article 1.1(a)(1) of the SCM Agreement in relation to the USDOC's public body determinations in the OCTG, WLP, HWRP, and CWP proceedings

7.2.1 Introduction

7.6. In the challenged proceedings, the USDOC found that Erdemir and its subsidiary Isdemir are public bodies which provided respondent companies with HRS for less than adequate remuneration (LTAR). As the basis for its public body determinations, the USDOC found that the Government of Turkey (GOT) exercised "meaningful control" over the two entities. This finding of meaningful control was based in part on a finding of "significant involvement" of the GOT in the Turkish military pension fund OYAK, which holds a controlling ownership stake in Erdemir.[21] The GOT has no direct ownership interest in Erdemir and Isdemir.

7.7. Turkey claims that the USDOC found that OYAK, Erdemir, and Isdemir are each subject to "meaningful control" by the GOT, and in doing so, determined that OYAK, Erdemir, and Isdemir are public bodies. Turkey claims that the USDOC's determinations that OYAK, Erdemir, and Isdemir are public bodies are inconsistent with Article 1.1(a)(1) of the SCM Agreement. In particular, Turkey claims that the USDOC applied the incorrect legal standard under Article 1.1(a)(1) in its public body determinations. In addition, Turkey claims that the USDOC failed to provide a reasoned and adequate explanation for its determinations because the evidence on the record that the USDOC cited does not support its public body findings, and because the USDOC failed to consider evidence that contradicted its public body determinations.[22]

7.8. The United States argues that Turkey's claim with respect to OYAK must fail because the USDOC did not find that OYAK is a public body and was not required to do so. The United States otherwise requests the Panel to find that the USDOC's public body determinations with respect to Erdemir and Isdemir are consistent with Article 1.1(a)(1) of the SCM Agreement.

7.9. We first recall the legal framework applicable to the public body inquiry before addressing the parties' arguments regarding Turkey's claims.

7.2.2 The legal standard applicable to the public body enquiry

7.10. Article 1.1(a)(1) of the SCM Agreement provides that a subsidy shall be deemed to exist if a financial contribution is provided by a government or any public body within the territory of a Member. The particular conduct of the government or public body must fall within any of the subparagraphs (i) to (iii) in Article 1.1(a)(1), or pursuant to subparagraph (iv), a government or public body may make payments to a funding mechanism, or otherwise entrust or direct a private body to carry out one or more of the type of functions illustrated in subparagraphs (i) to (iii).[23]

7.11. The Appellate Body has explained that a public body within the meaning of Article 1.1(a)(1) "must be an entity that possesses, exercises or is vested with governmental authority".[24] In evaluating whether an entity is a public body, a relevant enquiry is whether "an entity is vested with authority to exercise governmental functions".[25] The Appellate Body has further explained that "[w]hether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates".[26] In addition, "just as no two governments

[21] In the challenged determinations, the USDOC indicated that record evidence shows that the GOT exercised "meaningful control" over OYAK and the GOT's "meaningful control" of OYAK extends to Erdemir and Isdemir. (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85) p. 33; WLP CVD Final Determination Memorandum, (Exhibit TUR-122) p. 35; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46) pp. 21-22; and CWP CVD Final Determination Memorandum, (Exhibits TUR-22 (excerpt) and TUR-240 (full version)), p. 28).

[22] Turkey's first written submission, paras. 94-95, 99, 105-106, 143-144, 244-245, 249, 255-256, 293-294, 358, 362, 364, 368-369, 405-406, 468-469, 473, 475, 479-480, and 516-517.

[23] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

[24] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

[25] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[26] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317 ("Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be

are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[27]

7.12. Different types of evidence may be relevant to show that a government has bestowed authority on a particular entity, including such as when a statute legal instrument expressly vests authority in an entity.[28] Absent express statutory delegation of governmental authority, evidence that an entity is *in fact* exercising governmental functions may serve as evidence that the entity in question possesses or has been vested with governmental authority, particularly when the evidence points to a sustained and systematic practice.[29]

7.13. The Appellate Body has also observed that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions".[30] The Appellate Body has cautioned, however, that "the mere ownership or control over an entity by a government, without more, is not sufficient to establish that the entity is a public body".[31] Rather, "where evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority".[32]

7.14. Finally, in evaluating whether the conduct of a particular entity is that of a public body within the meaning of Article 1.1(a)(1), an investigating authority "must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant".[33]

7.2.3 The Panel's evaluation of Turkey's Article 1.1(a)(1) claims in connection with the challenged proceedings

7.15. Turkey has requested findings that the USDOC's evaluation of Turkish military pension fund OYAK, and Erdemir and Isdemir are inconsistent with Article 1.1(a)(1) of the SCM Agreement. At the core of its claims, Turkey argues that the USDOC "created an elaborate chain of governmental control linking the GOT to OYAK to [Erdemir and Isdemir]" and found that OYAK, Erdemir and Isdemir are public bodies.[34] Turkey submits that the USDOC applied an incorrect legal standard twice: first, in its assessment of OYAK, and second, in its assessment of Erdemir and Isdemir. Turkey also claims that the USDOC failed to provide a reasoned and adequate explanation for its determinations based on the evidence on the record. Turkey also emphasizes, in contrast to other occasions in which the

in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense") and para. 297 ("whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member may be a relevant consideration for determining whether or not a specific entity is a public body.")

[27] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

[28] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, para. 4.10.

[29] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[30] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, para. 4.10.

[31] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318 ("[w]e stress, however, that apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority.")

[32] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[33] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319. Further, investigating authorities are "under an obligation to actively seek out information relevant to the analysis of whether a financial contribution had been made", including information relevant to the potential characterization of entities as public bodies, to be able to provide a reasoned and adequate explanation of their conclusions. (Ibid. para. 344).

[34] Turkey's first written submission, paras. 95, 245, 358, and 469.

USDOC has assessed that entities are public bodies based on government ownership, that the GOT does not have any ownership stake in Erdemir or its subsidiary Isdemir.[35]

7.16. WTO panels or the Appellate Body have not previously addressed the issue of whether an investigating authority may establish that an entity is a public body through establishing a "chain" of governmental control linking that entity to the government, such as under the facts of this dispute. We note that Turkey does not in principle challenge that it may be possible to establish that a government may provide a financial contribution via such a chain of control over various entities. Rather, the parties disagree as to whether the legal standard under Article 1.1(a)(1) applies to each entity found to exist in the alleged chain of control.[36]

7.17. The United States argues that the text of Article 1.1(a)(1) clarifies that the requirements surrounding the determination of whether an entity is a public body only apply to entities that provide a financial contribution.[37] Thus, the United States argues that Turkey's separate Article 1.1(a)(1) claim cannot be considered with respect to OYAK, because the USDOC never attributed a financial contribution to OYAK, and therefore never made a public body determination in respect of that entity.[38] The United States considers that we should focus our legal assessment on the USDOC's evaluation of Erdemir and Isdemir. The United States also argues that we should not consider Turkey's arguments with respect to OYAK in the context of its challenge to Erdemir and Isdemir because the claim was independently raised.[39] However, for completeness, the United States also submits that we could examine the USDOC's factual findings regarding the relationship between the GOT and OYAK to determine whether the USDOC was entitled to treat OYAK as governmental, such that its meaningful control over Erdemir and Isdemir justified the treatment of those entities as public bodies. The United States asserts that nothing in the text of Article 1.1(a)(1), or in the relevant interpretations of that provision, suggests that OYAK needed to be a particular type of governmental entity, such as a government "organ". OYAK only needed to exhibit the characteristics of a government "organ" or "agency", or a "public body" or any other "governmental" entity.[40] The United States submits that the USDOC considered OYAK as an "organ of the GOT" in its assessment of Erdemir and Isdemir.[41] The United States has also asserted that OYAK was governmental in the broader sense.[42]

7.18. In response, Turkey submits that the United States' argument that the disciplines of Article 1.1(a)(1) only apply in respect of entities that provide financial contributions is unfounded.[43] Turkey submits that, under Article 1.1(a)(1), it is first necessary to determine whether an entity is governmental or a private body before analysing whether the conduct of an entity falls within subparagraphs (i) to (iv) of Article 1.1(a)(1). Accordingly, Turkey argues that the analysis of whether an entity is governmental or a private body is thus a separate step from the assessment of whether the particular conduct of an entity is determined to be a financial contribution under Article 1.1(a)(1) and the United States should not be relieved of any obligation in respect of OYAK.[44]

7.19. Turkey considers it clear that the USDOC analysed OYAK as a public body, as the USDOC analysed OYAK pursuant to the same US standard that it analysed Erdemir and Isdemir, i.e. as subject to "meaningful control" of the government.[45] Turkey also considers that an investigating

[35] Turkey's first written submission, paras. 97, 247, 360, and 471.
[36] Turkey's second written submission, para. 28.
[37] United States' first written submission, para. 78; response to Panel question No. 7, para. 30.
[38] The United States submits that a public body finding in respect of OYAK "was neither necessary, nor appropriate, because USDOC did not find that OYAK provided a countervailable subsidy". (United States' first written submission, para. 79). See also United States' response to Panel question No. 7, paras. 28-29; Turkey's statement at the first meeting of the Panel, para. 20; and Turkey's second written submission, paras. 22-26.
[39] United States' second written submission, para. 74.
[40] United States' second written submission, paras. 75-77.
[41] United States' first written submission, para. 97; response to Panel question No. 7, para. 32.
[42] United States' responses to Panel question No. 7, paras. 28-32, and No. 9, paras. 34-38; second written submission, paras. 75-77.
[43] Turkey's statement at the first meeting of the Panel, paras. 27-29; second written submission, paras. 31-32.
[44] Turkey's statement at the first meeting of the Panel, paras. 27-29; second written submission, paras. 31-32.
[45] Turkey's first written submission, paras. 103, 253, 366, and 477; statement at the first meeting of the Panel, para. 20; response to Panel question No. 8, paras. 24-26; second written submission, paras. 21-23;

authority need not make explicit finding or statement that an entity is a public body, but may make implicit findings in its determinations, as panels and the Appellate Body have recognized.[46] Turkey also argues that the United States' evaluation of OYAK as a "government organ" is not supported in the reasoning and findings of the determinations at issue.[47]

7.20. As a general matter, we do not reject that it may be possible to establish that an entity is a public body through establishing a chain of governmental control linking that entity to the government. However, to properly attribute[48] the actions of that entity to the government, the governmental character of entities in the alleged chain will be relevant to the assessment. In this regard, an entity may be "governmental" in either the broad sense or the narrow sense, or directly or through a government's entrustment or direction of a private body. We recall in this regard that the Appellate Body has explained that "the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body".[49] In addition, the Appellate Body has found that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions".[50]

7.21. Finally, although the United States considers that no legal standard under the SCM Agreement would apply to the USDOC's findings with respect to OYAK, we note the United States' statement that the Panel may find relevant to its factual assessment of OYAK the characteristics examined by other panels or the Appellate Body with respect to "government", "public body", and other governmental entities in other contexts.[51] The parties therefore appear to agree that OYAK's status is relevant to the assessment of Erdemir and Isdemir.

7.22. With this framework in mind, we will consider whether the USDOC's public body determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.2.3.1 Whether the USDOC's public body determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement

7.23. In claiming that the USDOC's public body determinations in respect of Erdemir and Isdemir are inconsistent with Article 1.1(a)(1), Turkey argues that the USDOC both failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation of the basis of its public body findings based on evidence on record.

7.24. Turkey raises a series of arguments with respect to the USDOC's analysis of OYAK and its relationship with the GOT. First, Turkey considers that neither OYAK's creation by statute, nor the USDOC's interpretation of certain provisions of Law No. 205, support the USDOC's finding that the GOT exercises control over OYAK and by extension, over Erdemir and Isdemir.[52] Second, Turkey argues that OYAK's property and tax treatment under Turkish law is consistent with that of other Turkish pension funds.[53] Third, Turkey argues that, because OYAK's member contributions are private funds, the mandatory nature of participation for some members does not support USDOC's findings.[54] Fourth, Turkey argues that the members participating in OYAK's governing bodies are acting in their individual capacities, and not as government officials.[55] Fifth, Turkey argues

statement at the second meeting of the Panel, para. 43; and comments on United States' response to Panel question No. 65, paras. 9-12.

[46] Turkey's comments on United States response to Panel question No. 69, paras. 17-18 (quoting Appellate Body Report, *Japan – DRAMs (Korea)*, para. 214).

[47] Turkey's statement at the first meeting of the Panel, para. 21.

[48] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

[49] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.

[50] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, para. 4.10.

[51] United States' second written submission, para. 77. The United States also argues that because Turkey's arguments concerning OYAK are raised separately from its challenge against the USDOC's determinations concerning Erdemir and Isdemir, we should decline to review Turkey's OYAK arguments because they are made on an independent basis. (United States' second written submission, para. 74).

[52] Turkey's first written submission, paras. 111-114, 261-264, 374-377, and 485-488.

[53] Turkey's first written submission, paras. 115-119, 265-269, 378-382, and 489-492.

[54] Turkey's first written submission, paras. 120-122, 270-272, 383-385, and 493-495.

[55] Turkey's first written submission, paras. 123-131, 273-281, 386-393, and 496-504.

that the USDOC did not consider contradictory record evidence that OYAK is an autonomous, private pension fund that is in fact a non-profit foundation, and acts independently of the government in making investment decisions.[56]

7.25. Turkey argues that the other evidence that the USDOC identified in relation to Erdemir and Isdemir, at most, demonstrates GOT's alleged ability to control Erdemir, and otherwise, the limited statements in Erdemir's 2012 and 2013 Annual Reports do not support a finding that Erdemir and Isdemir possess, exercise, or are vested with governmental authority.[57]

7.26. The United States has acknowledged that the Appellate Body considers that "the term public body in Article 1.1(a)(1) of the SCM Agreement means 'an entity that possesses, exercises or is vested with governmental authority'"[58], and argues that the USDOC's public body analysis in relation to Erdemir and Isdemir is consistent with the Appellate Body's interpretation of Article 1.1(a)(1).[59] The United States argues that the USDOC properly determined that Erdemir and Isdemir are public bodies in the challenged proceedings based on consideration of the totality of evidence, including the involvement of OYAK in Erdemir.[60]

7.27. In the challenged proceedings, the USDOC based its determination that Erdemir and Isdemir are public bodies on numerous considerations, including that OYAK holds a majority of shares of Erdemir through its wholly-owned holding company, Ataer Holding AS, and that Erdemir owns more than 92% of its subsidiary Isdemir.[61]

7.28. Regarding OYAK specifically, the USDOC found "extensive GOT involvement in OYAK" and that the GOT exercised "meaningful control" over OYAK.[62] The USDOC observed that 1961 Military Personnel Assistance and Pension Fund Law (Law No. 205) establishing OYAK states that the GOT created OYAK "as an institution related to the Ministry of National Defense".[63] Pursuant to Law No. 205, the USDOC observed that OYAK's property has by law the "same rights and privileges of state property", that OYAK is exempt from corporate and other taxes, and that members of the

[56] Turkey's first written submission, paras. 132-135, 282-285, 394-397, and 505-508; second written submission, paras. 35-38.

[57] Turkey's first written submission, paras. 147-152, 297-302, 409-413, and 520-525.

[58] United States' first written submission, para. 89, citing to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37.

[59] United States' first written submission, para. 89. The United States considers the Appellate Body to have erroneously collapsed the term "public body" into "government" (or government agency) in its interpretation, failing to properly interpret the meaning of the term in its context. Nevertheless, the United States explains that "[f]or purposes of this discussion, however, we explain the approach of the Appellate Body and, later, that the analysis of USDOC satisfies that approach". (Ibid.).

[60] United States' first written submission, para. 96; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 36 ("[t]herefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of HRS for LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies"); HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 23 ("[t]herefore, based on the totality of the record evidence, as described under the 'Analysis of Programs – Provision of HRS for LTAR' section above, we continue to find Erdemir and Isdemir to be public bodies"); Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 30 ("[t]herefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of HRS for LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies"); OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 35 ("[b]ased on the record evidence as a whole, as described above under the 'Analysis of Programs – Provision of HRS for LTAR' section, we find Erdemir and Isdemir to be public bodies"). See also United States' first written submission, paras. 97-120; and second written submission, para. 83.

[61] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 20 (stating that Erdemir owns 92.91% of Isdemir); WLP CVD Final Determination Memorandum, (Exhibit TUR-122), pp. 13-14 (stating that Erdemir owns 95% of Isdemir); HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 11 (stating that Erdemir owns 95% of Isdemir); and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 8 (stating that Erdemir owns 95.07% of Isdemir). The USDOC noted that the GOT sold a 49.93% ownership stake in Erdemir to OYAK in 2006. In light of the fact that Erdemir holds 3% of its own shares as treasury stock, the USDOC found that OYAK holds the majority of Erdemir's outstanding shares. (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 20).

[62] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), pp. 21 and 33; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), pp. 14 and 35; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), pp. 11-12 and 21-22; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 8 and 28.

[63] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 11; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 8.

armed forces must by law contribute part of their salaries to OYAK.[64] The USDOC also reviewed OYAK's leadership structure, highlighting the following:

> OYAK's Representative Assembly comprises 50 to 100 members of the Turkish Armed Forces "designated by their respective commanders or superiors." The Representative Assembly, in turn, elects 20 of the 40 members of OYAK's General Assembly. Of the General Assembly's other 20 members, 17 are by statute government officials (*e.g.*, Ministers of Finance and Defense). Members of the General Assembly elect the eight-person Board of Directors.[65]

7.29. In the OCTG investigation, the USDOC also referred to a statement in a study published by the Turkish Economic and Social Studies Foundation (TESEV) that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control."[66] The United States contends that the evidence concerning OYAK before the USDOC exhibits the attributes associated with "government" in the broader sense.[67]

7.30. The USDOC next evaluated evidence which it considered "shows that the government's significant involvement in OYAK extends to Erdemir and Isdemir".[68] In the OCTG investigation, the USDOC referred to statements in Erdemir's 2012 Report that Erdemir "implemented policies which promoted the customers to engage in export-oriented production" and "supports the use of domestically mined resources for raw materials in view of … the added value created by the domestic suppliers in favor of the local industries".[69] In the WLP, HWRP, and CWP proceedings, the USDOC referred to Erdemir's 2013 Annual Report, stating that "'[t]hrough … flat steel sales to exporting industries,' Erdemir 'made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013' … and 'continues to create value added for Turkish industry through its initiatives to increase the use of domestic sources of raw materials.'"[70] The USDOC concluded that "[t]hese policies are in line with the GOT's stated policy in its 2012-2014 Medium Term Programme to improve Turkey's balance of payments".[71]

7.31. Finally, the USDOC evaluated evidence that members of OYAK and the Turkish Privatization Authority (TPA), and a "Representative of the Ministry of Finance" all participate on Erdemir's board of directors.[72] The USDOC additionally noted that the TPA holds veto power over any decision related to the closure, sale, merger, or liquidation of both Erdemir and Isdemir.[73] In the OCTG investigation,

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[64] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[65] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 8-9. (fns omitted)

[66] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21.

[67] United States' response to Panel question No. 7, para. 32.

[68] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[69] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21.

[70] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[71] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[72] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), pp. 21-22; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9. Specifically, both Erdemir's 2012 and 2013 Annual Reports state that the nine-member board is composed of three seats by OYAK, one by TPA, two by other investors, and three held independently. (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 22 and fn 163 (quoting Erdemir 2012 Annual Report, (Exhibit USA-5), pp. 54-55); WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; Erdemir 2013 Annual Report, (Exhibit USA-7), pp. 65-66; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; and HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12).

[73] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9. Erdemir's 2012

the USDOC observed that "OYAK effectively decides the composition of the majority of Erdemir's board through its majority shareholder voting rights in Erdemir".[74]

7.32. In our assessment, we must determine whether the findings and conclusions reached by the investigating authority are "reasoned" and "adequate"[75], in light of information provided by respondents in the investigation, and taking into account the totality of the evidence upon which the USDOC relied. In this regard, we bear in mind that:

> "[W]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the *totality* of the evidence, how the *interaction* of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation." In addition, if an investigating authority explains that the totality of the evidence supports the conclusion reached, a panel must undertake a critical examination of whether, in the light of the evidence on record, the investigating authority's conclusion was reasoned and adequate.[76]

7.33. However, a panel may bear in mind that errors in an investigating authority's examination of individual pieces of evidence "undoubtedly would affect an examination of the *totality* of the evidence".[77] Further, "[i]n reviewing individual pieces of evidence, for example, a panel should focus on issues such as the accuracy of a piece of evidence, or whether that piece of evidence may reasonably be relied on in support of the particular inference drawn by the investigating authority".[78]

7.34. In reviewing whether the USDOC's public body determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement, we will begin by assessing the USDOC's factual findings regarding the relationship between the GOT and OYAK. Thereafter, we will review the USDOC's factual findings in relation to Erdemir and Isdemir.

7.35. Regarding OYAK, the United States argues that "OYAK was … expressly established to provide retirement and social security benefits to members of the country's armed forces"[79], and argues that "ensuring that military members receive pensions and other benefits as a result of their service is

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Annual Report indicates that the TPA must approve "decisions regarding the closure, limitation upon restriction, or capacity curtailing of any of the integrated steel production plants or the mining plants owned by the Company and/or by the affiliates". (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; see also Erdemir 2012 Annual Report, (Exhibit USA-5), pp. 62-63). In the CWP, HWRP, and WLP determinations, USDOC examined Articles 21, 22, and 37 of Erdemir's Articles of Association and found that the TPA holds veto power over any decision related to the closedown, sale, merger, or liquidation, as well as capacity adjustments, for both Erdemir and Isdemir.

[74] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 22. Erdemir's 2012 Annual Report states that "[e]ach shareholder or the representative of the shareholder attending on [*sic*] Ordinary or an Extraordinary General Assembly Meetings shall have one voting right for each share". (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 34). Erdemir's Articles of Association state that "Board of Directors consists of minimum 5 and maximum 9 members to be selected by the General Assembly of Shareholders under the provisions of Turkish Commercial Code and Capital Markets Board Law". (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 34). In addition, Erdemir's Articles of Association state that "[e]ach share has only one voting right" and that the "Board of Directors consists of minimum 5 and maximum 9 members to be selected by the General Assembly of Shareholders". (Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9 and fn 45; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14 and fn 69; and HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12 and fn 60; see also Erdemir's Articles of Association, (Exhibit USA-8), Articles 10 and 21).

[75] Appellate Body Report, *US − Carbon Steel (India)*, fn 610:

> [A] panel must examine whether the conclusions reached by the investigating authority are reasoned and adequate, and that such an examination must be critical, and be based on the information contained on the record and the explanations given by the authority in its published report. … Thus, there must be, in the investigating authority's determinations, an explanation of how the evidence on the record supports its factual findings.

See also Appellate Body Reports, *US − Countervailing Duty Investigation on DRAMS*, fn 278; and *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 97.

[76] Appellate Body Report, *Japan − DRAMs (Korea)*, para. 131. (emphasis original; fn omitted)

[77] Appellate Body Report, *US − Countervailing Duty Investigations on DRAMS*, para. 154. (emphasis original)

[78] Appellate Body Report, *US − Countervailing Duty Investigation on DRAMS*, para. 188.

[79] United States' response to Panel question No. 9, para. 35.

indicative of a governmental function".[80] In its determinations, the USDOC found relevant that, pursuant to Law No. 205, OYAK was established "as an institution related to the Ministry of National Defense"[81]; that OYAK's governing bodies are comprised of military and certain governmental personnel, which elect the eight-person board of directors[82]; that OYAK is ensured funding through mandatory contribution requirements, which it can enforce as a matter of law[83]; and that OYAK was granted certain property and tax privileges.[84] The USDOC also found relevant a statement in the TESEV study that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control".[85]

7.36. Turkey objects that OYAK is part of the Turkish public social security system, and rejects that OYAK is performing "governmental functions".[86] Turkey has contended throughout these proceedings that OYAK is a private occupational pension fund that is not part of Turkey's mandatory "first pillar" public social security system.[87] Turkey further submits that OYAK is a "non-profit foundation".[88]

7.37. In the USDOC's public body determinations in the four proceedings at issue, the USDOC did not identify OYAK's role of providing retirement and social security benefits as being a government function. OYAK's annual reports, which were on the record before the USDOC, describe OYAK as a private supplemental pension fund that is not funded through the Turkish government.[89]

[80] United States' response to Panel question No. 14, para. 47.

[81] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 11; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 8.

[82] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 8-9 (fns omitted). As noted by the United States, Article 3 of Law No. 205 specifies that OYAK's Representative Assembly is to be composed entirely of members of the Turkish Armed Forces, who are "designated by their respective commanders or superiors". Article 4 of Law No. 205 states that the General Assembly shall be composed of the following members: the Minister of National Defence; the Minister of Finance; the Chief of the General Staff; the Commanders of the Land Forces, the Naval Forces and the Air Forces, or their Chiefs of Staff; the General Commander of the Gendarmeries or his Chief of Staff; the President of the Court of Accounts of the Republic of Turkey; the President of the Board of Audit of the Prime Ministry of the Republic of Turkey; the Chairman of the Board of the Banks Association of Turkey; the Chairman of the Union Chambers and Commodity Exchanges of Turkey; and six staff from the Ministry of National Defence or General Staff. Article 4 also provides that the General Assembly shall include "[f]rom the private sector, three persons distinguished in financial and economic fields, who will be appointed by the Minister of National Defence for three-year terms of office". (See, e.g. Law No. 205 (HWRP questionnaire), (Exhibit TUR-30), Article 4). The General Assembly, in turn, elects three members of OYAK's board of directors, drawing from candidates nominated by the Minister of National Defence and Chief of the General Staff. The four other members of the board of directors, as well as the Chairman of the board of directors, are selected by an Election Committee composed of the Minister of National Defence, the Minister of Finance, the President of the Court of Accounts of the Republic of Turkey, the President of the Board of General Audit of the Prime Ministry of the Republic of Turkey, the Chairman of the Union Chambers and Commodity Exchanges of Turkey, and the Chairman of the Board of the Banks Association of Turkey. Article 11(i) of Law No. 205 specifies that, among other duties, the board of directors is charged with determining "the methods for managing the assets of the Fund". (See, e.g. Law No. 205 (HWRP questionnaire), (Exhibit TUR-30)).

[83] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9. Law No. 205 states that membership and contributions are mandatory for members of the Turkish armed forces, and may be subject to penalty and collection if unpaid. (See, e.g. Law No. 205 (HWRP questionnaire), (Exhibit TUR-30), Articles 17 and 18).

[84] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), pp. 11-12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 8-9. Law No. 205 states that OYAK's property "shall enjoy the same rights and privileges as State property" and that OYAK is to be exempted from corporate and other taxes. (See, e.g. Law No. 205 (HWRP questionnaire), (Exhibit TUR-30), Articles 35 and 37).

[85] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21.

[86] Turkey's second written submission, para. 38.

[87] Turkey's first written submission, paras. 10-11; second written submission, paras. 35-38.

[88] Turkey's second written submission, para. 38.

[89] OYAK 2012 Annual Report (OCTG questionnaire), (Exhibit TUR-57), p. 2 ("OYAK is not a part of the government's social security institutions and does not and has not, at any time, seized any share from the budgets of such institutions"); OYAK 2013 Annual Report (WLP questionnaire), (Exhibit TUR-106), p. 5 ("OYAK

OYAK's annual reports further specify that OYAK does not use public resources or receive any other form of public support, and the government has no ownership stake in OYAK.[90]

7.38. Although the USDOC highlighted the statement in Article 1 of Law No. 205 that OYAK was established "as an institution related to the Ministry of National Defense"[91], and provisions of Law No. 205 concerning OYAK's tax and property status and governing structure, Article 1 of Law No. 205 also provides that "[OYAK] shall be subject to the provisions of this Law and private law and shall be a corporate body with financial and administrative autonomy."[92] In our view, the fact that OYAK is granted financial and administrative autonomy under Turkish law is relevant to the analysis of whether OYAK acts according to the mandate of the GOT or in pursuit of Turkish government policies or objectives.[93] We recall the Appellate Body in *US − Carbon Steel (India)* explained that panels should not overlook evidence on the record relevant to assessing the relationship between the government and an entity under investigation "and, in particular, the degree of control by the [government] and the degree of autonomy enjoyed by" such an entity.[94] Therefore, in weighing the relevance of OYAK's status under Turkish law, OYAK's financial and administrative autonomy is also relevant.

7.39. We do not consider the fact that OYAK's governing bodies are comprised of military and certain governmental personnel, which elect the eight-person board of directors, that OYAK is ensured mandatory contributions for pension purposes, and that OYAK may benefit from its certain property and tax status, is sufficient to establish that OYAK acts pursuant to governmental authority or is under the meaningful control of the GOT. The Appellate Body has explained that evidence of "formal indicia of control", such as a government's power to appoint and nominate directors to the board of an entity may be relevant to the assessment of whether the conduct of an entity is that of a public body.[95] However, the Appellate Body also observed that "a government's power to appoint directors to the board of an entity and the issue of whether those directors are independent, would seem to be distinct factors" in assessing the governmental character of an entity.[96] We see nothing in the evidence that the USDOC considered in its analysis of OYAK to suggest that military and government personnel within OYAK have made decisions under the direction of the GOT in pursuit of governmental economic policies. In its assessment of OYAK, in addition to citing provisions of Law No. 205, the USDOC referred to a single statement in the TESEV study that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control".[97] Although the USDOC appears to equate Turkish military presence in OYAK with governmental control based on this statement, the USDOC did not weigh other statements in the TESEV study describing OYAK's "core function as a holding company", and that OYAK's mission statement identifies the goals to "protect[] first and foremost the actuarial balance in its operations" and to "offer the highest rates

is not a part of the government's social security institutions and does not, and has not at any time, received any share from the budgets of such institutions"); OYAK 2014 Annual Report (HWRP questionnaire), (Exhibit TUR-29), p. 7 ("OYAK is not a part of the government's social security institutions and does not, and has not at any time, received any share from the budgets of such institutions"); OYAK 2013 Annual Report (CWP questionnaire), (Exhibit TUR-10), p. 5 ("OYAK is not a part of the government's social security institutions and does not, and has not at any time, received any share from the budgets of such institutions.")

[90] OYAK 2012 Annual Report (OCTG questionnaire), (Exhibit TUR-57), p. 2; OYAK 2013 Annual Report (WLP questionnaire), (Exhibit TUR-106), p. 5; OYAK 2014 Annual Report (HWRP questionnaire), (Exhibit TUR-29), p. 7; and OYAK 2013 Annual Report (CWP questionnaire), (Exhibit TUR-10), p. 5.

[91] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 11; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 8.

[92] Law No. 205 (HWRP questionnaire), (Exhibit TUR-30), Article 1.

[93] As we discuss in further detail below, in the context of its assessment of Erdemir and Isdemir, the USDOC reasoned that the GOT exercised its control (in part, through OYAK) to "implement[] policies which promoted [Erdemir and Isdemir's] customers to engage in export-oriented production" and to "support[] the use of domestically mined resources for raw materials in view of … the added value created by the domestic suppliers in favor of the local industries". The USDOC states that "[t]hese policies are in line with the GOT's stated policy in its 2012-2014 Medium Term Programme to improve Turkey's balance of payments." (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21).

[94] Turkey's first written submission, para. 155 (quoting Appellate Body Report, *US − Carbon Steel (India)*, para. 4.44).

[95] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.43.

[96] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.45.

[97] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21.

of return to its members".[98] In our view, these additional statements do not support an inference that OYAK officials act at the behest of the GOT.[99]

7.40. Taking into account the evidence on the record, including that OYAK is granted financial and administrative autonomy under Turkish law, we are not persuaded that the evidence that the USDOC relied upon demonstrates that OYAK is under the meaningful control of the GOT, or that OYAK is part of the GOT in either the broad sense or the narrow sense. Accordingly, we find that the USDOC was not justified in attributing to the GOT any control that OYAK may exercise over Erdemir and Isdemir.

7.41. We recall the United States' argument that the USDOC based its consideration on the totality of evidence, which includes but is not limited to OYAK's involvement in Erdemir. In particular, the USDOC also considered relevant participation by the Ministry of Finance and TPA on Erdemir's board of directors. The USDOC found that the TPA "holds veto power over any decisions [sic] related to the closure, sale, merger, or liquidation of both Erdemir and Isdemir".[100] The United States argues that this "affords the GOT, through the TPA, an ability to determine critical aspects of Erdemir's and Isdemir's operations".[101] The United States has also pointed to the fact that, as a condition of purchasing Erdemir from the GOT in 2006, OYAK agreed to increase Erdemir's steel production capacity by 3.5 million tonnes through the creation of Isdemir in 2008.[102] Finally, the USDOC referred to selected statements from the 2012 and 2013 Erdemir Annual Reports, which the USDOC found to be "in line"[103] with the Turkish policy to improve the balance of payments.

7.42. As we have found in respect of military and government officials in OYAK's governing bodies, Ministry of Finance and TPA participation on Erdemir's board of directors amount to formal "indicia" of control that is insufficient to establish that the GOT meaningfully controls Erdemir and Isdemir.[104] For instance, although the United States has emphasized the *ability* of the TPA to determine critical aspects of Erdemir and Isdemir's operations, as Turkey argues[105], the USDOC has not pointed to evidence on the record that TPA has at any point since Erdemir's privatization exercised its veto power or sought to influence Erdemir's pricing, production or financial decisions. We do not share the United States' view that events taking place at the time of Erdemir's privatization in 2006 are indicative of whether Erdemir and Isdemir were acting in pursuit of Turkish governmental policies in the years after Erdemir's privatization.

[98] TESEV study, (Exhibit USA-4), p. 10. In addition, while noting that OYAK benefits from special privileges under private and public law which facilitates its pursuit of revenue-generating activities, the TESEV study indicates that OYAK investments and profits are never used for military spending and projects. (TESEV study, (Exhibit USA-4), pp. 8 and 10).

[99] In support of its argument that the members participating in OYAK's governing bodies are acting in their individual capacities, and not as government officials, Turkey refers to a position paper offered by a law firm that was on the record of the OCTG, HWRP, and WLP proceedings, as well as a case brief submitted by petitioner Borusan in the CWP proceeding. (See, e.g. Turkey's first written submission, paras. 126, 276, and 389 (referring to Application of State aid rules to OYAK (OCTG questionnaire), (Exhibit TUR-66), paras. 3.10-3.18; Application of State aid rules to OYAK (WLP questionnaire), (Exhibit TUR-99), paras. 3.1-3.18; and Application of State aid rules to OYAK (OCTG questionnaire), (Exhibit TUR-39), paras. 3.10-3.18)). See also Turkey's first written submission, para. 499 (referring to Excerpt from Borusan's CWP Case Brief, (Exhibit TUR-5), pp. 13-14). The United States argues that these documents are unsupported by record evidence and Turkey's reliance on these documents should carry little weight. (United States' first written submission, paras. 108-112; second written submission, paras. 89-93). We have not taken these documents into account in our assessment here.

[100] See, e.g. OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21.

[101] United States' second written submission, para. 117.

[102] United States' second written submission, para. 102 (referring to Exhibit 4 of Maverick's comments, (Exhibit USA-35), as cited in WLP CVD Final Determination Memorandum, (Exhibit TUR-122), pp. 33-34). Turkey argues that this evidence should not be considered as it was not relied upon by the USDOC in any of the underlying proceedings, in determining that Erdemir and Isdemir are public bodies. (Turkey's response to Panel question No. 16, para. 42). We note that the USDOC referred to evidence submitted by petitioner Maverick in the "Comments" section of the WLP determination, but did not refer to the information in its own analysis.

[103] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[104] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[105] See, e.g. Turkey's second written submission, para. 64.

7.43. As the only evidence that Erdemir has acted in pursuit of governmental policy, the USDOC considered that statements from Erdemir's 2012 and 2013 Annual Reports demonstrated that Erdemir's conduct was "in line"[106] with Turkish policy to improve the balance of payments. The USDOC referred to the objective set out in the 2012-2014 Medium Term Programme "to decrease high dependency of production and exports on imports, especially for intermediate and capital goods, policies and supports enhancing domestic production capacity will be carried on".[107] As set out in paragraph 7.30 above, the USDOC referred to statements that: "the [Erdemir] Group also implemented policies which promoted the customers to engage in export-oriented production"[108]; "ERDEMIR Group also supports the use of domestically mined resources for raw materials in view of the close proximity of the resources to our production sites and the added-value created by the domestic suppliers in favour of the local industries"[109]; Erdemir "continues to create-value-added for Turkish industry through its initiatives to increase the use of domestic sources of raw materials"[110]; and Erdemir "made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013".[111]

7.44. We do not share the USDOC's assessment that these statements support the inference that Erdemir and Isdemir acted in pursuit of objectives set out in the 2012-2014 Medium Term Programme. Erdemir's 2012 and 2013 Annual Reports do not themselves refer to the 2012-2014 Medium Term Programme or any other government macroeconomic programme. Absent clear indication that Erdemir acts pursuant to governmental authority, the mere fact that Erdemir's own business strategies include encouraging customers in export-oriented industries to increase production or encouraging the use of domestic sources of raw materials – even if such efforts might align with GOT macroeconomic policy objectives – does not show that Erdemir and Isdemir exercise governmental authority.

7.45. Other statements in Erdemir's 2012 Annual Report support our understanding that Erdemir's business strategies are consistent with those of a private, profit-seeking company. For instance, Erdemir's 2012 Annual Report indicates that "ERDEMIR Group managed to boost its sales by 22% in 2012 with the assistance of industries which are export-driven".[112] Erdemir's 2012 Annual Report also notes that raw material "entails a very large share in the total costs" and is procured from abroad, and also explains that Erdemir monitors raw material markets "in line with two objectives, firstly, to search for alternative raw material resources and, secondly, to augment access to economical raw material suppliers", further highlighting the importance of "supply safety" to production and the need to find "the most cost-effective raw material resources".[113]

7.46. Finally, the United States has referred to additional statements in Erdemir's 2012 and 2013 Annual Reports in this dispute, beyond those that were identified in the challenged determinations. These include statements that: "[p]roducing flat steel products is crucial for the development of Turkish steel industry, and Isdemir plays a significant role in enhancing the capacity of flat steel production"; Erdemir's "goal is to meet the country's ever-growing need for flat steel and pave the way for the development and growth of Turkish industry"; and "Isdemir also began manufacturing flat products in 2008 with the Modernization and Transformation Capital Investments undertaken after Isdemir's acquisition by Erdemir that year. This largest single investment in the history of the Republic of Turkey served to mitigate the imbalance between long and flat steel production in the country."[114] Turkey objects to the United States' reference to these statements in this dispute as *ex post* justifications.

[106] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[107] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21 and fn 160. See also Medium Term Programme, (Exhibit USA-6), p. 23.

[108] Erdemir 2012 Annual Report, (Exhibit USA-5), p. 29.

[109] Erdemir 2012 Annual Report, (Exhibit USA-5), p. 35.

[110] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 18.

[111] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 34.

[112] Erdemir 2012 Annual Report, (Exhibit USA-5), p. 29. Erdemir's 2013 Annual Report indicates that it "made 35% of its flat steel sales to the steel pipe-manufacturing sector, one of the largest exporting sectors in Turkey". (Erdemir 2013 Annual Report, (Exhibit USA-7), p. 34).

[113] Erdemir 2012 Annual Report, (Exhibit USA-5), p. 35.

[114] United States' first written submission, paras. 102-103; response to Panel question No. 26, para. 89 (referring to Erdemir 2012 Annual Report, (Exhibit USA-5), p. 5; and Erdemir 2013 Annual Report, (Exhibit USA-7), p. 6).

7.47. As Turkey notes, the USDOC did not directly address these excerpts in any of the determinations. Setting aside the question of whether the USDOC might have taken these statements into account in its determinations, we do not consider that general references to developing the Turkish steel industry and Turkish industry more generally change our assessment reached above.

7.48. Based on our review above, we therefore find that the USDOC failed to establish based on evidence on the record that OYAK is under the meaningful control of the GOT, or that OYAK is part of the GOT in either the broad sense or the narrow sense. We are therefore not persuaded that OYAK's control over Erdemir and Isdemir justifies attributing the actions of those entities to the GOT.

7.49. In addition, we find that the remaining evidence that the USDOC relied upon in the context of assessing Erdemir and Isdemir in the challenged proceedings is insufficient on its own to establish that Erdemir and Isdemir possess, exercise, or are vested with governmental authority to constitute public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. We find that most of the evidence that the USDOC relied upon amounts to evidence of "indicia" of government control. As we explained above, we are also not convinced that statements that the USDOC identified in Erdemir's 2012 and 2013 Annual Reports provide evidence that Erdemir and Isdemir's corporate objectives and accomplishments are aligned with GOT stated macroeconomic policies in its 2012-2014 Medium Term Programme, in particular, the objective to improve Turkey's balance of payments either by "decreas[ing] high dependency of production and exports on imports" through "policies and supports enhancing domestic production capacity".[115]

7.50. For the foregoing reasons, we therefore find that Turkey has demonstrated that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement. In particular, we find that the USDOC failed to apply the standard applicable to the public body inquiry under Article 1.1(a)(1) by failing to establish that Erdemir and Isdemir possess, exercise, or are vested with governmental authority to perform a government function. In addition, we find that the USDOC acted inconsistently with Article 1.1(a)(1) by failing to provide a reasoned and adequate explanation for its determinations based on consideration of the information contained in the record and the explanations given by the authority in its published report.

7.2.3.2 Whether the USDOC failed to consider relevant evidence on the record related to Erdemir's commercial conduct

7.51. Turkey also argues that the USDOC acted inconsistently with Article 1.1(a)(1) by failing to consider evidence on record that arguably demonstrates that Erdemir and Isdemir operate on a commercial basis and independently from OYAK and the GOT.[116]

7.52. Referring to the guidance of the Appellate Body in *US − Carbon Steel (India)*, Turkey argues that an investigating authority conducting a public body determination must give proper consideration to evidence on the record regarding the relationship between the government and the entity at issue "and, in particular, the degree of control by the [government] and the degree of autonomy enjoyed by" the entity in question, such as evidence that the entity operates "in a commercial, de-regulated environment and conducts its operations and business on commercial principles".[117]

7.53. Specifically, Turkey argues that the totality of evidence demonstrates that Erdemir, its board, and its management act independently from both OYAK and the GOT. In the OCTG proceeding, Turkey argues that respondents presented arguments that "Erdemir does not sell coil at preferential prices", and that Erdemir's prices are higher than co-respondent Toscelik's cost of production and selling prices.[118] In the WLP, HWRP, and CWP proceedings, Turkey argues that the GOT presented arguments that Erdemir and Isdemir "operate[] only to maximize [their] profits as is the case for all

[115] Medium Term Programme, (Exhibit USA-6), p. 23.
[116] Turkey's first written submission, paras. 146, 153-165, 296, 303-316, 408, 414-426, 519, and 526-538.
[117] Turkey's first written submission, para. 155 (referring to Appellate Body Report, *US − Carbon Steel (India)*, paras. 4.40 and 4.44).
[118] Turkey's first written submission, para. 154.

private companies" and that "Erdemir has always been a profitable company and reached a net operating profit worth of 484 million dollar in 2013".[119]

7.54. In addition, Turkey refers to information contained in the Input Producer Appendices and other documents on the record in the four proceedings, which Turkey argues provides evidence that (a) Erdemir is a publicly-traded company subject to strict audit and disclosure requirements with 47.63% of Erdemir's shares owned by private entities; (b) Erdemir has a corporate framework with established guidelines by which its board and executive officers make investment decisions based on maximizing profits; (c) Erdemir's executive officers and senior management are selected based on their professional expertise; (d) Erdemir's executive officers are independent from the GOT and none of Erdemir's senior managers are government officials; and (e) Erdemir's hot rolled steel pricing decisions are made based on worldwide price indexes and cost considerations, free from government involvement.[120]

7.55. Contrary to Turkey's assertion, the United States argues that the USDOC considered this information and provided a reasoned and adequate explanation for its rejection. Recalling the USDOC's explanation in its determinations, the United States submits that "a firm's commercial behavior is not dispositive in determining whether that firm is a government 'authority'", as "this line of argument conflates the issues of the 'financial contribution' being provided by an authority and 'benefit.'"[121] The United States submits that this reasoning is consistent with the approach taken by previous panels[122] and is also supported by the structure of the SCM Agreement, in that Article 1.1(a)(1) does not include consideration of whether the financial contribution is provided consistent with market principles.[123]

7.56. The United States further argues that Turkey conflates the distinct concepts of a company operating independently and autonomously from the government with that of a company exhibiting commercial profit-maximizing behaviour. The United States submits that Turkey has only referred

[119] Turkey's first written submission, paras. 304, 415, and 527.

[120] Turkey's first written submission, paras. 157-162; 307-312; 418-423, and 530-535. See also Excerpt from Borusan's OCTG Case Brief, (Exhibit TUR-52); Erdemir and OYAK's OCTG Input Producer Appendix, (Exhibit TUR-61); Functioning and Governing Principles of Erdemir and Isdemir and Audit Committee Regulation (OCTG questionnaire), (Exhibit TUR-62); Change in the Share and Capital Structure of Erdemir and Isdemir (OCTG questionnaire), (Exhibit TUR-64); Target Base Price Determination Diagram (OCTG questionnaire), (Exhibit TUR-67); Excerpt from Tosçelik's OCTG Case Brief, (Exhibit TUR-81), pp. 6-7; OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 34; Erdemir and Isdemir's Input Producer Appendix (WLP questionnaire), (Exhibit TUR-103); Functioning and Governing Principles of Erdemir and Isdemir and Audit Committee Regulation (WLP questionnaire), (Exhibit TUR-104); Excerpt from Erdemir 2013 Annual Report (WLP questionnaire), (Exhibit TUR-105); Price Determination Methodology and HRS Price Index (WLP questionnaire), (Exhibit TUR-110); Tosçelik's WLP Case Brief, (Exhibit TUR-119), p. 12; Input Producer Appendix (HWRP questionnaire), (Exhibit TUR-26); Functioning and Governing Principles of Erdemir and Isdemir (HWRP questionnaire), (Exhibit TUR-27); Excerpt from Erdemir 2013 Annual Report (HWRP questionnaire), (Exhibit TUR-28); Price Determination Methodology and HRS Price Index (HWRP questionnaire), (Exhibit TUR-33); Input Producer Appendix (CWP questionnaire), (Exhibit TUR-7); Responsibilities of Erdemir (CWP questionnaire), (Exhibit TUR-8); Excerpt from Erdemir 2012 Annual Report (CWP questionnaire), (Exhibit TUR-9); Performance of Erdemir (CWP questionnaire), (Exhibit TUR-13); and Price Determination Methodology and HRS Price Index (CWP questionnaire), (Exhibit TUR-14).

[121] United States' first written submission, para. 114 (quoting OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 35; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 22; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 36; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 29); second written submission, para. 110.

[122] For example, the United States refers to the statement by the panel in *Korea – Commercial Vessels* that:

> [T]he concept of "financial contribution" is writ[tten] [sic] broadly to cover government and public body actions that might involve subsidization. Whether the government or public body action in fact gives rise to subsidization will depend on whether it gives rise to a "benefit." Since the concept of "benefit" acts as a screen to filter out commercial conduct, it is not necessary to introduce such a screen into the concept of "financial contribution".

(Panel Report, *Korea – Commercial Vessels*, para. 7.28)

In response to a question from the Panel, the United States submits that the Appellate Body in *Brazil – Aircraft* and the panel in *US – Anti-Dumping and Countervailing Duties (China)* also recognized financial contribution and benefit as independent concepts. (United States' response to Panel question No. 25, para. 81 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 157; and Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.29)).

[123] United States' first written submission, paras. 115-116.

to evidence with respect to commercial behaviour, which does not demonstrate that Erdemir and Isdemir operate autonomously from the GOT.[124]

7.57. The United States submits that Turkey has not in any event demonstrated Erdemir's independence from the GOT based on its financial decision-making processes. In this respect, Erdemir's board of directors, which includes OYAK and TPA officials, also approves the selection of senior managers, thus allowing it to participate in the decision-making process regarding pricing and production. The United States submits that the fact that high-level managers may be selected based on their professional expertise does not rebut the GOT's influence. Lastly, although Turkey raises the fact that Erdemir is a publicly traded company subject to certain audit and disclosure requirements, the United States argues that Turkey has not cited any evidence or provided explanation to demonstrate that compliance with these requirements somehow means Erdemir's behaviour is free of government influence.[125]

7.58. We recall that, in evaluating whether the conduct of a particular entity is that of a public body within the meaning of Article 1.1(a)(1), an investigating authority "must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant".[126] In addition, the Appellate Body has observed that an investigating authority undertaking a public body analysis should take into account all evidence on the record regarding the relationship between the government and the entity at issue, which may include evidence that the entity operates "in a commercial, de-regulated environment and conducts its operations and businesses on commercial principles".[127]

7.59. We note that the United States has taken a number of stances in relation to evidence on the record regarding Erdemir and Isdemir's commercial conduct. On the one hand, citing the USDOC in the determinations at issue, the United States has submitted that a firm's commercial behaviour is "not dispositive" in determining whether that firm is a public body.[128] On the other hand, the United States submits that the USDOC considered all the evidence that was submitted, but concluded that the evidence on Erdemir's commercial behaviour "simply was outweighed, in [the] USDOC's view, by the ample record evidence to the contrary that supported [the] USDOC's determinations".[129]

7.60. The United States has also submitted that information regarding an entity's "commercial conduct" does not undermine the USDOC's findings, as it is possible that a government or government-controlled entity may act in a commercial manner.[130] Finally, as noted above, the

[124] United States' response to Panel question No. 26, para. 84; second written submission, paras. 106 and 109.

[125] United States' second written submission, paras. 111-114.

[126] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319. Further, investigating authorities are "under an obligation to actively seek out information relevant to the analysis of whether a financial contribution had been made", including information relevant to the potential characterization of entities as public bodies, so as to be able to provide a reasoned and adequate explanation of their conclusions. (Ibid. para. 344).

[127] Turkey's first written submission, para. 155 (referring to Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.40 and 4.44). In its third-party submissions, Japan has argued that an important aspect of the analysis is whether an entity is structured in a manner that ensures that management decisions are made independently, arguing that evidence of "[e]stablished guidelines on corporate governance, such as stringent disclosure and auditing regulations, or operation of an independent corporate body, such as an investment advisory board, may be evidence of such independence". (Japan's third-party submission, para. 12; third-party statement, para. 5).

[128] United States' first written submission, para. 114 (as USDOC explained "a firm's commercial behavior is not dispositive in determining whether that firm is a government 'authority'"). See also ibid. para. 117 ("consideration of whether a financial contribution was provided consistent with market principles is not germane to the determination of the existence of financial contribution"). See also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 35; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 36; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 22; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 29-30.

[129] United States' first written submission, para. 118.

[130] United States' second written submission, paras. 109 and 111.

United States disputes that the submitted information and explanation reflects behaviour free of government influence.

7.61. Based on our review of the underlying determinations, we understand that the USDOC found that evidence regarding Erdemir's commercial conduct was not legally "relevant" (or not "dispositive")[131] to the public body analysis. In light of the Appellate Body's guidance that evidence that an entity conducts its operations and business on commercial principles may be relevant to the public body assessment, we are of the view that the USDOC's failure to consider this information in any meaningful way runs contrary to an investigating authority's obligation to evaluate and give due consideration to all relevant characteristics of the entity. Rather, we consider that, in making its public body determinations in respect of Erdemir and Isdemir, the USDOC should have at least engaged with evidence submitted in the underlying proceedings related to Erdemir's commercial conduct, rather than simply dismissing the information as irrelevant.

7.62. Accordingly, in addition to our findings above, we find that Turkey has demonstrated that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement for having failed to consider relevant evidence on the record.

7.2.3.3 Whether the USDOC's assessment of OYAK is also inconsistent with Article 1.1(a)(1) of the SCM Agreement

7.63. Turkey also requests a separate finding that the USDOC determined that OYAK is a public body in a manner inconsistent with Article 1.1(a)(1) of the SCM Agreement, in addition to findings in relation to Erdemir and Isdemir. Turkey submits that the USDOC applied the same legal standard under US law for "public body" to OYAK as it did to Erdemir and Isdemir, and considers that findings in relation to OYAK would assist in resolving the dispute.[132]

7.64. Based on our findings above that Turkey has demonstrated that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in its determinations regarding Erdemir and Isdemir, we do not consider it necessary to separately rule on whether the USDOC determined that OYAK is a public body in a manner inconsistent with Article 1.1(a)(1) to resolve the matter before us. We are of the view that we have adequately addressed flaws in the USDOC's analysis regarding OYAK in our assessment above. Accordingly, we make no separate finding regarding any public body determination that the USDOC may have made in respect of OYAK.

7.2.4 Conclusions regarding Turkey's claims under Article 1.1(a)(1) of the SCM Agreement

7.65. In the four challenged countervailing duty proceedings, the USDOC relied upon record evidence to reach its conclusion that the GOT exercises "meaningful control" over Erdemir and Isdemir, including through its control of OYAK, and accordingly, the USDOC found Erdemir and Isdemir to be public bodies, and hence "authorities", pursuant to Section 771(5)(B) of the Tariff Act of 1930.[133]

7.66. We found that the USDOC failed to apply the standard applicable to the public body enquiry under Article 1.1(a)(1) of the SCM Agreement in its assessment of "meaningful control", by failing to establish that Erdemir and Isdemir possess, exercise, or are vested with governmental authority to perform a government function, as required by the Appellate Body's interpretation of Article 1.1(a)(1). We further found that the USDOC failed to provide a reasoned and adequate explanation for its determinations based on consideration of the information contained in the record

[131] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 35; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 36; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 22; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 30.

[132] Due to the central role of OYAK in the USDOC's determinations regarding Erdemir and Isdemir, Turkey believes that an effective resolution of the dispute "would be best served by a clear panel finding on OYAK's, as well as Erdemir's and Isdemir's, status as a 'public body'". (Turkey's response to Panel question No. 8, para. 32).

[133] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 22; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), pp. 13-15; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), pp. 11-12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 8-9.

and the explanations given by the authority in its published report, and for failing to consider relevant evidence on the record.

7.67. In our assessment, we are mindful that the United States based its finding on the totality of evidence. However, we found that the USDOC failed to establish based on evidence on the record that OYAK is under the meaningful control of the GOT, or that OYAK is part of the GOT in either the broad sense or the narrow sense. In particular, we observed that OYAK is granted financial and administrative autonomy under Turkish law. We also found that much of the evidence that the USDOC considered in relation to OYAK constitutes mere "formal indicia" of government control, and the USDOC did not identify otherwise establish that OYAK has taken decisions in pursuit of government economic policies. We are therefore not persuaded that OYAK's control over Erdemir and Isdemir justifies attributing the actions of those entities to the GOT.

7.68. In addition, we concluded that the evidence that the USDOC relied upon in the context of assessing Erdemir and Isdemir in the challenged proceedings is insufficient on its own to establish that Erdemir and Isdemir possess, exercise, or are vested with governmental authority to constitute public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. We found that most of the evidence that the USDOC relied upon amounts to evidence of "indicia" of government control. We did not find that the remaining evidence supported the United States' argument that Erdemir effectuates governmental interests by pursuing policies and objectives that are consistent with the GOT's macroeconomic policies as reflected in the 2012-2014 Medium Term Programme, namely, policies aimed at improving Turkey's balance of payments either by "decreasing high dependency of production and exports on imports" through "policies and supports enhancing domestic production capacity".[134] We also found that the USDOC should have engaged with evidence submitted in the underlying proceedings related to Erdemir's commercial conduct, rather than simply dismissing the information as irrelevant. In light of our findings regarding Erdemir and Isdemir, we did not consider it necessary to separately rule on whether the USDOC public body determinations in respect of OYAK are also inconsistent with Article 1.1(a)(1) in order to resolve the dispute.

7.3 Turkey's claims under Articles 1.1(b) and 14(d) of the SCM Agreement in relation to the benefit determination in the OCTG proceeding

7.3.1 Introduction

7.69. Turkey claims that the USDOC "has a practice, in assessing whether a good is provided for less than adequate remuneration 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".[135] Turkey claims that this practice is inconsistent with Article 14(d) of the SCM Agreement, both "as such" and as applied in the OCTG investigation. Turkey also claims that, because the USDOC failed to properly establish that Erdemir and Isdemir provided HRS to the respondents for LTAR under Article 14(d), the USDOC failed to establish that the alleged provision of hot rolled steel conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

7.70. In its first written submission, the United States requested that the Panel make a preliminary ruling excluding from its terms of reference Turkey's challenge concerning the alleged "practice" mentioned above, on the basis that Turkey failed to identify such a measure and accompanying "as such" claims relating to the measure in its request for consultations. In addition, the United States requested the Panel to make a preliminary ruling that the OCTG Final Determination which forms the basis of Turkey's as applied claim in relation to the alleged "practice" is also outside the Panel's terms of reference, on the basis that the determination had ceased to exist and have legal effect prior to the Panel's establishment.

7.71. In addressing Turkey's claims, we first address the United States' requests concerning the Panel's terms of reference, before turning to the parties' arguments regarding the merits of Turkey's claims.

[134] Medium Term Programme, (Exhibit USA-6), p. 23.
[135] Turkey's first written submission, para. 172.

7.3.2 The United States' request to exclude measures and claims from the Panel's terms of reference

7.3.2.1 Whether Turkey's panel request adds a challenge regarding an alleged benefit "practice" that was not the subject of Turkey's request for consultations

7.72. The United States has first requested the Panel to rule that Turkey's panel request improperly includes measures and claims regarding an alleged benefit "practice" that were not the subject of consultations.

7.73. The United States submits that Turkey clearly limited its challenge in its consultations request with respect to the USDOC's benefit determination exclusively to the preliminary and final benefit determinations in the OCTG proceeding.[136] By limiting its challenge in its consultations request to the preliminary and final benefit determinations in the OCTG proceeding, the United States submits that Turkey has attempted to improperly expand the scope of the dispute by including, first, a new measure, i.e. an alleged "practice" of rejecting in-country prices as benchmarks "based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good"[137]; and, second, by raising an "as such" claim that this alleged practice is inconsistent with Article 14(d) of the SCM Agreement.[138]

7.74. Turkey argues that the Panel should reject the United States' request. First, contrary to the United States' position, Turkey argues that the identification of the measures at issue in its consultations request is broader in scope as Turkey did identify "practices" as measures that are the subject of the dispute.[139] Second, Turkey argues that Article 4.4 of the DSU does not require a complainant to identify the practice in question with the same degree of specificity and particularity in its consultations request as in its panel request.[140] Third, Turkey argues that the manner in which it identified the measures at issue does not limit Turkey from raising an "as such" claim in its panel request.[141]

7.75. The United States' request requires the Panel to consider whether Turkey's challenge to the "practice" as specified in its panel request and associated "as such" claim should be excluded from the Panel's terms of reference on the basis that the alleged practice and the "as such" claim against this practice were not identified in Turkey's request for consultations. This issue involves the relationship between the measures that are identified in the consultations request and the panel request.

7.76. We recall the relevant legal standards applicable under Articles 4.4 and 6.2 of the DSU. Thereafter, we consider whether, based on the content of Turkey's request for consultations and panel request, Turkey has improperly expanded the scope of its challenge.

7.77. Article 4.4 of the DSU provides:

> All … requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

7.78. Article 6.2 of the DSU provides:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than

[136] United States' first written submission, paras. 18-20.
[137] United States' first written submission, para. 21 (quoting Turkey's panel request, para. 8.(A).2.a).
[138] United States' first written submission, para. 21 (referring to Turkey's panel request, para. 8.(A).2.a).
[139] Turkey's response to the United States' request for a preliminary ruling, paras. 16-17.
[140] Turkey's response to the United States' request for a preliminary ruling, para. 18.
[141] Turkey's response to the United States' request for a preliminary ruling, paras. 19-22.

> standard terms of reference, the written request shall include the proposed text of special terms of reference.

7.79. Although similar, these provisions contain important textual differences. While Article 4.4 of the DSU provides that a request for consultations must identify the "measure at issue", Article 6.2 provides that a panel request must identify the "specific measure at issue". This difference in the language between Articles 4.4 and 6.2 makes it clear that, in identifying the measure at issue, greater specificity is required in a panel request than in a consultations request.[142] Further, while Article 4.4 provides that a consultations request must identify the "legal basis for the complaint", Article 6.2 specifies that a panel request must "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

7.80. The Appellate Body has explained that the measures and claims identified in a panel request may constitute a natural evolution of the consultations process.[143] In this respect, a "precise and exact identity"[144] is not required between the measures identified in the request for consultations and the measures identified in the panel request.[145] The Appellate Body has also explained that the "legal basis" for a complaint in a panel request may reasonably evolve from the consultations request, so long as the addition of provisions do not have the effect of changing the essence of the complaint.[146] Thus, in respect of measures or claims, as long as a complainant does not "expand the scope"[147] or change the "essence" of the dispute[148] in its panel request as compared to its consultations request, the contents of that panel request will determine the panel's terms of reference.[149]

7.81. When a party alleges that a panel request has impermissibly expanded the scope of the dispute or changed its essence, a panel must scrutinize the extent to which the identified measure or claim at issue has evolved or changed from the consultations request to the panel request. The determination of whether the identification of the specific measure at issue or claim in the panel request expanded the scope or changed the essence of the dispute must be made on a case-by-case basis, considering the context in which the measures exist and operate.[150]

7.82. We must therefore assess whether Turkey expanded the scope or changed the essence of the dispute in its panel request as compared to its request for consultations, through the inclusion as a specific measure in its panel request, a "practice[] followed by the United States in the identified countervailing duty proceedings related to … the rejection of in-country prices in the assessment of benefit"[151], and through the inclusion of an "as such" claim against this practice.[152]

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[142] Appellate Body Reports, *Argentina − Import Measures*, para. 5.9.

[143] The Appellate Body has explained that the difference in language between Articles 4.4 and 6.2 reflects the underlying distinction between the consultations process and the panel process, in particular, that consultations facilitate the exchange of information that allows the parties to either reach a mutually agreed solution or refine the contours of the dispute. (Appellate Body Reports, *Argentina − Import Measures*, para. 5.10; *US − Upland Cotton*, para. 293; and *Mexico − Corn Syrup (Article 21.5 − US)*, para. 54).

[144] Appellate Body Report, *Brazil − Aircraft*, para. 132.

[145] Appellate Body Reports, *Argentina − Import Measures*, para. 5.9; *Mexico − Anti-Dumping Measures on Rice*, para. 138; and *Mexico − Corn Syrup (Article 21.5 − US)*, para. 54.

[146] Appellate Body Report, *Mexico − Anti-Dumping Measures on Rice*, para. 138.

[147] Appellate Body Report, *US − Upland Cotton*, para. 293.

[148] Appellate Body Report, *Mexico − Anti-Dumping Measures on Rice*, paras. 137-138.

[149] The Appellate Body has cautioned that a panel should not impose "too rigid a standard" of identity between the scope of the request for consultations and the request for the establishment of a panel, as this would substitute the consultations request for the panel request, which would undermine the stipulation in Article 7 of the DSU that the request for establishment of a panel will govern the panel's terms of reference unless the parties agree otherwise. (Appellate Body Reports, *Argentina − Import Measures*, para. 5.13; *US − Upland Cotton*, para. 293).

[150] See, e.g. Appellate Body Report, *US − Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

[151] Turkey's panel request, para. 7

[152] Regarding Turkey's "as such" claim, Turkey's panel request provides as follows:

> The USDOC has a practice, in assessing whether a good is provided for less than adequate remuneration 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 considers that this USDOC practice is inconsistent with Article 14(d) of the SCM Agreement both "as such", as a practice, and as applied in this investigation.

(Turkey's Panel request, para. 8.(A).2.a)

7.83. As part of this enquiry, we are required to evaluate whether the identified measures and claims in the panel request have evolved from measures and claims identified in the request for consultations.

7.84. We note that section (A) of Turkey's request for consultations, entitled "Specific Measures at Issue", provides as follows:

> This request for consultations concerns the preliminary and final countervailing duty measures imposed by the United States on Turkish imports of Certain Oil Country Tubular Goods ("OCTG"); Welded Line Pipe; Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes; and Circular Welded Carbon Steel Pipes and Tubes, as identified in Annex 1.
>
> These measures include the determination by the United States to initiate the identified countervailing duty proceedings, the conduct of those proceedings, any preliminary or final countervailing duty or injury determinations issued in those proceedings, any definitive countervailing duties imposed as a result of those proceedings, as well as any notices, annexes, memoranda, orders, amendments, or other instruments issued by the United States, and related practices, in connection with the measures identified in Annex 1.[153]

7.85. This language in the first paragraph only identifies the preliminary and final countervailing duty measures that the United States imposed on OCTG, WLP, HWRP, and CWP, as identified in Annex 1.[154] This language is consistent with the United States' view that Turkey's challenge in its request for consultations is exclusively aimed at the preliminary and final countervailing duty measures imposed on Turkish OCTG, WLP, HWRP, and CWP imports.

7.86. The second paragraph also refers to the preliminary and final countervailing duty measures imposed in the four challenged proceedings. In addition, the second paragraph refers to "related practices", in connection with the measures identified in Annex 1. The United States acknowledges the reference to "related practices" in the description of the measures at issue, but argues that this reference is "so general" that it does not identify a particular "practice" at issue and cannot provide a basis for challenging the specific practices that are subsequently identified in Turkey's panel request.[155] We do not consider the reference to "related practices" is particularly clear, as it does not identify which are the practices that were followed in connection with the measures in Annex 1 that are the focus of Turkey's concerns. The generic modifier "related" is also not informative. When read in isolation, the reference to "related practices" in section (A) can at most be understood as related to any preliminary or final countervailing duty or injury determination issued in the four proceedings at issue, or any definitive countervailing duty imposed resulting from those proceedings.

7.87. The Appellate Body has made clear that a panel should view the requests for consultations on the whole when determining whether the language of the request provides a sufficient basis for considering particular measures are covered by a panel's terms of reference.[156]

7.88. In this regard, we note that section (B) of Turkey's request for consultations, entitled "Legal Basis of the Complaint" provides in part as follows:

> Turkey considers that the measures identified above, and in Annex 1, are inconsistent with the United States' obligations under the WTO Agreements. Turkey's concerns are particularly focused on, though not necessarily limited to, the following aspects of the measures and underlying administrative proceedings:
>
> ...

[153] Fns omitted.

[154] Annex 1 lists certain documents for initiation; preliminary, post-preliminary, final, and amended final determinations; and countervailing duty orders as well as related decision memoranda, for each of the respective OCTG, WLP, and HWRP investigations and the CWP review at issue.

[155] United States' opening statement at the first meeting of the Panel, para. 7.

[156] Appellate Body Reports, *Argentina – Import Measures*, para. 5.14 (referring to Appellate Body Report, *US – Upland Cotton*, para. 291).

> 2. Benefit Determination: The United States' determination that sales of hot rolled steel conferred a benefit, within the meaning of Article 1.1(b), and were made for less than adequate remuneration, within the meaning of [sic] 14(d) of the SCM Agreement, including the Department's improper rejection of in-country prices for hot rolled steel as a benchmark for less than adequate remuneration.
>
> ...
>
> Turkey considers that the United States' administrative proceedings and measures are inconsistent with Article VI:3 of the GATT 1994, Articles 10, 19.4, and 32.1 of the SCM Agreement, and the specific provisions cited above. Turkey's concerns relate to both the aspects of the measures and underlying administrative proceedings cited above as well as ongoing practices applied in administrative proceedings more generally.[157]

7.89. As can be understood from this excerpt, among other concerns, section (B) sets out that Turkey's concerns are focused on the United States' "Benefit Determination" in the OCTG investigation.[158] Notably, in addition, the end of this excerpt specifies that "Turkey's concerns relate to both the aspects of the measures and underlying administrative proceedings cited above *as well as ongoing practices applied in administrative proceedings more generally*".[159]

7.90. We thus understand that Turkey's consultations request is focused on several concerns, one of which relates to the United States' benefit determination in the OCTG investigation. Turkey's concerns relate to the preliminary and final countervailing duty measures imposed in the four challenged proceedings. However, Turkey's concerns may also be understood to relate to ongoing practices, in light of the reference to "ongoing practices applied in administrative proceedings more generally". In our view, the reference to "ongoing practices" may be linked to Turkey's identification of each the different aspects of the identified "legal basis" of its consultations request, one of which includes the alleged "improper rejection of in-country prices for HRS as a benchmark for less than adequate remuneration" referred to in connection with the benefit determination.

7.91. We recall that a "precise and exact identity"[160] is not required between the measures identified in the request for consultations and the measures identified in the panel request, and that the contents of the panel request may govern the panel's terms of reference so long as a complainant does not "expand the scope"[161] or change the "essence" of the dispute.[162]

7.92. Based on our review of Turkey's request for consultations on the whole, although the reference to "related practices" in the subsection "Specific Measures at Issue" is general in nature, a reasonable reading of section (B) discussing the "Legal Basis of the Complaint" indicates that Turkey's concerns relate not only to preliminary and final countervailing duty measures imposed in the four challenged proceedings, but also to ongoing practices applied in connection with benefit determinations in countervailing duty investigations. Accordingly, Turkey's reference to "related practices" in the subsection "Specific Measures at Issue" in Turkey's consultations request may be understood to include, *inter alia*, a practice in connection with the "improper rejection of in-country prices" as a benchmark.

7.93. In light of our understanding of Turkey's consultations request, we do not consider that Turkey improperly expanded the scope or changed the essence of the dispute by including a practice regarding the benefit determination as a specific measure at issue in its panel request.

7.94. Therefore, we disagree with the United States that Turkey's panel request improperly expanded the scope of the dispute by including as a new measure, an alleged "practice" of rejecting in-country prices as benchmarks "based solely on evidence that the government owns or controls

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[157] Fn omitted.

[158] We note that footnote 5 of Turkey's consultations request specifies that its claim in relation to the benefit determination is limited to the countervailing duty determinations in the OCTG proceeding.

[159] Emphasis added.

[160] Appellate Body Report, *Brazil – Aircraft*, para. 132.

[161] Appellate Body Report, *US – Upland Cotton*, para. 293.

[162] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 137-138.

the majority or a substantial portion of the market for the good". Rather, we consider that, while the panel request identifies the challenged "practice" measures with greater specificity, the manner in which this was done did not expand the scope or essence of the dispute as these "practice" measures were set forth in the request for consultations. Accordingly, we reject the United States' request to exclude the alleged benefit practice measure from our terms of reference.

7.95. We recall that the United States has argued that Turkey's panel request adds measures and *claims* regarding a benefit "practice" that were not the subject of Turkey's request for consultations.[163] The United States argues that Turkey's "as such" claim in connection with the alleged benefit "practice" must necessarily fall outside the Panel's terms of reference "[b]ecause [the alleged benefit practice measure is] not within the terms of reference".[164] The United States further argues that the issue "is not that Turkey described its claims with respect to the alleged practices as 'as such' claims in its panel request, but that Turkey failed to identify those alleged measures in its consultations request altogether".[165]

7.96. We thus understand that the basis for the United States' argument that Turkey's "as such" claim corresponding to the alleged benefit "practice" is outside our terms of reference, is that the alleged benefit practice measure is not within the terms of reference. As we have rejected that the alleged benefit practice measure is outside our terms of reference, we see no basis in the United States' request for finding that Turkey's "as such" claim in connection with the alleged benefit "practice" is outside the Panel's terms of reference.

7.97. We also recall that the "legal basis" for a complaint in a panel request may reasonably evolve from the consultations request, so long as the addition of provisions does not have the effect of changing the essence of the complaint.[166] In our view, the basis for Turkey's "as such" claim against the alleged benefit practice measure reasonably evolved from the description and reference to Articles 1.1(b) and 14(d) in the section discussing the "Legal Basis of the Complaint" in Turkey's consultations request, as well as reference to "ongoing practices" therein, demonstrating that Turkey's "as such" claim in its panel request is clearly connected to its request for consultations.

7.98. For the above reasons, we therefore reject the United States' request for a ruling that Turkey's challenge to an alleged "practice" in relation to the benchmark determination and its "as such" claim with respect to this alleged practice are outside the Panel's terms of reference.

7.3.2.2 Whether the Panel should make findings on the benchmark determination in the OCTG investigation which was successfully challenged in a US domestic court and reversed in a remand determination

7.99. With respect to Turkey's Articles 1.1(b) and 14(d) claims, the United States submits that Turkey challenges the benchmark determination in the OCTG Final Determination, which was amended and ceased to have legal effect prior to the establishment of the Panel. Therefore, the United States requests the Panel to make a preliminary ruling that this aspect of the OCTG Final Determination is outside the Panel's terms of reference.

7.100. The United States submits that, as a general rule, the measures included in a panel's terms of reference must be measures that exist at a panel's establishment.[167] The United States submits that the initial OCTG Final Determination was successfully challenged before a US domestic court, remanded to the USDOC, and reversed by the USDOC in a remand determination at least 15 months prior to the establishment of the Panel.[168] Therefore, the United States submits that the Panel needs to review the benchmark that is set out in the amended OCTG remand determination, and not the benchmark in the initial OCTG Final Determination. Notably, the United States submits that the remand determination no longer relies on out-of-country prices as a benchmark, but instead uses in-country prices.[169] Accordingly, the United States submits that Turkey cannot establish that the

[163] United States' first written submission, para. 21.
[164] United States' opening statement at the first meeting of the Panel, para. 6.
[165] United States' opening statement at the first meeting of the Panel, para. 8.
[166] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[167] United States' first written submission, para. 39.
[168] United States response to Panel question No. 5, para. 27; second written submission, para. 30.
[169] United States' first written submission, paras. 43-45 (referring to OCTG Remand Redetermination, (Exhibit USA-1), p. 18).

initial OCTG final benchmark determination was impairing benefits accruing to it at the Panel's establishment, and the panel should not make findings on this initial determination.[170]

7.101. Turkey disputes that the initial OCTG Final Determination has ceased to have legal effect for two reasons. First, Turkey observes that the remand determination referred to by the United States was appealed to the US Court of Appeals for the Federal Circuit, and that court only issued its decision on 30 May 2017, after Turkey had requested the Panel's establishment. Turkey argues that the decision of the US Court of Appeals for the Federal Circuit could have been further appealed to the United States Supreme Court, leaving open the possibility that the USDOC's remand determination would be reversed and the original benefit determination reinstated.[171] Second, Turkey argues that the initial OCTG Final Determination continues to have legal effect because it reflects the USDOC's long-standing practice of rejecting in-country benchmarks based on evidence of government ownership or control of domestic producers. Accordingly, Turkey submits that a ruling from the Panel is necessary to resolve whether the alleged continuing practice is consistent with the United States' WTO obligations.[172]

7.102. The United States' request raises the issue of whether the Panel should make findings on the initial OCTG Final Determination when addressing Turkey's claims under Article 1.1(b) and Article 14(d) of the SCM Agreement. Specifically, we understand that the United States has requested us to find outside our terms of reference the benchmark determination in the initial OCTG Final Determination in respect of Turkey's "as applied" claims under Article 1.1(b) and Article 14(d).

7.103. WTO panel and Appellate Body jurisprudence indicates that panels have discretion regarding whether to make findings in relation to measures that have expired or ceased to have legal effect.[173]

7.104. When deciding whether to make findings on expired measures, panels have declined to make findings on challenged measures that have expired before panel establishment.[174] Panels have also considered whether a measure is affecting the operation of any covered Agreement or impairing the benefits accruing to the requesting Member under a covered Agreement[175]; whether a complainant continued to request that the Panel make findings with respect to the measure[176]; whether an expired or repealed measure is likely to be reimposed or reoccur[177]; and whether the responding Member could impose duties on goods from the complaining Member in a manner that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in the dispute.[178]

7.105. We see no basis to make findings on the benefit determination in the USDOC's initial OCTG Final Determination in the context of addressing Turkey's "as applied" claims in this dispute. We agree with the United States that the benefit determination in the initial OCTG Final Determination ceased to have legal effect under US law following the publication of the amended OCTG Final Determination on 10 March 2016. Thus, the initial OCTG Final Determination ceased to have legal effect well in advance of the Panel's establishment on 19 June 2017.[179] We recall that panels may

[170] United States' second written submission, para. 35.
[171] Turkey's response to the United States' request for a preliminary ruling, para. 34.
[172] Turkey's response to the United States' request for a preliminary ruling, para. 35.
[173] Appellate Body Reports, *EU – PET (Pakistan)*, paras. 5.1-5.61; *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270; and *China – Raw Materials*, para. 263; and Panel Reports, *US – Poultry (China)*, para. 7.54; *EC – IT Products*, para. 7.165.
[174] Panel Reports, *US – Gasoline*, DSR 1996:I, p. 76, para. 6.19; *Argentina – Textiles and Apparel*, paras. 6.4 and 6.12-6.13. Panels have also considered measures that expired after panel establishment. (Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343; *Indonesia – Autos*, para. 14.9; *China – Electronic Payment Services*, para. 7.227; and *EC – Approval and Marketing of Biotech Products*, paras. 7.1307-7.1308).
[175] Appellate Body Report, *US – Upland Cotton*, para. 263; Panel Report, *US – Upland Cotton*, para. 7.118.
[176] Panel Reports, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 425, para. 6.2; *Indonesia – Autos*, paras. 14.134-14.135; and *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343. See also Appellate Body Report, *Peru – Agricultural Products*, paras. 5.18-5.19.
[177] Panel Reports, *US – Gasoline*, DSR 1996:I, p. 76, para. 6.19; *Argentina – Textiles and Apparel*, para. 6.14; *India – Additional Import Duties*, paras. 7.69-7.70; *US – Poultry (China)*, para. 7.55; *EC – IT Products*, para. 7.1159; *China – Electronic Payment Services*, para. 7.227; and *EC – Approval and Marketing of Biotech Products*, para. 7.1310.
[178] Panel Report, *EU – PET (Pakistan)*, para. 7.13.
[179] DSB, Minutes of Meeting held on 19 June 2017, WT/DSB/M/398.

exercise discretion on whether to make findings regarding expired measures, particularly with respect to measures that expired *before* panel establishment.[180]

7.106. In addition, the benchmark used in the amended benefit determination is based on in-country prices, which is at odds with Turkey's argument that the United States acted inconsistently with Articles 1.1(b) and 14(d) in the OCTG investigation because it relied on out-of-country benchmarks to determine whether HRS was provided to Turkish respondents for LTAR.[181] As the amended Final Determination that replaces the initial Final Determination is based on in-country benchmarks, we do not need to make "as applied" findings on the WTO consistency of the initial benefit determination to resolve the dispute. Tellingly, Turkey has not raised any Article 1.1(b) and Article 14(d) claim against the amended OCTG benefit determination that replaced the initial benchmark and benefit determinations.

7.107. In reaching this decision, we also agree with the United States that potential subsequent US domestic litigation or a risk that the USDOC would revert to using the out-of-country benchmark, should not factor into our assessment of whether to make "as applied" findings on the initial OCTG Final Determination. First, the mere potential for a subsequent appeal to the United States Supreme Court does not alter the fact that the initial OCTG Final Determination was replaced under US law and ceased to have legal effect.[182] Moreover, that any potential subsequent legal action might have allowed the USDOC to further amend the duty rates or alter the legal basis of those rates does not mean that the initial OCTG Final Determination continued to have legal effect.[183]

7.108. Turkey cites the Appellate Body's statement in *US − Upland Cotton* in support of its argument that a panel should rule on measures that expire prior to the establishment of a panel.[184] Turkey's argument is misplaced. In that case, the complainant had challenged a measure whose legislative basis had expired prior to a panel's establishment, but whose effects were alleged to be impairing the benefits accruing to the requesting Member under a covered Agreement at the establishment of the panel.[185] As noted above, the circumstances in this dispute are different, as the amended Final Determination that supersedes and replaces the initial Final Determination, is based on in-country benchmarks, thereby reverting from relying on out-of-country prices and eliminating

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[180] Panel Reports, *US − Gasoline*, para. 6.19; *Argentina − Textiles and Apparel*, paras. 6.4 and 6.12-6.13.

[181] On remand, the USDOC re-examined whether in-country prices could be used as a benchmark for LTAR, and issued the OCTG final remand determination on 31 August 2015, in which it reversed its determination and used in-country prices as a benchmark for determining whether HRS was provided to Turkish respondents for LTAR. Specifically, the USDOC concluded:

> [W]e are reversing our determination that actual transaction prices in Turkey are not appropriate to use as a benchmark for the HRS purchased by respondents during the POI. Accordingly, we find that HRS prices stemming from transactions within Turkey − including domestic purchases and imports into the country (*i.e.*, tier one prices) − may be considered appropriate, pursuant to the statutory and regulatory requirements, to use as benchmarks for the purposes of this remand redetermination. On this basis, we have recalculated the benefit to the [Turkish respondents] from their purchases of HRS produced by Erdemir and Isdemir.

(OCTG Remand Redetermination, (Exhibit USA-1), p. 18 (fn omitted))

[182] United States' opening statement at the first meeting of the Panel, para. 26. The United States notes that once the amended determination was issued, it changed the subsequent rates calculated for investigated producers and served as the legal basis for the collection of cash deposits on entries. As a result, producer Toscelik's subsidy rate was reduced to *de minimis* and the USDOC ceased collecting cash deposits on that company's entries prior to establishment. (Ibid.).

[183] We also agree with the United States that, if a complainant was allowed to argue that a potential domestic legal challenge might give rise to a WTO inconsistency at some point in the future, it would mean that a complainant could equally challenge a measure in which no inconsistency was identified or claimed, based on the possibility that a domestic legal challenge might result in an inconsistency at some future point in time. (United States' opening statement at the first meeting of the Panel, para. 26).

[184] Turkey's response to the United States' request for a preliminary ruling, paras. 12-13 (referring to Appellate Body Reports, *US − Upland Cotton*, para. 263; and *EC − Selected Customs Matters*, para. 184).

[185] Appellate Body Report, *US − Upland Cotton*, para. 270 ("[Articles 3.3 and 4.2 of the DSU] do not preclude a Member from making representations with respect to measures whose legislative basis has expired, if that Member considers, with reason, that benefits accruing to it under the covered Agreements are still being impaired by those measures.") The panel in *US − Upland Cotton* was asked to consider whether payments which had been made in the past under legislation that no longer existed at the time of establishment were within the panel's terms of reference. The panel found the payments were within its terms of reference and the Appellate Body found no error in the panel's finding. (Ibid. paras. 250-266; Panel Report, *US − Upland Cotton*, paras. 7.104-7.122; see also Appellate Body Report, *EC − Selected Customs Matters*, para. 184 (discussing *US − Upland Cotton*)).

the conduct alleged by Turkey to be inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

7.109. Turkey also cites the Panel Report in *Turkey − Rice* and the Appellate Body Report in *China − Raw Materials* in arguing that panels may make findings on measures which expired but for which the underlying legislative framework remained in force.[186] First, unlike the facts before us, both of those cases concerned measures that had expired after a panel's establishment and the issues did not arise as to whether those measures were within the panel's terms of reference.[187] Even so, Turkey has not challenged here the basic legislative framework and implementing regulations on calculating benchmarks for determining the adequacy of remuneration.[188]

7.110. Finally, Turkey argues that a finding regarding its "as applied" claim with respect to the USDOC's benefit determination in the OCTG investigation would differ from a finding regarding its "as such" claim because such a finding would be based on the USDOC's reasoning and evaluation of the facts in that instance. Thus, Turkey argues that "even if [the] Panel finds the USDOC's practice is not 'as such' inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, it may nonetheless find the practice as applied in the OCTG investigation to be inconsistent with those obligations".[189] Turkey submits that such a finding would resolve the dispute by affirming that the USDOC's application of a continuing practice was inconsistent with Articles 1.1(b) and 14(d). Turkey considers this would "provid[e] guidance for benefit determinations in future segments of the same proceeding, *i.e.*, administrative or sunset reviews, or other countervailing proceedings involving the alleged provision of hot rolled steel by the [GOT]".[190]

7.111. In this sense, we understand that Turkey considers that the initial OCTG Final Determination continues to have legal effect because it reflects the USDOC's alleged practice of rejecting in-country benchmarks.[191] As an initial matter, Turkey conflates the notion of the existence of a "practice" with whether a USDOC countervailing duty determination that was superseded by an amended determination continues to have legal effect under US law. As explained above, we disagree with Turkey that the initial OCTG Final Determination continues to have legal effect under US law following the publication of the amended OCTG Final Determination. In addition, in making its argument, Turkey's request for an "as applied" finding in respect of the initial OCTG Final Determination would serve as a second opportunity to challenge an alleged "practice". We disagree with Turkey that such an "as applied" finding would differ from a finding regarding Turkey's "as such" claim. The reason Turkey gives for requesting an "as applied" finding, i.e. providing guidance for future benefit determinations in the same proceeding, is precisely the reason why complaining WTO Members bring "as such" challenges against another Member's laws, practice or ongoing conduct: to seek to prevent that Member from continuing to apply the offending law or conduct in the future. "As such" challenges by a Member also avoid the need to bring further "as applied" challenges in the future. Therefore, we are not persuaded that we should rule on the USDOC's initial OCTG Final Determination in the context of addressing Turkey's "as applied" claims under Article 1.1(b) and Article 14(d).

7.112. For the foregoing reasons, 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

[186] Turkey's response to the United States' request for a preliminary ruling, para. 14 (referring to Panel Report, *Turkey − Rice*, para. 5.29; and Appellate Body Reports, *China − Raw Materials*, para. 264).

[187] Panel Report, *Turkey − Rice*, para. 5.29; Appellate Body Report, *China − Raw Materials*, para. 254.

[188] Turkey's first written submission, para. 176:

> The USDOC's regulation on calculating benchmarks for determining the adequacy of remuneration, 19 CFR 351.511(a)(2), establishes a hierarchy of potential benchmarks, referred to as "tiers," and properly specifies that the "preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation," referred to as the "tier one" benchmark or prices. The regulation, on its face, is consistent with the Appellate Body's interpretation of Article 14(d), as enunciated in *US − Anti-Dumping and Countervailing Duties (China)*[.]

Moreover, as the United States notes, Turkey itself appears to acknowledge that the text of the Preamble to 19 CFR 351.511 does not indicate the existence of a practice of systematically rejecting in-country prices. (Ibid. para. 179 ("[t]he Preamble suggests that the USDOC would conduct an investigation of whether 'actual transaction prices are significantly distorted,' prior to rejecting in-country market prices and resorting to an alternative benchmark."))

[189] Turkey's response to Panel question No. 6, para. 21.

[190] Turkey's response to Panel question No. 6, para. 21.

[191] Turkey's response to the United States' request for a preliminary ruling, para. 35.

Article 14(d) of the SCM Agreement, as we do not consider that findings would aid in providing a positive resolution to the dispute.

7.3.3 The Panel's evaluation of Turkey's "as such" challenge under Article 14(d) of the SCM Agreement

7.113. Under Article 14(d) of the SCM Agreement, a subsidy in the form of a provision of goods or services is deemed to confer a benefit to the recipient, within the meaning of Article 1.1(b), if it is "made for less than adequate remuneration".[192] Article 14(d) provides that "[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision".[193]

7.114. In making its "as such" claim that the United States acted inconsistently with Article 14(d), Turkey argues that the USDOC "has a practice, in assessing whether a good is provided for less than adequate remuneration 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".[194] Turkey argues that "this practice has been articulated and applied systematically by the USDOC in both prior and subsequent countervailing duty proceedings, and thus should be considered a rule of 'general and prospective application' subject to challenge … 'as such' … in this proceeding."[195]

7.115. Turkey argues that the Appellate Body has clarified that the relevant inquiry for selecting a proper benchmark under Article 14(d) is whether or not certain in-country prices are distorted, rather than whether such prices originate from a particular source (e.g. government-owned entities).[196] Moreover, Turkey argues that the Appellate Body has explained that a finding of government ownership and control of certain entities alone cannot serve as the sole basis for establishing price distortion.[197] Thus, Turkey argues that an investigating authority may not reject in-country prices based solely on evidence of substantial government ownership or control of domestic suppliers, with no consideration of whether those prices are in fact distorted.[198] Accordingly, Turkey claims that the USDOC's practice is therefore inconsistent "as such" with the Appellate Body's interpretation of Article 14(d).

7.116. At the outset, we observe that Turkey does not challenge the consistency "as such" of the United States' laws or regulations concerning calculating benchmarks for determining the adequacy for remuneration[199], but instead asserts that the USDOC has a practice which constitutes a rule or norm of general and prospective application. In light of this, we will consider below whether Turkey has established the existence of such a practice as a rule or norm of general and prospective application. If we find that Turkey has established the existence of such a practice, we will then evaluate whether such a practice is incompatible with the requirements of Article 14(d).

7.117. The Appellate Body has explained that any act or omission attributable to a WTO Member may be challenged in dispute settlement proceedings.[200] The specific measure at issue, whether it is written or unwritten, and how it is described, characterized, and challenged by a complainant, will

[192] Article 14(d) of the SCM Agreement.
[193] Article 14(d) of the SCM Agreement.
[194] Turkey's first written submission, para. 172.
[195] Turkey's first written submission, para. 175.
[196] Turkey's first written submission, para. 180 (referring to Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.105); second written submission, para. 80. See also Appellate Body Report, *US – Softwood Lumber IV*, para. 90 ("investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods.")
[197] Turkey's first written submission, para. 180 (referring to Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.105); second written submission, para. 80.
[198] Turkey's second written submission, para. 80.
[199] We recall, as explained in fn 188 above, that Turkey acknowledges that regulation 19 CFR 351.511(a)(2), which establishes a hierarchy of potential benchmarks for determining the adequacy of remuneration, on its face, is consistent with the Appellate Body's interpretation of Article 14(d), as enunciated in *US – Anti-Dumping and Countervailing Duties (China)*.
[200] Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.122; *US – Corrosion-Resistant Steel Sunset Review*, para. 82. See also Appellate Body Reports, *Guatemala – Cement I*, fn 47; *EC and certain member States – Large Civil Aircraft*, para. 794; and *Argentina – Import Measures*, paras. 5.106 and 5.109.

inform the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the challenged measure.[201]

7.118. In challenging a rule or norm of general and prospective application, a Member must demonstrate (a) that the alleged rule or norm is attributable to the responding Member; (b) the precise content of the alleged rule or norm; and (c) that the alleged rule or norm has general and prospective application.[202] A rule or norm has "general" application when it affects an unidentified number of economic operators.[203] Lastly, a rule or norm has "prospective" application "to the extent that it applies in the future".[204] In this regard, complainants are not required to show with "certainty" that a measure will continue to apply in the future.[205] However, when prospective application is not sufficiently clear from the constitutive elements of the rule or norm, it may be demonstrated through a number of factors, including: the existence of an underlying policy that the rule or norm implements; proof of systematic application of the challenged rule or norm; the extent to which the rule or norm provides administrative guidance for future conduct; and the expectations it creates among economic operators that the rule or norm will be applied in the future.[206] The examination of whether a rule or norm has general and prospective application may vary from case to case and other factors may also be relevant.[207]

7.119. When an "as such" challenge concerns an unwritten measure − as in the present dispute − the complaining party must reach a "high [evidentiary] threshold".[208] Thus, "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document".[209]

7.120. We note that, in prior disputes, complainants have submitted both documentary evidence as well as extensive evidence of instances of systematic application, to demonstrate the existence of unwritten measures that have general and prospective application.[210] In its first written submission, Turkey submitted relatively limited evidence in support of its claim, consisting of (a) a single statement in the Final Issues and Decision Memorandum issued in the OCTG investigation at issue in this dispute concerning the benchmark determination[211]; (b) the preliminary CVD determination in the CWP proceeding at issue in this dispute[212]; and (c) a reference to three preliminary affirmative countervailing duty determinations involving Chinese imports.[213]

[201] Appellate Body Reports, *US − Anti-Dumping Methodologies (China)*, para. 5.123; *Argentina − Import Measures*, paras. 5.108 and 5.110.

[202] Appellate Body Reports, *US − Anti-Dumping Methodologies (China)*, para. 5.127 ("[w]hen an unwritten rule or norm is challenged 'as such', a complainant will be required to adduce arguments and supporting evidence to demonstrate the precise content, attribution, and general and prospective nature of the rule or norm"); *US − Zeroing (EC)*, para. 198; and *Argentina − Import Measures*, para. 5.104.

[203] Appellate Body Report, *US − Anti-Dumping Methodologies (China)*, para. 5.130 (referring to Appellate Body Reports, *US − Underwear*, p. 21, DSR 1997:I, p. 29; and *EC − Poultry*, para. 113, in turn quoting Panel Report, *US − Underwear*, para. 7.65).

[204] Appellate Body Report, *US − Anti-Dumping Methodologies (China)*, para. 5.157 (referring to Appellate Body Reports, *US − Oil Country Tubular Goods Sunset Reviews*, paras. 172 and 187; and *US − Corrosion-Resistant Steel Sunset Review*, para. 82).

[205] Appellate Body Report, *US − Anti-Dumping Methodologies (China)*, para. 5.132.

[206] Appellate Body Report, *US − Anti-Dumping Methodologies (China)*, para. 5.132. See also Appellate Body Reports, *US − Zeroing (EC)*, paras. 198, 201, and 204-205; and *US − Zeroing (Japan)*, paras. 85 and 88 (quoting Panel Reports, *US − Zeroing (Japan)*, para. 7.52; and *US − Oil Country Tubular Goods Sunset Reviews*, para. 187).

[207] Appellate Body Report, *US − Anti-Dumping Methodologies (China)*, para. 5.133.

[208] Appellate Body Reports, *US − Anti-Dumping Methodologies (China)*, para. 5.157; *US − Zeroing (EC)*, para. 198.

[209] Appellate Body Report, *US − Zeroing (EC)*, para. 196.

[210] See, for instance, Appellate Body Reports, *US − Anti-Dumping Methodologies (China)*, paras. 5.132 and 5.157; *US − Zeroing (EC)*, para. 198; *Argentina − Import Measures*, para. 5.117; and *US − Zeroing (Japan)*, paras. 81-88.

[211] Turkey's first written submission, para. 177.

[212] Turkey's first written submission, para. 179 and fn 437.

[213] Turkey's first written submission, para. 179 and fn 437 (referring to Preliminary AD/CVD Determination on Certain Steel Wheels from China; Preliminary AD/CVD Determination on Circular Welded Austenitic Stainless Pressure Pipe from China; and Preliminary CVD Determination on Circular Welded Carbon Quality Steel Line Pipe from China).

7.121. The United States considers that the evidence on which Turkey relies is "patently insufficient"[214] to support the existence of an unwritten measure and "in no way reflects proof of systemic application" or "a 'practice' at the time of the Panel's establishment".[215]

7.122. Following the first meeting with the parties, the Panel submitted a written question asking Turkey to explain how the evidence that Turkey *has presented* shows the existence of a practice, particularly considering that the USDOC amended its determination in the OCTG investigation.[216] In response, Turkey submitted that "the USDOC's exercise of discretion to depart from its normal practice of rejecting in-country prices … does not establish that the USDOC's practice is not ongoing", noting also that "the USDOC only departed from its normal practice following the adverse USCIT ruling in the OCTG investigation, and it did so under protest".[217] In addition, Turkey took the opportunity to submit 28 "examples" of countervailing proceedings in which the USDOC has applied its alleged practice on a systematic basis, including examples "which post-date the [US]CIT's April 2015 ruling remanding the USDOC's determination in the OCTG investigation".[218]

7.123. The United States has objected to us considering any of the examples provided in Turkey's response, on the ground that the evidence is untimely and contrary to the Panel's Working Procedures.[219] The United States argues that Turkey should have presented evidence in its first written submission or even at the first meeting, but having failed to do so, Turkey should not be permitted to make its case at a subsequent stage.[220] In response to questions from the Panel following the first meeting asking the United States for examples, the United States also submitted three examples in which it argues that the USDOC considered additional evidence of market distortions after determining that the government constituted the majority of the market for a good, in analysing whether in-country prices could be used as benchmarks.[221]

7.124. In our view, the evidence that Turkey refers to in its first written submission, and other evidence cited by Turkey and the United States does not demonstrate that the USDOC systematically bases its decision to rely on in-country, or out-of-country, prices exclusively on evidence as to whether the government owns or controls the majority or a substantial portion of the market. Accordingly, we consider that Turkey has failed to establish the existence of a practice in support of its claim that the USDOC systematically "reject[s] 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".[222]

7.125. We find most troubling Turkey's selective citation in its first written submission to the USDOC's benefit determination in the Final Issues and Decision Memorandum in the OCTG investigation, as follows:

> Notwithstanding the regulatory preference [in 19 CFR 351.511(a)(2)] for the use of prices stemming from actual transactions in the country, where the Department finds that the government owns or controls the majority or a substantial portion of the market for the good or service, the Department will consider such prices to be significantly

[214] United States' first written submission, para. 58.
[215] United States' first written submission, para. 69.
[216] Panel question No. 34 to Turkey.
[217] Turkey's response to Panel question No. 34, para. 69.
[218] Turkey's response to Panel question No. 34, para. 69.
[219] United States' second written submission, para. 52. We recall that paragraph 7 of our Working Procedures requires that "[e]ach party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purpose of rebuttal, answers to questions or comments on answers provided by the other party."
[220] In addition, the United States argues that Turkey also fails to explain how the newly submitted evidence establishes that the USDOC had a practice at the time of the Panel's establishment that demonstrates the existence of a rule or norm of general and prospective application. The United States submits that Turkey merely lists the title of 28 determinations taking place both before and after the OCTG investigation, and does not identify which parts of the subsidy programme analyses are alleged to support its claim. The United States argues that a panel should not make an affirmative case for a party through its own review of evidence. (United States' second written submission, para. 53).
[221] United States' response to Panel question Nos. 35 and 37 (referring to Final Determination Memorandum on cold-rolled steel from Russia, (Exhibit USA-37), p. 54; Expedited Review Memorandum on supercalendered paper from Canada, (Exhibit USA-38), p. 49; and Final Determination Memorandum on truck and bus tires from China, (Exhibit USA-36), pp. 19 and 44).
[222] Turkey's first written submission, para. 172.

> distorted and not an appropriate basis of comparison for determining whether there is a benefit.[223]

7.126. We recall, as discussed in Section 7.3.2.2 above, that the initial OCTG final benchmark determination was successfully challenged in a US domestic court by Turkish respondents, remanded to the USDOC and reversed by the USDOC in an amended determination that was published approximately 15 months prior to the establishment of the Panel. In the amended final OCTG determination, the USDOC reversed its decision to base its benchmark on out-of-country prices and relied on in-country prices for its amended benchmark.[224] In its amended determination, the USDOC explained as follows:

> [W]e are reversing our determination that actual transaction prices in Turkey are not appropriate to use as a benchmark for the HRS purchased by respondents during the POI. Accordingly, we find that HRS prices stemming from transactions within Turkey − including domestic purchases and imports into the country (*i.e.*, tier one prices) − may be considered appropriate, pursuant to the statutory and regulatory requirements, to use as benchmarks for the purposes of this remand redetermination. On this basis, we have recalculated the benefit to [the Turkish respondents] from their purchases of HRS produced by Erdemir and Isdemir.[225]

7.127. Initially, Turkey did not refer to the amended OCTG Final Determination in connection with its Articles 1.1(b) and 14(d) claims. Turkey has explained that the USDOC only revised its determination "under protest" and at the direction of a US domestic court[226] and considers that the reaction of the USDOC to the ruling confirms the existence of a practice. Therefore, Turkey does not consider that the USDOC's decision to deviate from its earlier determination should prevent the Panel from finding the existence of a practice of general and prospective application. Turkey also cites the Appellate Body in *EU − Biodiesel (Argentina)*, arguing that the fact that a Member may at times exercise discretion does not preclude a panel from finding that a measure violates certain WTO obligations "as such".[227]

7.128. First, we do not consider that Turkey's citation to the Appellate Body's Report in *EU − Biodiesel (Argentina)* is relevant to our assessment. In that dispute, the Appellate Body discussed panel and Appellate Body findings in past cases addressing discretionary aspects of WTO Members' municipal laws subject to "as such" challenges.[228] The Appellate Body did not, however, address the evidentiary burden relevant to the examination of an alleged unwritten measure as a rule or norm that has general and prospective application. In this dispute, we must assess whether Turkey has met its burden to demonstrate the existence of the alleged challenged practice.

7.129. While Turkey considers relevant that the USDOC revised its determination "under protest", the evidence before us suggests that the OCTG remand decision has influenced subsequent benchmark determinations, at least on certain occasions. For instance, in the subsequent CWP 2013 Final Determination Memorandum, the USDOC found that "the record of this review does not contain evidence of the GOT's direct or indirect involvement resulting in distortion of the Turkish HRS market during the POR sufficient to warrant using an out-of-country benchmark."[229] The USDOC explained:

> For example, the record does not contain evidence of GOT export restraints on HRS and the share of imports into the domestic market is higher than in certain past cases where

[223] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 23.

[224] See para. 7.100 above. See also United States' first written submission, paras. 43-45 (referring to OCTG Remand Redetermination, (Exhibit USA-1), p. 18).

[225] OCTG Remand Redetermination, (Exhibit USA-1), p. 18. (fn omitted)

[226] Turkey's second written submission, para. 88.

[227] Turkey's second written submission, para. 88 (referring to Appellate Body Report, *EU − Biodiesel (Argentina)*, para. 6.229). In response to a question from the Panel, Turkey submits that it is possible for a measure to be applied "systematically" even if it is applied in "almost" all circumstances. Thus, Turkey argues that the discretionary nature of the USDOC's benefit practice does not detract from its systematic application. (Turkey's response to Panel question No. 84, para. 19).

[228] Appellate Body Report, *EU − Biodiesel (Argentina)*, para. 6.229 (referring to Appellate Body Reports, *US − 1916 Act*, fn 59; *US − Corrosion-Resistant Steel Sunset Review*, para. 100; and *US − Carbon Steel*, para. 162; and Panel Report, *US − Section 301 Trade Act*, paras. 7.53-7.54).

[229] CWP CVD Final Determination Memorandum, (Exhibit TUR-240), pp. 18-20.

> the Department pointed to low import levels as relevant information in rejecting tier one prices. The record information regarding any policies that the GOT may have with respect to the steel industry does not indicate that the GOT's pursuit of those policies results in a significant distortion of the Turkish HRS market. There is no indication otherwise that government involvement significantly distorts this market. Thus, the record of this investigation is absent additional facts present in other cases in which the agency found government distortion even where record evidence did not show that government-controlled producers accounted for a majority of the market for the good.[230]

7.130. Consequently, the USDOC concluded that it would use "the Borusan Companies' actual domestic and import prices for HRS to calculate the benefit from the Borusan Companies' purchases of HRS from Erdemir and Isdemir during the POR".[231] In our review of the Final Determinations in the WLP and HWRP proceedings at issue in this dispute, the USDOC similarly found that record evidence did not support a finding that the Turkish HRS market was so distorted that it cannot serve as an appropriate benchmark, despite the fact that Erdemir's and Isdemir's production accounted for a substantial portion of the domestic supply.[232]

7.131. Outside of the proceedings at issue in this dispute, other examples submitted by both parties confirm that the USDOC does not systematically reject 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, without considering other evidence of whether in-country prices are distorted. For instance, in certain cases, the USDOC considered government export restraints (e.g. export tariffs) and import levels, in addition to the level of government involvement in the market.[233] In at least one instance, the USDOC declined to resort to out-of-country prices as benchmarks for its benefit analysis even in presence of a substantial level of control on the production of the product concerned by the government.[234]

7.132. Turkey argues that, while the USDOC may in certain cases refer to factors beyond the level of government involvement in the market, such as the level of import penetration, the USDOC does not analyse these factors in the context of a market analysis or otherwise use it to determine if prices are in fact distorted because of government ownership or control.[235] Regardless of how the USDOC may evaluate other factors, we disagree with Turkey's contention that consideration of such

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[230] CWP CVD Final Determination Memorandum, (Exhibit TUR-240), pp. 18-20. (fns omitted)

[231] CWP CVD Final Determination Memorandum, (Exhibit TUR-240), pp. 18-20.

[232] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 16; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 13.

[233] Preliminary AD/CVD Determination on certain kitchen appliance shelving and racks from China, (Exhibit TUR-140), p. 690 (the USDOC found that a 10% export tariff on wire rod was imposed during the POI and that the share of imports of wire rod into the PRC was small (1.53%) relative to Chinese domestic production of wire rod); Preliminary CVD Determination on aluminium extrusions from China, (Exhibit TUR-146), p. 54318 (the USDOC found that the Government of China has imposed export tariffs on certain categories of primary aluminium); Final Determination CVD Memorandum on certain coated paper from China, (Exhibit TUR-147), p. 22 (imports of the product concerned as a share of domestic consumption were insignificant); Preliminary CVD Memorandum on certain tool chests and cabinets from China, (Exhibit TUR-164), p. 30 (the volume of imports as a percentage of domestic production and consumption (1.20% and 1.34%, respectively, for wide strip and 1.37% and 1.35%, respectively, for thin strip) was insignificant); Final Determination Memorandum on cold-rolled steel from Russia, (Exhibit USA-37), pp. 54-55 (considering, for instance, the presence of export restrictions (e. g. tariffs, licensing) and the lack of natural gas imports); Expedited Review Memorandum on supercalendered paper from Canada, (Exhibit USA-38), p. 49 (evidence indicated that the government's long-maintained export restrictions on log and wood residue, leading to price suppression and market distortions in British Columbia).

[234] Preliminary CVD Memorandum on certain new pneumatic off-the-road tires from China, (Exhibit TUR-162), p. 24 (in view of the significant level of imports of rubber (approximately 50% of the total consumption), the USDOC resorted to actual import prices as the basis for the calculation of a tier 1 benchmark). Turkey has referred to the 2013 US judicial decision, Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States in response to a separate question from the Panel. In its response, Turkey has itself acknowledged that the USDOC took into account "a number of factors indicating the substantial influence the [Government of China] held over the wire rod market, including the [Government of China]'s near-majority market share, the low market share of wire rod imports, and regulations on the exportation of wire rod". (Turkey's response to Panel question No. 36, para. 71 (quoting US Court of International Trade, Guangdong v. United States, (Exhibit TUR-165))).

[235] Turkey's response to Panel question No. 83, paras. 14 and 16-17; see also second written submission, fn 179.

factors does not detract from the existence of the alleged practice. To the extent that the USDOC considers additional evidence in assessing the degree of distortion present in the market, as reflected in several examples before us, the USDOC cannot be said to have rejected 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.

7.133. We recall that Turkey has referred to excerpts from three preliminary determinations involving Chinese products that pre-date the USDOC's CVD determinations challenged in this dispute: Certain Steel Wheels from China, Circular Welded Austenitic Stainless Pressure Pipe from China, and Circular Welded Carbon Quality Steel Line Pipe from China.[236] In each of these determinations, the USDOC determined that private prices in China are significantly distorted based on a finding of "overwhelming involvement" by the Chinese government in the market.[237] Turkey has also identified examples in response to questioning from the Panel in which the USDOC rejected 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, without considering other evidence.[238] We do not consider that three preliminary determinations involving Chinese products and certain examples identified in response to questioning are sufficient evidence to demonstrate a systematic practice, particularly in consideration of other evidence contradicting the existence of such a practice. In this respect, we recall the "high [evidentiary] threshold"[239] that applies in proving the existence of an unwritten rule or norm that is alleged to have general and prospective application.

7.134. Based on the foregoing, we thus find that Turkey has failed to establish that the USDOC "has a practice, in assessing whether a good is provided for less than adequate remuneration 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".[240] Accordingly, we find that Turkey has failed to demonstrate that the United States has acted inconsistently "as such" with Article 14(d) of the SCM Agreement.

[236] Turkey's first written submission, fn 437. At the time of filing its first written submission, Turkey did not submit this evidence on the record as exhibits. Turkey subsequently provided the Panel with excerpts from the cited preliminary USDOC determinations. (Preliminary AD/CVD Determination on certain steel wheels from China, (Exhibit TUR-149); Preliminary AD/CVD Determination on circular welded austenitic stainless pressure pipe from China, (Exhibit TUR-138); and Preliminary CVD Determination on circular welded carbon quality steel line pipe from China, (Exhibit TUR-139)).

[237] Preliminary AD/CVD Determination on certain steel wheels from China, (Exhibit TUR-149), p. 55024 ("we derived the ratio of HRS produced by government entities (SOEs and collectives) during the POI (70.18 percent). Consequently, because of the government's overwhelming involvement in the HRS market, the use of private producer prices in the PRC would be akin to comparing the benchmark to itself (i.e., such a benchmark would reflect the distortions of the government presence)"); Preliminary AD/CVD Determination on circular welded austenitic stainless pressure pipe from China, (Exhibit TUR-138), p. 39664 ("we find that SOEs account for approximately 82 percent of the stainless steel coil production in the PRC during the POI (and approximately 71 percent of production if available data on import volume are included). Consequently, because of the government's overwhelming involvement in the PRC stainless steel coil market, the use of private producer prices in China would be akin to comparing the benchmark to itself. … Even if, arguendo, we were to rely on the [Government of China]'s 71 percent production figure, we would still find that government production accounts for a significant portion of the HRS industry, so that it is reasonable to conclude that private prices in China are significantly distorted and therefore unusable as benchmarks"); Preliminary CVD Determination on circular welded carbon quality steel line pipe from China, (Exhibit TUR-139), p. 52307 ("we find that SOEs and collectives account for approximately 60.77 percent of the HRS production in the PRC during the POI. Consequently, because of the government's overwhelming involvement in the HRS market, the use of private producer prices in the PRC would be akin to comparing the benchmark to itself (*i.e.*, such a benchmark would reflect the distortions of the government presence).")

[238] Turkey's response to Panel question No. 34, para. 69. For example, see Preliminary CVD Determination on OCTG from China, (Exhibit TUR-143), p. 47219; Preliminary AD/CVD Determination on certain steel wheels from China, (Exhibit TUR-149), p. 55024; Preliminary AD/CVD Determination on utility scale wind towers from China, (Exhibit TUR-152), p. 33434; and Preliminary AD/CVD Determination on drawn stainless steel sinks from China, (Exhibit TUR-154), p. 46725.

[239] Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.157; *US – Zeroing (EC)*, para. 198.

[240] Turkey's first written submission, para. 172.

7.3.4 Conclusions regarding Turkey's claims under Articles 1.1(b) and 14(d) of the SCM Agreement

7.135. For the reasons set out above, we reject the United States request for a ruling that Turkey's challenge to an alleged "practice" in relation to the benchmark determination and its "as such" claim with respect to this alleged practice are outside the Panel's terms of reference. We further exercise our discretion and 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. We found that the initial OCTG final benefit determination ceased to have legal effect under US law prior to the Panel's establishment following the publication of the amended OCTG Final Determination, and thus, we do not consider that findings would aid in providing a positive resolution to the dispute.

7.136. In addressing Turkey's "as such" claim Article 14(d), we find that Turkey has failed to establish that the USDOC "has a practice, in assessing whether a good is provided for less than adequate remuneration 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". On this basis, we reject Turkey's claim that the United States acted inconsistently "as such" with Article 14(d) of the SCM Agreement.

7.4 Turkey's claims under Articles 2.1(c) and 2.4 of the SCM Agreement in relation to the specificity determinations in the OCTG, WLP, HWRP, and CWP proceedings

7.4.1 Introduction

7.137. Turkey claims that the USDOC's *de facto* specificity determinations in the OCTG, WLP, and HWRP investigations and the CWP review are inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement. Turkey claims, first, that the USDOC acted inconsistently with Articles 2.1(c) and 2.4 by failing to sufficiently identify or substantiate the existence of a "subsidy programme" within the meaning of Article 2.1(c). Second, the USDOC acted inconsistently with Article 2.1(c) by failing to take into consideration the two mandatory factors in the last sentence of Article 2.1(c), i.e. the extent of diversification of economic activities, as well as the length of time during which the subsidy programme has been in operation.[241]

7.138. In each of the determinations at issue, the USDOC determined that the number of industries or enterprises using the so-called "Provision of HRS for LTAR" programme was limited and, thus, *de facto* specific under Article 2.1(c). The USDOC based its determination primarily on a questionnaire response from the GOT that 8 or 9 industries purchased HRS in Turkey during the POI. In the OCTG investigation, the USDOC stated that:

> Regarding the specificity of HRS for LTAR, the GOT provided a list of the industries that purchased HRS in Turkey during the POI. The GOT identified eight industries: Construction, Automotive, Machinery & Industrial, Electrical Equipment, Appliances, Agricultural, Oil & Gas, and Containers & Packaging. Consistent with past determinations, we find that the provision of HRS is specific pursuant to section 771(5A)(D)(iii)(I) of the Act because the number of industries or enterprises using the program is limited.[242]

7.139. The USDOC replicated its specificity determination for the WLP, HWRP, and CWP proceedings.[243]

7.140. We will first address the legal standard under Articles 2.1(c) and 2.4 of the SCM Agreement before addressing Turkey's claims.

[241] Turkey's first written submission, paras. 215, 333, 446, and 547.
[242] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 22. (fn omitted)
[243] For the WLP investigation, see WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 15. For the HWRP investigation, see HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12. For the CWP review, see Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 9-10.

7.4.2 The Panel's evaluation of Turkey's Articles 2.1(c) and 2.4 claims

7.141. Article 2.1 of the SCM Agreement provides as follows:

> *Article 2*
> *Specificity*
>
> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") *within the jurisdiction of the granting authority*, the following principles shall apply:
>
> ...
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: *use of a subsidy programme by a limited number of certain enterprises*, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.[244]

7.142. Article 2.4 of the SCM Agreement provides:

> Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

7.143. Thus, a subsidy may be *de facto* specific notwithstanding the appearance of being *de jure* non-specific in certain cases. For instance, a finding of *de facto* specificity may arise when a subsidy is provided under a "subsidy programme" that is used "by a limited number of certain enterprises".

7.144. In order to establish *de facto* specificity on this basis, an investigating authority must first have established the existence of the relevant "subsidy programme". An investigating authority might do this when determining the existence of the relevant subsidy within the meaning of Article 1.1.[245] When this is not the case, the investigating authority must do so at the time of making its determination of specificity. In order to do so, an investigating authority needs to determine that subsidies have been provided to recipients pursuant to a plan or scheme of some kind.[246] Moreover, in determining whether a subsidy programme is used by a limited number of enterprises, the last sentence of Article 2.1(c) provides that an investigating authority shall take into account the extent of diversification of economic activities with the jurisdiction of the granting authority, as well as the length of time that the subsidy programme has operated. Thus, an investigating authority is obligated to take these two factors into consideration in its *de facto* specificity determination, regardless of whether an interested party raises this issue during the investigation.[247] Finally, an investigating authority's specificity determination is subject to the obligation under Article 2.4 that it be clearly substantiated on the basis of positive evidence.

[244] Emphasis added; fn omitted.

[245] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144. In the present case, for example, the USDOC might have established that HRS was provided pursuant to the Provision of HRS for LTAR Programme when establishing the existence of a financial contribution. Indeed, evidence regarding the provision of HRS by the alleged public bodies under such programme may have indicated that such entities were pursuing a government policy under the meaningful control of the GOT, and may have been providing HRS in a systematic manner.

[246] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

[247] See, e.g. Panel Report, *US – Countervailing Measures (China)*, paras. 7.252 and 7.255.

7.4.2.1 Whether the United States established the existence of a "subsidy programme" for purposes of Article 2.1(c) of the SCM Agreement

7.145. We recall our findings at paragraphs 7.51 and 7.62 above that the USDOC's public body determinations regarding Erdemir and Isdemir in the challenged proceedings are inconsistent with Article 1.1(a)(1) of the SCM Agreement because the USDOC failed to establish that Erdemir and Isdemir possess, exercise, or are vested with governmental authority to perform a government function. Since the SCM Agreement is concerned only with subsidies provided by a government (in either the narrow or broad sense, either directly or through entrustment and direction of a private body), the term "subsidy programme" under Article 2.1 (c) necessarily refers to a governmental subsidy programme. Accordingly, a lack of governmental function of an entity for the purpose of public body analysis likely suggests a lack of a subsidy programme for the purpose of Article 2.1 (c). Nevertheless, we consider it useful to address the parties' arguments raised directly in relation to the issue of whether the USDOC established a "programme", to provide a more complete analysis to resolve the present dispute.

7.146. The parties agree that Article 2.1(c) requires the identification of a "subsidy programme". In this regard, both parties[248] referred to the Appellate Body's statement in *US − Countervailing Measures (China)* regarding the notion of "subsidy programme" in Article 2.1(c):

> The ordinary meaning of the word "programme" refers to "a plan or scheme of any intended proceedings (whether in writing or not); an outline or abstract of something to be done". The reference to "use of a subsidy programme" suggests that it is relevant to consider whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind. Evidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, for instance, in the form of a law, regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy. A subsidy scheme or plan may also be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises. This is so particularly in the context of Article 2.1(c), where the inquiry focuses on whether there are reasons to believe that a subsidy is, in fact, specific, even though there is no explicit limitation of access to the subsidy set out in, for example, a law, regulation, or other official document.
>
> ...
>
> The mere fact that financial contributions have been provided to certain enterprises is not sufficient, however, to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement. In order to establish that the provision of financial contributions constitutes a plan or scheme under Article 2.1(c), an investigating authority must have adequate evidence of the existence of a *systematic* series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.[249]

7.147. We agree with the above statement and are guided by these findings in addressing Turkey's claim. The issue before us is essentially a factual one: whether the USDOC identified and evidenced a "subsidy programme" in the form of the Provision of HRS for LTAR in each challenged proceeding.

7.148. Turkey contends that the USDOC simply based its *de facto* specificity determinations on the mere fact that the purchasers of HRS in Turkey are limited in number. In Turkey's view, the record contains neither evidence of a "plan" or "scheme", nor evidence demonstrating "a systematic series of actions" concerning the Provision of HRS for LTAR.[250]

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[248] See, e.g. United States' first written submission, para. 224; Turkey's first written submission, paras. 59-60; and Turkey's second written submission, para. 91.

[249] Appellate Body Report, *US − Countervailing Measures (China)*, paras. 4.141 and 4.143. (emphasis original; fn omitted)

[250] Turkey's first written submission, paras. 215-217, 334-335, 447-448, and 548-549; second written submission, paras. 91 and 106.

7.149. The United States argues that in each of the challenged proceedings the USDOC identified the subsidy programme at issue, i.e. the Provision of HRS for LTAR, in the form of "plan or scheme" through a systematic series of actions. The United States contends that the existence of the Provision of HRS for LTAR as a "subsidy programme" was first alleged by the petitioners in their petition, and was confirmed in the challenged proceedings through, *inter alia*, an examination of the GOT's 2012-2014 Medium Term Programme, Erdemir's Annual Reports, and a complete transaction-specific accounting of the provision of HRS, *in conjunction*.[251]

7.150. In response, Turkey argues that the United States took the statements in Erdemir's 2012 and 2013 Annual Reports out of context. Turkey also argues that the USDOC did not evaluate or explain its relevance of the list of HRS transactions in its *de facto* specificity determinations.[252] Turkey contends that a list of HRS transactions, some of which are above and some of which are below a benchmark price, cannot support the existence of a plan or scheme in the form of a systematic series of actions, let alone a plan or scheme for the Provision of HRS for LTAR. According to Turkey, the frequency or number of transactions that provide a subsidy may be relevant evidence of an underlying plan or scheme, but such evidence is not, in and of itself, sufficient evidence.[253]

7.151. We first observe that the USDOC determinations in the challenged proceedings do not include any explicit discussion or statement concerning the existence of a "subsidy programme" in the form of the Provision of HRS for LTAR. For example, in its *de facto* specificity determination section of the OCTG investigation, the USDOC stated that:

> Regarding the specificity of HRS for LTAR, the GOT provided a list of the industries that purchased HRS in Turkey during the POI. The GOT identified eight industries: Construction, Automotive, Machinery & Industrial, Electrical Equipment, Appliances, Agricultural, Oil & Gas, and Containers & Packaging. Consistent with past determinations, we find that the provision of HRS is specific pursuant to section 771(5A)(D)(iii)(I) of the Act because the number of industries or enterprises using the program is limited.[254]

7.152. Elsewhere in the determinations, the USDOC referred to all investigated subsidies in the challenged proceedings generally as "program" or "programs". For instance, the USDOC's determination in the WLP investigation contains the following:

> Further, we are applying the above-zero rates calculated for Toscelik in this investigation for the following identical *programs*: Provision of HRS for LTAR ...[.][255]

7.153. Thus, the USDOC simply used the word "program" without any explanation of the reason why this term could properly be used to refer to the subsidy or subsidies in question. In our view, such a generic reference to all investigated subsidies as "programmes" alone is not sufficient to properly identify and substantiate a "subsidy programme" to determine *de facto* specificity under Article 2.1(c). We recall and agree with the panel's statement in *US − Countervailing Measures (China)* that "the use of the term 'subsidy programme', as opposed to 'subsidy', is not lacking in significance".[256] For its *de facto* specificity determination under Article 2.1(c), an objective and unbiased investigating authority is expected to provide a reasoned explanation whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind, before assessing whether access to that programme is specifically restricted.

7.154. In the present proceedings, the United States refers to the GOT's Medium Term Programme, Erdemir's policies of supporting export-oriented production, and a complete transaction-specific

[251] United States' first written submission, paras. 225-230. See also responses to Panel question No. 42, paras. 130-133, and No. 88(a), para. 75; second written submission, para. 168; opening statement at the second meeting of the Panel, paras. 29 and 31; and comments on Turkey's responses to Panel question No. 88, para. 24, and No. 91, para. 29.

[252] Turkey's response to Panel question No. 91, para. 38

[253] Turkey's second written submission, para. 106 (referring to Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.143).

[254] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 22 (fn omitted). We note that in the WLP and HWRP proceedings the USDOC found that nine industries in Turkey purchased HRS during the POI.

[255] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 5. (emphasis added)

[256] Panel Report, *US − Countervailing Measures (China)*, para. 7.238.

accounting of the provision of HRS as evidence of the existence of the "subsidy programme". The United States claims that, on the basis of all evidence in conjunction, the USDOC concluded that a subsidy programme in the form of the Provision of HRS for LTAR existed.[257] We have no doubt that government policies and the list of HRS transactions may serve as potential evidence demonstrating the existence of a plan or scheme in the form of a systematic series of actions. However, we must determine whether the USDOC *actually* considered the alleged evidence, and if so whether such evidence sufficiently supports the conclusion that there is a "subsidy programme" for the Provision of HRS for LTAR under Article 2.1(c). The parties do not dispute that the set of evidence referred to by the United States was in the record of the challenged proceedings. Nevertheless, the existence of the policy documents and the transaction data in the record does not necessarily mean that the USDOC actually considered them in determining the existence of a "subsidy programme" in the form of the Provision of HRS for LTAR. The burden is on the United States to demonstrate that the USDOC actually considered these policy statements and transaction data in determining the existence of a "subsidy programme". We shall now consider whether or not the United States has discharged that burden.

7.4.2.1.1 2012-2014 Medium Term Programme

7.155. In the OCTG, WLP, and CWP proceedings, the USDOC did indeed refer to the GOT's "stated policy in its 2012-2014 Medium Term Programme to improve Turkey's balance of payments".[258] The Medium Term Programme refers to the GOT's objectives such as "increasing employment, maintaining fiscal discipline, increasing domestic saving, [and] reducing the current account deficit, [in] this way strengthening macroeconomic stability in stable growth process".[259] The USDOC referred to the Medium Term Programme for the purpose of determining that Erdemir and Isdemir are public bodies. The USDOC did not refer to the Medium Term Programme as a basis for establishing the existence of any alleged Provision of HRS for LTAR Programme in the context of its *de facto* specificity determination. There may be many different ways of achieving the broad objectives of the Medium Term Programme of improving the balance of payments, increasing employment and strengthening macroeconomic stability in Turkey. The provision of subsidised HRS may well be one of them. However, this need not necessarily be the case. In the absence of any additional evidence suggesting that the Medium Term Programme somehow envisages the provision of subsidised HRS, or a reasoned explanation by the USDOC to this effect, any connection between these broad governmental policies in the Medium Term Programme and the alleged Provision of HRS for LTAR Programme is too remote to support the existence of the latter subsidy programme.

7.4.2.1.2 Erdemir's Annual Reports

7.156. Regarding Erdemir's alleged support to export-oriented production, we recall that, in the public body determination sections of the OCTG investigation, the USDOC refers to the statement in Erdemir's 2012 Annual Report that "the [Erdemir] Group also implemented policies which promoted the customers to engage in export-oriented production".[260] In the WLP, CWP and HWRP proceedings, the USDOC refers to the statements in Erdemir's 2013 Annual Report that Erdemir "made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013"[261] and "continues to create value added for Turkish industry through initiatives to increase the use of domestic sources of raw materials".[262] According to the USDOC, these policies are "in line" with the GOT's policies in

[257] United States' first written submission, paras. 225-230; response to Panel question No. 42, paras. 130-133; and second written submission, para. 168.

[258] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9. The USDOC did not refer to the Medium Term Programme in context of the HWRP proceeding.

[259] Medium Term Programme, (Exhibit USA-6), p. 12. See also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21 and fn 160; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[260] Erdemir 2012 Annual Report, (Exhibit USA-5), p. 29.

[261] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; and HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12. See also Erdemir 2013 Annual Report, (Exhibit USA-7), p. 34.

[262] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; and HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12. See also Erdemir 2013 Annual Report, (Exhibit USA-7), p. 34. The United States also refers to other statements in Erdemir 2013 Annual Report, such as the statements that Erdemir is "Turkey's iron and steel power", and that Erdemir "made 35% of its flat steel sales to the steel pipe

the 2012-2014 Medium Term Programme.[263] The United States submits that together with the Medium Term Programme and the list of HRS transactions, the alleged policies of Erdemir to support export-oriented production demonstrate that there is a plan or scheme in the form of the systematic provision of HRS for LTAR.[264] Turkey argues that these policy statements were taken out of context[265], and do not demonstrate the existence of a "subsidy programme" because the USDOC did not discuss any of them in any of its determinations in any context.[266]

7.157. As discussed at paragraph 7.44 above, we do not consider that the statements, when considered in their context, demonstrate that Erdemir pursued a governmental policy to support export-oriented production, let alone that there is a plan or scheme in the form of the Provision of HRS for LTAR in order to support export-oriented production in Turkey. In any event, considering that there could be many ways for a government or public body to support export-oriented production, an objective and unbiased investigating authority is expected to provide a reasoned explanation in its determinations of how Erdemir's alleged policies indicate the existence of the Provision of HRS for LTAR. In our view, the USDOC has failed to provide such a reasoned explanation in the present case. Without any additional evidence or a reasoned explanation by the USDOC, we consider that any connection between Erdemir's alleged policies and any alleged Provision of HRS for LTAR is too remote to support the existence of the latter subsidy programme.

7.4.2.1.3 List of HRS transactions

7.158. The list of HRS transactions may serve as potential evidence demonstrating that there is a *systematic* series of actions in the form of the Provision of HRS for LTAR by a public body. However, such a list alone is not sufficient evidence, particularly where the prices of the transactions vary with some prices higher than the benchmark prices and some lower than the benchmark prices.[267] As the Appellate Body stated in *US − Countervailing Measures (China)*, "the mere fact that financial contributions have been provided to certain enterprises is not sufficient, however, to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement".[268]

7.159. In our view, the number or frequency of the subsidies provided under an alleged subsidy programme must be analysed before the *systematic* nature of the subsidy provision can be determined.[269] We are not suggesting that a "subsidy programme" in the form of provision of inputs for LTAR must consist exclusively of transactions with prices lower than the benchmark prices. However, if the transactions providing a subsidy are disparate and infrequent in light of the total number of transactions, it may not be discernible that subsidies were provided pursuant to "a plan or scheme of some kind". We consider that an investigating authority must therefore provide a reasoned explanation as to how each of the pieces of evidence individually or jointly indicates the existence of the alleged subsidy programme. Where such a subsidy programme is evidenced by a systematic series of transactions, there must be a reasoned explanation as to whether and how the transactions providing a subsidy are "*systematic*" in the particular circumstances of a given case. In

manufacturing sector, one of the largest exporting sectors in Turkey". However, the USDOC did not refer to these statements in its determinations.

[263] United States' first written submission, paras. 227-229; United States' second written submission, para. 168; and response to Panel question No. 42, para. 131 (referring to OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21 and fn 160; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9). The USDOC did not refer to the Medium Term Programme in context of the HWRP proceeding.

[264] United States' response to Panel question No. 42, paras. 130-133; second written submission, para. 168.

[265] Turkey' second written submission, paras. 95-99.

[266] Turkey' second written submission, paras. 93 and 104; statement at the first meeting of the Panel, paras. 79-80.

[267] See OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 26, where the USDOC stated that "*[f]or instances in which Borusan or Toscelik paid a lower unit price to Erdemir and Isdemir than the benchmark unit price*, we multiplied the difference by the quantity of HRS that the company purchased to calculate the benefit" (emphasis added). We understand from this statement that not all transactions of HRS purchases from Erdemir and Isdemir were made at prices lower than the benchmark price.

[268] Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.143.

[269] In this regard, we agree with the European Union's third-party submission that the more transactions are above the benchmark, the less systematic the transactions below the benchmark become and the less probative their evidentiary value becomes for demonstrating a "subsidy programme". (European Union's third-party response to Panel question No. 5, para. 19).

the present case, the record does not indicate that the USDOC actually analysed the list of HRS transactions to determine whether the transactions providing subsidies in the form of the provision of HRS for LTAR are *systematic* by considering, e.g. the volume and frequency of transactions providing subsidies as compared with transactions for which the prices are above the benchmark.

7.4.2.1.4 Consideration of the evidence in its totality

7.160. We note that the United States argues that the USDOC considered the above-mentioned policy statements and the list of HRS transactions "in conjunction".[270] Having considered that each of the three pieces of evidence was not sufficient to support the USDOC's alleged conclusion concerning the existence of a subsidy programme in the form of the Provision of HRS for LTAR, we are not persuaded that the abovementioned evidence, when considered together, supports the USDOC's alleged conclusion that a subsidy programme existed in the form of systematic provision of HRS for LTAR by Erdemir and Isdemir.

7.161. Accordingly, given that the USDOC failed to make proper "public body" determinations in the challenged proceedings, we find that the USDOC could not have properly determined that Erdemir and Isdemir provided subsidies, much less that they did so pursuant to a "subsidy programme" within the meaning of Article 2.1(c). In any event, we find that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to properly identify and substantiate the existence of a subsidy programme in the form of the Provision of HRS for LTAR.

7.162. We recall that Turkey also brings a claim under Article 2.4 of the SCM Agreement concerning the USDOC's failure to substantiate the alleged "subsidy programme" of the Provision of HRS for LTAR.[271] We have found above that the USDOC failed to properly identify and substantiate the existence of a subsidy programme within the meaning of Article 2.1(c). Accordingly, the USDOC's *de facto* specificity determination was not clearly substantiated on the basis of positive evidence in accordance with Article 2.4. For this reason, we also find that the USDOC acted inconsistently with Article 2.4 of the SCM Agreement for failing to clearly substantiate its *de facto* specificity determination.

7.4.2.2 Whether the United States considered the two factors in the last sentence of Article 2.1(c) of the SCM Agreement

7.163. In determining whether a subsidy programme is used by a limited number of enterprises, the last sentence of Article 2.1(c) of the SCM Agreement provides that an investigating authority shall take into account the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time that the subsidy programme has operated. Article 2.1(c) however does not provide any specific guidance as to how an investigating authority should take into account these two factors. The panel in *US – Countervailing Measures (China)* addressed this issue in the following terms:

> With regard to the ordinary meaning of the final sentence of Article 2.1(c), we are of the view that the use of the term "shall" clearly connotes an obligation. Indeed, the term is defined as "has a duty to; more broadly, is required to". The decision by the drafters of the SCM Agreement to use the term "shall" instead of terms such as "should" or "may" is significant.
>
> With regard to the context of Article 2.1(c) more broadly, as we have seen above, subparagraph (c) concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise. In this context, we consider the last sentence of Article 2.1(c) to function as a safeguard that keeps in check this flexibility. Indeed, where economic activities within the jurisdiction of the granting authority are less diversified, the use of a subsidy programme by a limited number of certain enterprises may nonetheless lead to a finding of non-specificity. Use by a limited

[270] United States' opening statement at the second meeting of the Panel, para. 31; response to Panel question No. 42, para. 130.

[271] Turkey's first written submission, para. 547.

> number of certain enterprises may similarly lead to a finding of non-specificity where the subsidy programme has been in operation for a limited period of time only.[272]

7.164. Moreover, that panel considered that an investigating authority's consideration of the factors in the final sentence of Article 2.1(c) need not be done explicitly. That is to say, an investigating authority need not in all circumstances include an *explicit* statement in its determination that these factors had been taken into account. However, there must be evidence that these two factors were taken into account, either explicitly or implicitly.[273] The panel in *US − Washing Machines* followed a similar approach.[274]

7.165. We agree with these panels. Thus, the two factors, i.e. the extent of economic diversification and the length of time during which the subsidy programme has operated, are mandatory, and must therefore be taken into account whenever an investigating authority makes a *de facto* specificity determination. This does not depend upon whether an interested party in the proceeding raised the relevance of the two factors. Having said that, an investigating authority does not need to consider these two factors explicitly.

7.166. In the present case, the United States does not dispute that the USDOC did not discuss these two factors, or make any explicit statement regarding these factors in its determination. The United States asserts that the USDOC took these factors into account implicitly. The question before us is whether the record evidence supports this assertion. We make this inquiry with respect to each of these two factors in turn.

7.4.2.2.1 Economic diversification

7.167. The United States argues that the USDOC concluded, *implicitly*, that the extent of economic diversification factor had no bearing on its specificity analysis. According to the United States, the USDOC's implicit consideration of this factor is reflected in the USDOC's consideration and discussion of the factual record such as the Medium Term Programme and Erdemir's 2012 and 2013 Annual Reports.[275] The United States also submits that it is a publicly known fact that Turkey has a highly diversified economy.[276]

7.168. In our view, the United States' reference to the Medium Term Programme in its public body determinations in each of the proceedings does not demonstrate that the USDOC actively and meaningfully considered the economic diversification of Turkey. According to the United States, the Medium Term Programme discusses the Turkish economy in relation to other world economies. The United States underlines the following statements in the Medium Term Programme:

> Turkey was among the countries that had highest growth rates around the world.[277]

> Turkey has been one of the most successful countries among the OECD in struggling with the unemployment thanks to rapid growth and measures taken timely during the crisis exit process.[278]

7.169. Although these statements concern Turkey's economy, they address only certain aspects of the Turkish economy, i.e. its growth and unemployment rates. These statements are not connected with the economic diversification of the Turkish economy. We note that the last sentence of Article 2.1(c) does not simply require consideration of factors related to the economy of the granting authority, but specifies that an investigating authority consider the extent of the economic

[272] Panel Report, *US − Countervailing Measures (China)*, paras. 7.251-7.252. (fns omitted)
[273] Panel Report, *US − Countervailing Measures (China)*, paras. 7.250-7.256. (fns omitted)
[274] Panel Report, *US − Washing Machines*, para. 7.252.
[275] United States' second written submission, para. 175.
[276] United States' response to Panel question No. 41, para. 127.
[277] Medium Term Programme (Exhibit USA-6), p. 9; see also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14.
[278] Medium Term Programme, (Exhibit USA-6), p. 10; see also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14.

diversification. Therefore, even if we accept the United States' argument that the USDOC indeed *implicitly* considered these statements when making its *de facto* specificity determination, the United States has not demonstrated that the USDOC specifically took into account the economic diversification factor.

7.170. Likewise, Erdemir's 2012 and 2013 Annual Reports do not demonstrate that USDOC actively and meaningfully considered the economic diversification of Turkey. The United States referred to statements in Erdemir's 2012 and 2013 Annual Reports that Turkey is among the eight largest steel producers in the world, with a production capacity of 35.9 million tonnes in 2012 and 34.7 million tonnes in 2013.[279] The United States also points to the statements in Erdemir's 2013 Annual Report that the Turkish economy expanded more than 3% in 2013 despite the global crisis[280], and that Turkeys' manufacturing exports grew by 4.6% in 2013.[281] None of these references are linked to the diversification of the Turkish economy.

7.171. Finally, regarding whether the USDOC implicitly took into account the publicly known fact that the Turkish economy is highly diversified, we do not necessarily disagree that an investigating authority may take into account publicly known facts in its determinations. However, leaving aside whether the high level of diversification of the Turkish economy is a publicly known fact or not, the United States has not identified anything in the investigation record to indicate that the USDOC implicitly took into account the diversification of the Turkish economy. We recall and agree with the panel in *US − Washing Machines* that there must be *some means* of determining from the determination that the investigating authority did consider the factors in the last sentence of Article 2.1(c) in an "active and meaningful" way.[282]

7.172. In sum, we conclude that the identified statements contained in the evidence on the record do not indicate that the USDOC considered the economic diversification of Turkey in its determination of *de facto* specificity. Accordingly, we find that the USDOC acted inconsistently with the final sentence of Article 2.1(c) of the SCM Agreement by failing to take into account the extent of diversification of economic activities within Turkey.

7.4.2.2.2 Length of time that the "subsidy programme" has been in operation

7.173. Regarding the length of time that the subsidy programme has been in operation, the United States argues that in evaluating the Provision of HRS for LTAR, the USDOC examined Erdemir's 2012 and 2013 Annual Reports, which identify Erdemir as "Turkey's iron and steel power"[283], as well as evidence that Erdemir has existed since 1960 and Isdemir has existed since 1970.[284] The United States also contends that the GOT provided the USDOC with information regarding the production and provision of HRS not only for the period of investigation (POI), but also the preceding two years, which demonstrated that the programme usage data for the POI was not anomalous in comparison to data for past years.[285] According to the United States, the length of

[279] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 12; Erdemir 2012 Annual Report, (Exhibit USA-5), p. 16; see also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14.

[280] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 10; see also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46) p. 12; and WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14.

[281] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 10; see also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14.

[282] Panel Report, *US − Washing Machines*, para. 7.253.

[283] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 2.

[284] Erdemir 2013 Annual Report, (Exhibit USA-7), second cover page; Erdemir 2012 Annual Report, (Exhibit USA-5), p. 6.

[285] Excerpt from GOT's OCTG questionnaire response, (Exhibit TUR-60), pp. 4-6; Excerpt from GOT's WLP initial questionnaire response, (Exhibit USA-43), pp. 14-16; Excerpt from GOT's HWRP initial questionnaire response, (Exhibit USA-44), pp. 12-15; and Excerpt from GOT's CWP initial questionnaire response, (Exhibit USA-45), pp. 7-10.

time in which the subsidy programme had existed did not warrant explicit discussion in the USDOC's determination.[286]

7.174. Turkey argues that the USDOC's *de facto* specificity determination is not based on the evidence that the United States refers to in the present proceedings. Turkey contends that the duration of the existence of Erdemir and Isdemir does not establish of the duration of the subsidy programme.[287] Turkey also points out that, for the two preceding years before the POI, the data on the record are insufficient to allow the USDOC to meaningfully take into account the length of time in which the alleged subsidy programme has operated.[288]

7.175. We must decide whether the USDOC took into account the length of the subsidy programme's operation by virtue of the fact that there is evidence on the record that Erdemir and Isdemir have been in operation since 1960 and 1970, respectively, and the fact that the USDOC requested and obtained data from the GOT concerning the two years preceding the POI.

7.176. The kinds of evidence that the United States identified could be potentially relevant for an investigating authority to consider in its evaluation of the length of time in which the subsidy programme has been in operation. For instance, for a subsidy programme in the form of the provision of inputs for LTAR, an investigating authority may consider the duration of the subsidy programme by examining transactional data preceding the POI with regard to the provision of that relevant input.[289] The compliance panel in *US − Countervailing Measures (Article 21.5 − China)* did not understand this mandatory factor to require an investigating authority to establish in each case the total duration of the subsidy programme that has been in operation. That panel stated that:

> [W]e do not consider that Article 2.1(c) imposes in all cases a requirement to establish the total duration of the programme. Rather, to comply with the requirement of the last sentence of Article 2.1(c), it would be sufficient to show that the programme has been in operation for a duration that does not itself account for "use of a subsidy programme by a limited number of certain enterprises".[290]

7.177. We agree with this statement. In our view, an investigating authority does not need to establish the total duration of the subsidy programme, so long as it can be demonstrated that the limited number of users of the programme is not entirely explained by the short durations of the programme. In the present case, the parties do not dispute that the data for the two preceding years are incomplete, so far as the provision of HRS for LTAR by Erdemir and Isdemir is concerned. In particular, in the OCTG investigation, because the requested HRS consumption and production data was not available, the GOT provided Turkish production and consumption figures for all flat steel products, which includes hot rolled coils, cold rolled coils, stainless coils, and other products.[291] In subsequent proceedings, the GOT provided data for all Turkish HRS imports, exports, production, and consumption.[292] The GOT did not provide any company-specific data for Erdermir and Isdemir. Moreover, the GOT did not provide any HRS pricing information during the relevant period.[293]

7.178. Given that pricing information for the relevant period is missing from the record, and Erdemir and Isdemir were not the only HRS producers in Turkey during the relevant period, we do not see how assessing the data provided by the GOT would allow the USDOC to meaningfully consider the length of the time that the subsidy programme has been in operation.

7.179. We also do not consider that statements that Erdemir and Isdemir existed since 1960 and 1970, necessarily inform the length of time that the so-called Provision of HRS for LTAR Programme

[286] United States' second written submission, para. 174.
[287] Turkey's second written submission, para. 114.
[288] Turkey's second written submission, paras. 114-117.
[289] Panel Report, *US − Countervailing Measures (China) (Article 21.5 − China)*, para. 7.270.
[290] Panel Report, *US − Countervailing Measures (China) (Article 21.5 − China)*, para. 7.273.
[291] Turkey's second written submission, para. 115 (referring to Excerpt from GOT's OCTG questionnaire response, (Exhibit TUR-60), pp. 4-5).
[292] Turkey's second written submission, paras. 115-117 (referring to Excerpt from GOT's WLP initial questionnaire response, (Exhibit USA-43), p. 14; Excerpt from GOT's HWRP initial questionnaire response, (Exhibit USA-44), p. 13; and Excerpt from GOT's CWP initial questionnaire response, (Exhibit USA-45), p. 8).
[293] Turkey's second written submission, paras. 115-117 (referring to Excerpt from GOT's WLP initial questionnaire response, (Exhibit USA-43), p. 14; Excerpt from GOT's HWRP initial questionnaire response, (Exhibit USA-44), p. 13; and Excerpt from GOT's CWP initial questionnaire response, (Exhibit USA-45), p. 8).

has been in operation. The fact that these two companies have existed since the 1960s and 1970s does not necessarily mean that these two companies have been providing HRS for LTAR as public bodies since then. In our view, the evidence cited by the United States is not sufficient on its own to demonstrate that the USDOC actively and meaningfully considered the length of operation of the alleged "subsidy programme".

7.180. Finally, we do not see any basis in Article 2.1(c) or elsewhere in the SCM Agreement for the United States' argument that a complainant must also show how the investigating authority's failure to consider the two factors in the final sentence of Article 2.1(c) affected the specificity determination.[294]

7.181. In sum, we find that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to properly evaluate the length of time in which the so-called Provision of HRS for LTAR Programme has been in operation.

7.4.3 Conclusions regarding Turkey's Article 2.1(c) and 2.4 claims

7.182. For the reasons stated above, we find that the USDOC acted inconsistently with Articles 2.1(c) and 2.4 of the SCM Agreement by failing to identify and clearly substantiate the existence of a Provision of HRS for LTAR Programme based on positive evidence. We also find that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take into account the extent of diversification of economic activities within Turkey, and by failing to properly evaluate the length of time in which the so-called Provision of HRS for LTAR Programme has been in operation.

7.5 Turkey's claims under Article 12.7 of the SCM Agreement in relation to the use of facts available in the OCTG, WLP, and HWRP proceedings

7.5.1 Introduction

7.183. Turkey claims that the USDOC's use of facts available in the OCTG, WLP, and HWRP investigations is inconsistent with Article 12.7 of the SCM Agreement.

7.184. In its first written submission, the United States requested the Panel to make a preliminary ruling excluding from its terms of reference claims under Article 12.7 of the SCM Agreement relating to the WLP investigation, concerning subsidy programmes other than the Provision of HRS for LTAR. In its panel request, the United States argues that Turkey expressly limited its Article 12.7 claim in the WLP investigation to a single programme, the Provision of HRS for LTAR, and thus any Article 12.7 claims in respect of any other investigated programmes in the WLP proceeding fall outside the Panel's terms of reference.

7.185. We address Turkey's claims concerning the OCTG, WLP, and HWRP proceedings in turn.

7.5.2 The use of facts available in the OCTG investigation

7.5.2.1 Factual background

7.186. In the OCTG investigation, the USDOC requested that Borusan report in its questionnaire response *all* of its HRS purchases during the POI, including purchases which were not used to produce OCTG.[295] Following a request by Borusan, the USDOC extended the deadline for response to the original questionnaire.[296]

7.187. In response to the original questionnaire, Borusan stated that it had production facilities at three locations during the POI: Gemlik, Halkali, and Izmit. Borusan only reported HRS purchases for the Gemlik facility. Borusan explained that it only produces OCTG at Gemlik, and did not transfer any HRS purchased at the other two facilities to Gemlik. Borusan also explained that the process of

[294] C.f. United States' first written submission, para. 231 (where the United States argues that Turkey does not explain how the USDOC's alleged lack of consideration of these factors affected the overall specificity determination and thereby resulted in a breach of Article 2.1(c)).

[295] Turkey's first written submission, para. 198.

[296] USDOC's letter on extension request, (Exhibit USA-12) (granting Borusan an extension of 12 days to respond to the questionnaire).

gathering HRS purchase data on a coil-by-coil basis is extremely time-consuming and burdensome, and failed to see the purpose of gathering information for the facilities that do not produce OCTG. The USDOC subsequently issued a supplemental questionnaire requesting that Borusan either report all its HRS purchases, including for the other two facilities, or otherwise justify why it could not report the purchases.[297] In its response to the supplemental questionnaire, Borusan stated that Gemlik HRS purchase data was collected from two different data systems, and transportation costs had to be separated out manually. For these reasons, Borusan requested the USDOC's permission to report HRS purchases only for Gemlik.[298] Borusan further indicated to the USDOC that it would be willing to cooperate if a full reporting was insisted upon for all facilities, but stressed that Borusan would require several weeks to provide such complete information.[299]

7.188. The USDOC determined that Borusan failed to follow the questionnaire instructions and failed to properly request an extension when asked for the second time to provide all HRS purchases data, thus failing to act to the best of its ability. As a result, the USDOC applied an adverse inference. Specifically, for both the Halkali and Izmit facilities, the USDOC found that Borusan purchased HRS at the lowest price on the record for the Gemlik facility's purchases. The USDOC also adversely inferred that the Halkali and Izmit facilities purchased quantities of HRS during the POI equal to their annual production capacity[300], and that these facilities purchased HRS from Erdemir and Isdemir in the same ratio as the Gemlik facility purchased from Erdemir and Isdemir (expressed as a share of Gemlik's total purchases from all suppliers).

7.5.2.2 The Panel's evaluation of Turkey's claim regarding the use of facts available in the OCTG investigation

7.189. Article 12.7 of the SCM Agreement provides that:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

7.190. Article 12.7 of the SCM Agreement thus allows an investigating authority to make determinations using facts available in cases when a Member or interested party refuses access to necessary information within a reasonable time period, otherwise fails to provide such information within a reasonable period, or significantly impedes the investigation. This provision is intended to ensure that an interested party's failure to provide necessary information does not impede the investigation. Article 12.7 permits the use of facts that are otherwise available on the record solely for the purpose of replacing necessary information that may be missing, to allow the investigating authority to make an accurate subsidization determination. Recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses. Rather, an investigating authority must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party. An investigating authority may draw inferences when selecting from among the facts otherwise available, but should not use Article 12.7 to punish non-cooperating parties by intentionally drawing an adverse inference. The use of inferences to select adverse facts to punish non-cooperating parties would result in an inaccurate subsidization determination.

7.191. Paragraph 7 of Annex II of the Anti-Dumping Agreement, which is relevant to the interpretation and application of Article 12.7, provides that "if an interested party does not cooperate and thus relevant information is being withheld from the investigating authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate".[301]

[297] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), pp. 9-13.
[298] Turkey's first written submission, para. 203.
[299] Turkey's first written submission, para. 204.
[300] Initially, the USDOC used the quantities of HRS which Gemlik facility purchased as the quantities for the two non-responding facilities. Following the submission from the respondents, USDOC reduced its initial calculation of these HRS quantities in order to arrive at a more accurate determination of the relevant subsidy rates. (United States' first written submission, paras. 156-157).
[301] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426.

7.192. Turkey argues that the USDOC's reliance on facts available and its decision to draw an adverse inference is inconsistent with Article 12.7 of the SCM Agreement: first, because the USDOC failed to take "due account" of the difficulties Borusan experienced in gathering the requested information; and second, because the USDOC's application of facts available is punitive.[302] We address these two aspects of Turkey's claim in turn.

7.5.2.2.1 Failure to take into account the difficulties

7.193. Turkey argues Borusan experienced considerable difficulties in collecting the requested information. According to Turkey, once Borusan informed the USDOC of its difficulties in obtaining the requested information, the USDOC should have taken "due account" of those difficulties in having recourse to Article 12.7.[303] In particular, Turkey argues that the USDOC should have considered "whether it would have been reasonable to use the data which Borusan provided on its hot rolled steel purchases for the Gemlik facility to approximate the missing information or to ask Borusan to provide the missing information in a different form".[304] In this regard, Turkey relies on the Appellate Body's statement in *US – Carbon Steel (India)* that:

> In our view, the context provided by these provisions suggests that the manner or procedural circumstances in which information is missing can be relevant to an investigating authority's use of "facts available" under Article 12.7. In particular, Article 12.11 requires an investigating authority to take "due account of any difficulties experienced by interested parties", which includes interested parties that have not provided the "necessary information" referred to in Article 12.7. The kinds of "difficulties", or lack thereof, experienced by interested parties to be taken into account by an investigating authority in having recourse to Article 12.7 could relate, *inter alia*, to the nature and availability of the evidence being sought … the time period provided in which to respond, and the extent or number of opportunities to respond[.][305]

7.194. According to Turkey, the Appellate Body's statement above means that the USDOC was obligated to take "due account" of the difficulties Borusan experienced in responding to the USDOC's requests for information both when determining that necessary information was not provided (such that recourse to Article 12.7 is justified), and when selecting facts available under Article 12.7.[306] Turkey's claim only concerns the latter situation, regarding the USDOC's *selection* of facts available.[307]

7.195. The United States argues that Turkey is trying to collapse the obligation to take due account of the difficulties under Article 12.11 into the obligation under Article 12.7.[308] The United States contends that, in any event, the USDOC took due account of Borusan's difficulties, including by granting an extension, and by issuing a supplemental questionnaire to allow Borusan significant additional time to gather the requested data.[309] The United States contends that Borusan had two opportunities to provide the information, 65 days to prepare for the initial questionnaire response, and an opportunity to request a further extension for the supplemental questionnaire response.[310] According to the United States, the USDOC appropriately relied on facts available to "fill in gaps" due to the continued failure of Borusan to provide data regarding its HRS purchases for the Halkali and Izmit facilities.[311]

7.196. In our view, Turkey's complaint about the difficulties fits more appropriately into the obligation under Article 12.11 to take "due account of any difficulties experienced by interested

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[302] Turkey's first written submission, para. 196; second written submission, para. 121.
[303] Turkey's response to Panel question No. 45, para. 86.
[304] Turkey's response to Panel question No. 45, para. 91.
[305] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.422.
[306] Turkey's response to Panel question No. 45, paras. 86 and 91.
[307] Turkey does not pursue any claims concerning the USDOC's determination that Borusan failed to provide necessary information or whether the resort to facts available under Article 12.7 was justified. (Turkey's response to Panel question No. 43, para. 83).
[308] United States' opening statement at the first meeting of the Panel, para. 51.
[309] United States' first written submission, para. 148; second written submission, para. 122.
[310] United States' first written submission, paras. 151-153.
[311] United States' first written submission, para. 153 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291); second written submission, para. 123.

parties". We do not see any basis to read the obligation under Article 12.11[312] into Article 12.7. In *US − Carbon Steel (India)*, the Appellate Body referred to Articles 12.4 and 12.11 for context in its interpretation of the text of Article 12.7, because "these provisions recognize some potential reasons why the 'necessary information' referred to in Article 12.7 may not be provided, namely, confidentiality and resource constraints".[313] The Appellate Body's reference to these provisions as context for understanding the potential reasons why "necessary information" may not be provided in the sense of justifying recourse to facts available under Article 12.7 cannot have the effect of reading an obligation into Article 12.7 that is not reflected in its text. Nor do we understand the Appellate Body to have suggested otherwise. The Appellate Body stated clearly after its contextual consideration of Article 12.7 that "*[w]hether and how* such procedural circumstances should be taken into account by an investigating authority, and any appropriate inferences that may be drawn, will necessarily depend on the particularities of a given investigation."[314] Thus, the Appellate Body has not suggested that Article 12.7 *requires* an investigating authority to properly take into account the difficulties experienced by the interested parties.

7.197. Turkey's claim concerning the alleged difficulties is made under Article 12.7 only. Turkey has not brought any claim under Article 12.11. Thus, to the extent that Turkey relies on an alleged breach of the obligation to take due account of difficulties under Article 12.11 to demonstrate a breach of Article 12.7, we reject Turkey's claim as a matter of law.

7.198. In any event, we are not persuaded by Turkey's proposition that had the USDOC taken due account of the difficulties, it would not have insisted on Borusan submitting the relevant information, and thereby would not have resorted to facts available. We do not see how the difficulties experienced by Borusan could have affected the USDOC's resort to facts available, if the information that the USDOC requested is indeed "necessary information" for the purpose of Article 12.7.[315] The absence of a piece of "necessary information" in the record leaves a hole in the factual basis of an investigating authority's determination, which necessarily requires the investigating authority to resort to facts available to fill in the gaps. The mere failure of an interested Member or interested party to provide information *necessary* for the determination, regardless of the reasons or procedural circumstances, requires an investigating authority to resort to other sources of information to complete the factual record on which it makes its determination.

7.199. We are also not persuaded by Turkey's argument that the USDOC should have considered whether "to ask Borusan to provide the missing information in a different form".[316] That, in our view, is not a relevant consideration under Article 12.7 of the SCM Agreement, which strictly addresses situations in which information is not provided.

7.5.2.2.2 Punitive application of facts available

7.200. Turkey argues that the USDOC used an adverse inference to purposefully punish Borusan, contrary to the Appellate Body's interpretation of Article 12.7 in *US − Carbon Steel (India)*. Turkey contends that the USDOC should have used *all* of the data provided by Borusan regarding its purchases of HRS for the Gemlik mill to reasonably approximate the benefit received by Borusan with respect to Borusan's purchases of HRS for its Halkali and Izmit facilities.[317] Turkey submits that the USDOC chose the lowest price of any of Borusan's purchases of HRS from Erdemir and Isdemir and applied that price for all purchases of HRS for the Halkali and Izmit facilities equal to the facilities' entire annual production capacity. In doing so, the USDOC only relied on a part of the evidence provided by Borusan − i.e. only the lowest price on the record.[318] Turkey considers that "even a weighted average" of the prices paid for HRS at the Gemlik facility "might have been a more reasonable replacement for the price of hot rolled steel purchased for the Halkali and Izmit mills"

[312] Article 12.11 of the SCM Agreement states that:
The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.
[313] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.422.
[314] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.422. (emphasis added)
[315] We recall that Turkey has not challenged the USDOC's determination that the missing information was necessary for the purpose of Article 12.7. (Turkey's response to Panel question No. 43, para. 83).
[316] Turkey's response to Panel question No. 45, para. 91.
[317] Turkey's response to Panel question No. 46, para. 92.
[318] Turkey's response to Panel question No. 46, para. 94; second written submission, para. 126.

because it would reflect all of the relevant substantiated facts on the record.[319] According to Turkey, the USDOC's application of facts available is a clear attempt to use the worst facts to punish Borusan for non-cooperation[320], as the USDOC itself acknowledged.[321] In this regard, Turkey points to the USDOC's own statement that "the inference is *adverse*, not neutral".[322]

7.201. The United States submits that the USDOC's application of facts available was not punitive and fully complied with Article 12.7.[323] The United States argues that the Appellate Body has recognized that non-cooperation implies that a less favourable result becomes possible due to the selection of a replacement of an unknown fact. That the outcome is less favourable than Borusan would have liked does not mean that the application of facts available was punitive or otherwise inconsistent with Article 12.7.[324] According to the United States, the USDOC selected a reasonable replacement for the missing price and quantity information by relying on actual data that Borusan had provided for another of its facilities.[325] Turkey has not explained why its suggested approach would lead to a more accurate determination of the missing price and quantity data. With regard to price, the United States argues that the actual prices paid by Borusan for HRS for the non-responding facilities may have been less than the lowest price it paid for Gemlik. In that situation, the use of the lowest price may in fact reflect a better outcome than had Borusan fully cooperated with the investigation.[326] With regard to quantity, the United States points out that the selected quantities did not exceed the annual production capacity of the non-reporting facilities and reflected a reasonable replacement of the missing information.[327]

7.202. The United States rejects that the USDOC should have relied on a weighted average transaction price, as Turkey argued. The United States argues that such an approach would ignore the procedural circumstances of the investigation, including Borusan's failure to cooperate, and would in general lead to findings that are necessarily better than some of the outcomes for cooperating entities. According to the United States, such an interpretation would be inconsistent with Article 12.7 because it provides an incentive for interested parties not to cooperate.[328]

7.203. We note that Turkey's arguments concerning the alleged punitive application of facts available evolved during the dispute. At the outset, Turkey seemed to argue that, in light of the difficulties experienced by Borusan in providing the requested information, the USDOC is not entitled to resort to the use of adverse inferences with a view to punish Borusan.[329] If this is the case, Turkey's argument concerning "punitive application of facts available" hinges upon its view that the USDOC should have taken into account the difficulties experienced by Borusan when selecting facts available. In this regard, we refer to our findings above at paragraph 7.198 that the USDOC was not obliged to take into account the difficulties experienced by Borusan in responding to the USDOC's requests for information when *selecting* facts available under Article 12.7. Subsequently, Turkey clarified that its argument concerning the punitive application of facts available does not hinge upon the USDOC having to take into account the alleged difficulties.[330] Therefore, we proceed on the basis that Turkey is pursuing an argument that the facts that the USDOC selected in the OCTG investigation were punitive, irrespective of whether Borusan experienced any difficulties.

[319] Turkey's response to Panel question No. 46, para. 94; second written submission, paras. 126 and 129.
[320] Turkey's first written submission, para. 209; statement at the second meeting of the Panel, para. 84.
[321] Turkey's first written submission, para. 210.
[322] Turkey's first written submission, para. 210 (quoting OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 52). (emphasis added by Turkey)
[323] United States' second written submission, para. 125.
[324] United States' first written submission, paras. 131-132, and 154; response to Panel question No. 51, para. 152; and second written submission, para. 133.
[325] United States' second written submission, paras. 125, 128, and 134.
[326] United States' second written submission, para. 131.
[327] United States' first written submission, para. 155; second written submission, paras. 125, 128, and 132.
[328] United States' response to Panel question No. 47, para. 146.
[329] Turkey's response to panel question No. 45, para. 84 (where Turkey argues that "USDOC's selection of facts available based on adverse inferences in the OCTG investigation is inconsistent with Article 12.7 of the SCM Agreement, in part, *because the USDOC failed to take 'due account' of the difficulties Borusan experienced in providing the requested information* in drawing adverse inferences" (emphasis added)). See also United States' response to Panel question No. 44, para. 135.
[330] Turkey's response to Panel question No. 96, para. 49.

7.204. The words "punish" or "punitive" do not appear in the SCM Agreement. In alleging "punitive" application of facts available, we understand Turkey to argue that the use of adverse inferences—such as the selection of the lowest price on the record and the non-reporting facilities' entire annual production capacity was meant to punish Borusan and resulted in an inaccurate subsidization determination that does not accord with Article 12.7.[331] Turkey's argument concerning the "punitive" application of facts available thus rests on the premise that the way in which the USDOC selected "facts available" resulted in inaccurate determinations that are not "reasonable replacements" of the necessary missing information.[332] We note that in *US – Carbon Steel (India)*, the Appellate Body warned against the so-called "punitive" application of facts available for exactly that reason:

> [T]he use of inferences in order to select adverse facts that punish non-cooperation would lead to an inaccurate determination and thus not accord with Article 12.7.[333]

7.205. Thus, the issue before us is whether an objective and unbiased investigating authority would have considered the facts that the USDOC selected in the OCTG investigation to be reasonable replacements of the missing information, with a view to achieving an accurate determination. In this regard, the Appellate Body in *US – Carbon Steel (India)* stated that:

> [T]he task of ascertaining which "facts available" reasonably replace the missing "necessary information" under Article 12.7 calls for a process of reasoning and evaluation. … [I]t would not be possible to identify whether replacements for the missing "necessary information" are "reasonable", and thus constitute the "evidence" on which to ground a determination, without engaging in such a process.[334]

7.206. This process in turn calls for a consideration of all pertinent and substantiated facts on the record:

> [A]s part of the process of reasoning and evaluating which "facts available" reasonably replace the missing information, all substantiated facts on the record must be taken into account. It would frustrate the function of Article 12.7, namely, to "replac[e] information that may be missing, in order to arrive at an accurate subsidization or injury determination", if certain substantiated facts were arbitrarily excluded from consideration. In addition, we note that the participants agree that Article 12.7 should not be used to punish non-cooperating parties by choosing adverse facts for that purpose. Rather, the participants agreed at the oral hearing that the function of Article 12.7 is to replace the missing "necessary information" with a view to arriving at an accurate determination.[335]

7.207. Where there are multiple facts available on the record, an investigating authority may be required to make a comparative evaluation:

> [W]here there are several "facts available" from which to choose, an investigating authority must nevertheless evaluate and reason which of the "facts available" reasonably replace the missing "necessary information", with a view to arriving at an accurate determination.[336]

7.208. Finally, the investigating authority must sufficiently explain in its determination its selection of "facts available":

> [T]he explanation provided by the investigating authority in its published report must be sufficient to allow a panel to assess whether the "facts available" employed by the investigating authority resulted from a process of reasoning and analysis, including an

[331] Turkey's first written submission, para. 209.
[332] Turkey's responses to Panel question No. 46, para. 94, and No. 48, para. 96.
[333] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468.
[334] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.418. (emphasis added)
[335] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419. (fns omitted; emphasis added)
[336] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426.

> assessment of whether the use of an inference comports with the legal standard of Article 12.7 we have set out above.[337]

7.209. We are guided by these principles when assessing whether the USDOC as an objective and unbiased investigating authority could have found the selected facts to be reasonable replacements for the missing necessary information.

7.210. In the OCTG investigation, the USDOC selected facts available for the purpose of determining two elements regarding Borusan's purchases of HRS from Erdemir and Isdemir at the two non-responding facilities, i.e. the price and quantity of such purchases. We examine each of these selected facts in turn.

7.5.2.2.2.1 The selection of the lowest price on the record

7.211. We recall that, for the purpose of establishing the price paid for HRS at the two non-responding facilities, the USDOC's Post-Preliminary Analysis Memorandum for Borusan stated that:

> With respect to Borusan's HRS purchases for the Halkali and Ismit mills … we are also inferring adversely that for both the Halkali and Ismit mills, Borusan purchased HRS at the lowest price on the record for the Gemlik mill's HRS purchases.[338]

7.212. The USDOC's Final Determination stated in this regard that:

> Consistent with the Borusan Post-Preliminary Analysis, we are inferring adversely that Borusan purchased all HRS for the Halkali and Izmit mills at the lowest price on the record for the Gemlik mill's HRS purchases from Erdemir and Isdemir.[339]

7.213. The parties do not dispute that verified information concerning HRS transactions for the Gemlik facility was on the record. Accordingly, there was a series of verified prices on the record concerning Borusan's HRS purchases at the Gemlik facility. Before an investigating authority selects a price amongst the facts available, i.e. all verified prices, we expect an objective and unbiased investigating authority to engage in a process of reasoning and evaluation regarding the whole range of transactional prices on the record, including in particular the date, seller, purchase quantity associated with these transactions, as well as any reasons for fluctuations in prices. Moreover, as the Appellate Body observed on several occasions, when an investigating authority must choose among several facts available, like in the present case, the process of reasoning and evaluation must involve a degree of comparison in order to arrive at an accurate determination.[340] In our view, only through such a process could an investigating authority properly select among all verified prices to find a "reasonable replacement" for the missing price information consistently with Article 12.7.

7.214. We do not suggest that the price that an investigating authority eventually selects as the "fact available" must reflect all of the verified prices on the record, which Turkey seems to suggest.[341] What is important in our view is that an investigating authority cannot exclude other substantiated facts from the pool from which it will select a reasonable replacement. If an investigating authority simply chooses the lowest price without a process of reasoning and evaluation of all the prices, it risks excluding *a priori* the rest of the prices arbitrarily.

7.215. We do not understand that the USDOC engaged in any comparative process of reasoning and evaluation in selecting the lowest price on the record. Instead, the USDOC clearly stated that it was "inferring adversely" in selecting the lowest price on the record because of Borusan's non-cooperation. In other words, the sole basis for selecting the relevant price data was

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[337] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.469.
[338] Post-Preliminary Analysis Memorandum for Borusan, (Exhibit TUR-75), p. 14.
[339] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 12.
[340] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.431 and 4.435. See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.179.
[341] Turkey's second written submission, para. 129; United States' opening statement at the second meeting of the Panel, para. 41.

the adverse inference. Therefore, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement.

7.216. The United States argues that the USDOC considered the lowest price to be a "reasonable replacement" because it was a price that Borusan had actually paid for HRS for the Gemlik facility. For the United States, it is entirely possible that the actual prices paid by Borusan for HRS for the Halkali and Izmit facilities were less than the lowest price it paid for the Gemlik facility.[342]

7.217. The United States' argument is not reflected in the USDOC determination and amounts to *post hoc* rationalization. In any event, the United States' argument is unpersuasive. The fact that the selected price is an actual price does not necessarily mean that it is a "reasonable replacement" of the missing necessary information under Article 12.7. We agree that actual prices that the same respondent paid at a different facility may serve as a useful starting point for selecting the "reasonable replacement" for prices paid by that respondent at its other facilities. However, given that there is a range of actual prices available on the record, one cannot ascertain which of the actual prices reasonably replaces the missing "necessary information" under Article 12.7 without also looking into the particular circumstances of the transactions. While the United States may be right in pointing out that the unknown actual price at the non-responding facilities could be lower than the lowest price at the Gemlik facility, it is equally possible that the unknown price at the non-responding facilities could be higher than the highest price at the Gemlik facility. Such speculation cannot form the basis of *facts* available under Article 12.7. We recall and agree with the panel's views in *EC − Countervailing Measures on DRAM Chips* that an objective and unbiased investigating authority would not base its determination on "speculative assumptions or on the worst information available", even when interested parties have failed to cooperate.[343]

7.218. In light of our finding that the USDOC failed to engage in a process of reasoning and evaluation in selecting the facts available for the missing price information in the OCTG investigation, we do not address the arguments of Brazil[344] and Turkey[345] that a weighted average price serves better as a "reasonable replacement" of the missing price information at the two non-responding facilities. We also do not need to address Turkey's argument that the USDOC selected the lowest price on the record as the *worst possible fact* to punish Borusan.[346]

7.5.2.2.2.2 The selection of quantities of HRS purchases on the basis of the full capacity of the non-responding facilities and Gemlik's ratio of HRS purchases from Erdemir and Isdemir

7.219. In the OCTG investigation, the USDOC determined the quantities of HRS purchases by non-responding facilities, Halkali and Izmit, from Erdemir and Isdemir based on facts available. The USDOC initially used the quantity of HRS purchased by Gemlik from Erdemir and Isdemir as the quantity of HRS purchases for each of the non-responding facilities. The USDOC subsequently revised the quantities of HRS purchases for the non-responding facilities. The USDOC based the final quantities of HRS purchases at the Halkali and Izmit facilities on the full production capacity[347] of

[342] United States' second written submission, para. 131; comments on Turkey's response to Panel question No. 96, para. 43.

[343] Panel Report, *EC − Countervailing Measures on DRAM Chips*, para. 7.61. See also Appellate Body Report, *US − Carbon Steel (India)*, para. 4.417.

[344] In its oral statement, Brazil argues that a weighted average of the prices paid by the Gemlik facility for HRS "in all likelihood, would serve as a better approximation of the missing information" than USDOC's use of the lowest price on the record for purchases of HRS for the Gemlik facility. (Brazil's third-party statement, paras. 7-8). The United States argues that Brazil has not provided any explanation based on the text of Article 12.7 that would support such an assertion. According to the United States, such an interpretation would serve only to incentivize non-cooperation. (United States' response to Panel question No. 47, para. 146; see also opening statement at the second meeting of the Panel, para. 41).

[345] Turkey's response to Panel question No. 47, para. 95; second written submission, para. 126; and statement at the second meeting of the Panel, para. 85.

[346] Turkey's second written submission, para. 130; responses to Panel question No. 51(b), para. 109, and No. 49, para. 100.

[347] The capacity figures which the USDOC used to calculate the benefit to Borusan of the Halkali and Izmit facilities' HRS purchases were nominal rates, i.e. "their entire annual production capacity" of 100 ktonnes and 250 ktonnes, respectively. (Turkey's response to Panel question No. 98, para. 51 (referring to OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), pp. 51-52)). See also United States' response to Panel question No. 98, para. 105.

each facility, multiplied by the percentage of Gemlik's HRS purchases from Erdemir and Isdemir out of total HRS purchases. In its Final Determination, the USDOC stated the following:

> In the Borusan Post-Preliminary Analysis, we also inferred adversely that Borusan purchased the same quantity of HRS produced by Erdemir and Isdemir for each of these mills as it did for the Gemlik mill. Based on comments from interested parties and record information, however, we adjusted that inference for this final determination. Accordingly, we now are inferring as adverse facts available that the Halkali and Izmit mills each purchased the same quantity of HRS during the POI as its annual production capacity. In accordance with that inference, we are presuming in our calculations that the Halkali and Izmit mills each purchased HRS from Erdemir and Isdemir in the same ratio as the Gemlik mill's purchases from Erdemir and Isdemir as a share of its total purchases.[348]

7.220. In our view, an objective and unbiased investigating authority would not have simply used the full production capacity as a basis to calculate the quantities of HRS purchases from Erdemir and Isdemir at the two non-responding facilities, without first considering any substantiated information on the record that may shed light on the capacity utilization of the two non-responding facilities. The United States confirms that Borusan's verified capacity utilization rate at the Gemlik facility was on the record.[349] This information might have served as a reasonable approximation of the capacity utilization rate at the two non-responding facilities. This is clear given that the USDOC also used Gemlik's HRS purchase ratio for the purpose of establishing the two non-responding facilities' HRS purchase ratio from Erdemir and Isdemir. Even absent such verified capacity utilization data, an investigating authority may choose to use information from secondary sources, such as the industry average capacity utilization rate, in order to select a *commercially realistic capacity utilization rate* as a basis for a "reasonable replacement" of the quantities of HRS purchases with a view to arrive at an accurate subsidization determination. We have no evidence before us that the USDOC engaged in such a process of reasoning and evaluation to ascertain whether the full capacity utilization serves as the basis of a *reasonable replacement* of the missing quantity information.

7.221. We therefore find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement in using the full production capacity of the two non-responding facilities as the basis for calculating the quantity of the HRS purchases at these two facilities.

7.222. We now turn to examine whether an objective and unbiased investigating authority could have selected Gemlik's ratio of HRS purchases from Erdemir and Isdemir as the ratio for the non-responding facilities' HRS purchases from Erdemir and Isdemir. We recall that in determining the quantity of HRS provided by Erdemir and Isdemir, the USDOC multiplied the full production capacity of the two non-reporting facilities by the percentage of Gemlik's HRS purchases from Erdemir and Isdemir out of Gemlik's total HRS purchases. In our view, it was reasonable that the USDOC relied on Gemlik's ratio of HRS purchases from Erdemir and Isdemir out of Gemlik's total HRS purchases. First, the USDOC engaged in a process of reasoning and evaluation with a degree of comparison when it rejected the alternative facts proposed by the petitioner that "Borusan's Izmit and Halkali mills purchased the same quantity of HRS as the Gemlik facility, but that *100 percent of these purchases was from Erdemir and Isdemir*."[350] Second, we consider that there is a sufficiently close connection between the missing information, i.e. the quantity of Borusan's HRS purchases from Erdemir and Isdemir at non-responding facilities Halkali and Izmit, and the percentage of Gemlik's HRS purchases from Erdemir and Isdemir.

7.223. For the above reasons, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing to engage in a process of reasoning and evaluation in selecting the facts available for the missing price information in the OCTG investigation. We also find that the USDOC acted inconsistently with Article 12.7 by using the full production capacity of the two non-responding facilities as the basis for calculating the quantity of the HRS purchases at these two facilities, without engaging in a process of reasoning and evaluation. However, we consider that it was reasonable for the USDOC to use Gemlik's ratio of HRS purchases from Erdemir and Isdemir out of the total HRS

[348] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 12. (fn omitted)
[349] United States' response to Panel question No. 98, para. 104.
[350] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 52 (emphasis added). See also United States' comments on Turkey's response to Panel question No. 96, para. 44; and response to Panel question No. 98, para. 105.

purchases at the Gemlik facility as the basis for calculating the quantity of the HRS purchases at the two non-responding facilities.

7.5.3 The use of facts available in the WLP investigation

7.5.3.1 Factual background

7.224. In the WLP investigation, Borusan decided not to participate in the verification. Instead, Borusan requested the USDOC to use the verification report and exhibits from the CWP review proceeding, which allegedly covered the same programmes[351] and the same time period as the WLP investigation.[352] The USDOC rejected this request because "[v]erification of data submitted in a separate proceeding related to a different industry does not satisfy the requirement in section 782(i) of the Act that the Department verify the information relied upon in making its final determination".[353] The USDOC found that Borusan significantly impeded the investigation and provided information that could not be verified, and therefore its CVD rate has to be based on facts available. The USDOC concluded that Borusan did not cooperate to the best of its ability in this investigation. The USDOC stated that adverse inference is warranted "to ensure that Borusan did not obtain a more favorable result by failing to cooperate in the investigation".[354]

7.225. The USDOC inferred that Borusan benefitted from each of the programmes raised in the petition, with the exception of any programmes that were previously proven not to exist. The USDOC applied subsidy rates for all of the subsidy programmes in the following manner[355]:

a. for the 7 income tax programmes alleged in the petition which pertain to either the reduction of income tax paid or the payment of no income tax, the USDOC applied an adverse inference that Borusan paid no income tax during the POI, i.e. a subsidy rate of 20% was applied;

b. for 7 subsidy programmes, including the Provision of HRS for LTAR, the USDOC applied the highest-calculated programme-specific subsidy rates (above zero) for a cooperating respondent in the WLP investigation, Toscelik;

c. for programmes for which the USDOC did not calculate an above-zero rate for Toscelik in the WLP investigation, the USDOC applied the highest subsidy rate calculated for the same or, if lacking such rate, for a similar programme in a CVD investigation or administrative review involving Turkey; and

d. for programmes for which the USDOC were unable to find above-*de minimis* rates calculated for the same or similar programmes, the USDOC applied the highest calculated subsidy rate for any programme identified in a Turkish CVD proceeding that could conceivably be used by Borusan.

7.226. We first address the United States' request that we exclude from our terms of reference certain claims under Articles 12.7 of the SCM Agreement concerning the WLP investigations. We then address the claims that are within our terms of reference.

7.5.3.2 Whether Turkey's claims under Article 12.7 of the SCM Agreement in respect of "all investigated programs" in the WLP investigation are within the Panel's terms of reference

7.227. The United States requests the Panel to rule that Turkey's claims under Article 12.7 of the SCM Agreement with respect to 29 non-HRS for LTAR subsidies addressed in the WLP investigation are outside the Panel's terms of reference.

[351] The United States disagrees that it covers the same subsidy programmes. (United States' first written submission, para. 169; response to Panel question No. 94, para. 99).
[352] United States' first written submission, para. 165. See also Borusan's decision not to participate in verification, (Exhibit TUR-101), pp. 1-2.
[353] USDOC's letter on WLP verification, (Exhibit USA-20).
[354] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 4.
[355] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 7.

7.228. Turkey's panel request includes a number of claims regarding the WLP investigation. Three of these claims are grouped under the subheading "In connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration", including one claim under Article 12.7 of the SCM Agreement, as follows[356]:

> (B) WLP from Turkey (C-489-823)
>
> In connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration:
>
> 1. Article 1.1(a)(1) of the SCM Agreement
>
> a. In determining that OYAK is a "public body," the USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) and follow the Appellate Body's guidance regarding the interpretation of that standard. Instead, the USDOC determined that OYAK is a public body based on formal indicia of government ownership or control, with no consideration of whether OYAK in fact exercises or is vested with governmental authority. The USDOC also failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its finding that OYAK is a public body.
>
> b. In determining that Erdemir and its subsidiary Isdemir are "public bodies," the USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) and follow the Appellate Body's guidance regarding the interpretation of that standard. The USDOC's determination was improperly confined to formal indicia of government ownership or control, with no consideration of whether Erdemir and its subsidiary Isdemir in fact exercise or are vested with governmental authority. The USDOC also failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its finding that Erdemir and its subsidiary Isdemir are public bodies.
>
> 2. Article 12.7 of the SCM Agreement
>
> a. The USDOC drew adverse inferences in selecting among the facts available for the purpose of punishing Borusan for its alleged failure to cooperate.
>
> 3. Articles 2.1(c) and 2.4 of the SCM Agreement
>
> a. In finding specificity in terms of use by a limited number of industries or enterprises, the USDOC failed to identify, or substantiate based on positive evidence on the record, a "subsidy programme" related to the provision of hot rolled steel for less than adequate remuneration.
>
> ...
>
> In connection with the injury determination:
>
> 4. Article 15.3 of the SCM Agreement
>
> a. The U.S. International Trade Commission ("[US]ITC") has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, i.e., non-subsidized imports, from all countries with respect to which antidumping or countervailing duty petitions are filed on the same day. In investigations, the [US]ITC considers this practice to be required under section 771(7)(G)(i) of the

[356] Turkey's panel request, p. 4, section (B).

> Tariff Act of 1930, if the subsidized and non-subsidized imports compete with each other and with the domestic like product in the U.S. market.
>
> b. Turkey considers that the [US]ITC's practice of "cross-cumulating" subsidized and non-subsidized imports, with respect to which antidumping or countervailing duty petitions are filed on the same day, is inconsistent with Article 15.3 of the SCM Agreement both "as such", as a practice, and as applied in this proceeding.

7.229. The United States argues that, by grouping its claims in this manner, Turkey expressly limited its Article 12.7 claim in the WLP investigation to the USDOC's application of facts available "[i]n connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration".[357] The United States submits that the other 29 programmes were not included in the claim in Turkey's panel request.[358]

7.230. Turkey argues that it advanced its Article 12.7 claim that the United States' determination to apply facts available and draw adverse inferences with regard to Borusan in the WLP proceeding generally and not just in respect of the so-called Provision of HRS for LTAR Programme.

7.231. Therefore, we must address whether Turkey's panel request limits the scope of its Article 12.7 challenge in the WLP proceeding to the use of facts available in connection with the so-called Provision of HRS for LTAR Programme, based on how Turkey chose to group its claims in its panel request.

7.232. Article 6.2 of the DSU provides in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.233. The two requirements to identify the measures at issue and provide a brief summary of the legal basis of the complaint constitute the "matter referred to the DSB" and form the basis of a panel's terms of reference. These requirements are therefore central to the establishment of a panel's jurisdiction.[359] The panel request also serves a due process function, providing the respondent and third parties notice as to the nature of the complainant's case[360], enabling them to respond accordingly.[361] A panel must therefore determine whether the panel request, read as a whole and as it existed at the time of filing[362], is "sufficiently clear" or "sufficiently precise" on the basis of an "objective examination".[363]

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[357] United States' first written submission, para. 30. In its discussion of the use of facts available in the WLP investigation, Turkey refers to "examples of inaccurate determinations made by the USDOC" in determining the overall 152.2% subsidy rate for Borusan. As examples, Turkey refers to income tax-related subsidy programmes, as well as Customs Duty Exemptions and VAT Exemptions under each of the Investment Encouragement programme, the Large Scale Investment Incentives programme, and the Strategic Investment Incentives programme. Turkey does not refer to facts available determinations made in respect of the Provision of HRS for LTAR Programme. (Turkey's first written submission, para. 327).

[358] United States' first written submission, para. 32.

[359] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 639-640 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; and *US – Carbon Steel*, para. 125); *US – Continued Zeroing*, paras. 160-161; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; *Australia – Apples*, para. 416; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186.

[360] Appellate Body Reports, *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186; *US – Carbon Steel*, para. 126; and *EC and certain member States – Large Civil Aircraft*, para. 640.

[361] Appellate Body Reports, *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186; *Chile – Price Band System*, para. 164; *US – Continued Zeroing*, para. 161; and *Thailand – H-Beams*, para. 88.

[362] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

[363] Appellate Body Reports, *EC – Bananas III*, para. 142; *EC and certain member States – Large Civil Aircraft*, para. 641; *US – Carbon Steel*, para. 127; *US – Continued Zeroing*, para. 161; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108. Parties' subsequent submissions and

7.234. In order to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", the panel request must set out the claims so as to "present the problem clearly".[364] A "claim" in this context is an allegation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular Agreement".[365] "Arguments", by contrast, are statements put forth by a complaining party "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".[366] Further, "the narrative" of panel requests should "explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[367] Moreover, a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered Agreements claimed to have been infringed".[368] "Whether such a brief summary is 'sufficient to present the problem clearly' is to be assessed on a case-by-case basis, keeping in mind the nature of the measure(s) at issue, and the manner in which it is (or they are) described in the panel request, as well as the nature and scope of the provision(s) of the covered Agreements alleged to have been violated."[369]

7.235. We consider that, by grouping its claims in its panel request in the manner it did, Turkey expressly limited its Article 12.7 claim in the WLP investigation to the USDOC's application of facts available "[i]n connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration". Therefore, any claim that Turkey raises in respect of other subsidy programmes at issue in the WLP investigation are outside of our terms of reference.

7.236. Fundamentally, Turkey's panel request identifies a single subsidy programme in respect of the WLP investigation, namely the alleged "Provision of Hot Rolled Steel for Less Than Adequate Remuneration". Turkey's panel request does not refer to any of the other subsidy programmes at issue in the WLP investigation. In order to "present the problem clearly", a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered Agreements claimed to have been infringed".[370] Turkey's panel request plainly connects its Article 12.7 claim with the alleged Provision of HRS for LTAR Programme. It does not plainly connect its Article 12.7 claim with any other programmes or measures at issue in the WLP investigation.

7.237. We recall that a panel request forms the basis of a panel's terms of reference and establishes a panel's jurisdiction[371], as well as serves a due process function by providing the respondent notice as to the nature of the complainant's case. Based on the manner in which Turkey formulated its panel request, we conclude that a respondent would thus reasonably understand that Turkey as complainant was raising its Article 12.7 claim in the WLP investigation solely in connection with the Provision of HRS for LTAR.

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statements, therefore, cannot "cure" defects in panel requests. (Appellate Body Reports, *China – Raw Materials*, para. 220; *EC – Bananas III*, para. 143; *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Carbon Steel*, para. 127; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9).

[364] Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

[365] Appellate Body Report, *Korea – Dairy*, para. 139.

[366] Appellate Body Report, *Korea – Dairy*, para. 139. A panel request need not, however, include arguments seeking "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision". A party's arguments may be presented and clarified over the course of the proceeding. (Appellate Body Report, *Korea – Dairy*, para. 139 (referring to Appellate Body Reports, *EC – Bananas III*, para. 141; *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156)).

[367] Appellate Body Reports, *China – Raw Materials*, para. 226 (emphasis original); *EC – Selected Customs Matters*, para. 130.

[368] Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

[369] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.

[370] Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

[371] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 639-640 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; and *US – Carbon Steel*, para. 125); *US – Continued Zeroing*, paras. 160-161; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; *Australia – Apples*, para. 416; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186.

7.238. This conclusion is consistent with the logic with which claims are identified throughout Turkey's panel request.[372] For instance, we note that the other claims grouped with Turkey's Article 12.7 claim under the subheading "[i]n connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration" concerning the WLP investigation are raised exclusively in respect of the Provision of HRS for LTAR. Turkey's claims under Article 1.1(a)(1) in respect of the public body determination in the WLP investigation only concern the provision of HRS by Erdemir and Isdemir. Turkey's Articles 2.1(c) and 2.4 claims also concern the provision of HRS programme exclusively.[373] The same logic exists in respect of Turkey's claims concerning the HWRP investigation. In the subsection pertaining to that investigation, Turkey's panel request groups Turkey's Articles 1.1(a)(1), 2.1(c) and 2.4 claims under the subheading "In connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration".[374] Turkey's Article 12.7 claim regarding the HWRP investigation, however, is listed under the separate subheading "In connection with 'other subsidies' not previously reported to the USDOC".[375] Consistent with the inclusion of its Article 12.7 claim concerning the HWRP investigation under that subheading, Turkey has only raised arguments in connection with so-called "other subsidies" not reported to the USDOC prior to verification.[376]

7.239. Turkey argues that the United States conflates Turkey's "arguments" with its "claims" under Article 12.7 and mischaracterizes the nature of the claim at issue. Turkey considers that it was not required to include all potential arguments in support of its claim under Article 12.7 of the SCM Agreement in its panel request, and thus it was not required to identify all 30 programmes investigated in the WLP proceeding in its request. Turkey also argues that its panel request clearly connects the challenged measure with the provision that is alleged to have been infringed, and thus, Turkey considers that the United States was sufficiently informed of Turkey's claim.[377] We disagree. As we explain above, a panel request must plainly connect the challenged measures with the provisions of the covered Agreements claimed to have been infringed in order to "present the problem clearly". Turkey's panel request does not connect its Article 12.7 claim with any other subsidy programme, strictly identifying its Article 12.7 claim directly in connection with the Provision of HRS for LTAR Programme.

7.240. Turkey also raises several additional arguments. For instance, Turkey argues that the United States' determination to apply facts available with regard to Borusan was not a "program-specific determination", but was based on Borusan's decision not to participate in verification, which is a circumstance outside the context of the USDOC's investigation of any particular subsidy programme. Thus, Turkey submits that "the USDOC did not make an adverse facts available determination specifically with regard to its investigation of the provision of hot rolled steel for less than adequate remuneration".[378] In addition, Turkey argues that, even if the United States understood Turkey's claim to be limited to the Provision of HRS for LTAR, the United States is not prejudiced because the "USDOC made the same factual findings and applied the same legal reasoning in drawing adverse inferences to select subsidy rates for all investigated programs in the WLP proceeding".[379]

7.241. Turkey's arguments are not relevant to our assessment of whether any of Turkey's Article 12.7 claims fall outside our terms of reference. Regardless of whether the USDOC made the same factual findings and applied the same legal reasoning when drawing adverse inferences in respect of all subsidy programmes, whether the decision to resort to facts available is programme-specific or not cannot cure deficiencies in a panel request.[380] We further find irrelevant

[372] We note that Turkey's claims concerning the injury determination in the four challenged proceedings are placed under subheadings "In connection with the injury determination" as the injury determination is made in the context of all subsidy programmes under investigation.

[373] In this respect, Turkey's Article 2.1(c) and 2.4 claims are directed at the specificity findings "related to the provision of hot rolled steel for less than adequate remuneration". (Turkey's panel request, para. 8.(B).3.a).

[374] Turkey's Panel request, paras. 8.(C).1. and 8.(C).2.

[375] Turkey's Panel request, para. 8.(C).3.

[376] With the exception of its Article 12.7 claim concerning the WLP investigation, we note that Turkey has not introduced arguments over the course of the proceedings with a view to enlarging any of its other claims to encompass other programmes beyond those identified in its panel request.

[377] Turkey's response to the United States' preliminary ruling request, paras. 27-28.

[378] Turkey's response to the United States' preliminary ruling request, para. 29.

[379] Turkey's response to the United States' preliminary ruling request, para. 30.

[380] The United States argues that the USDOC engaged in separate fact-finding and legal determinations with respect to each of the subsidy programmes at issue. (United States' second written submission, para. 26).

whether the United States was prejudiced or not by a lack of precision in Turkey's panel request. As we explain above, Article 6.2 of the DSU requires a complainant to "identify the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". A panel's examination of whether a panel request complies with these requirements "must be objectively determined on the basis of the panel request as it existed at the time of the filing" and be "demonstrated on the face" of the request.[381] Article 6.2 of the DSU does not separately require a finding of prejudice to a responding party in order to determine whether or not a given claim falls within a panel's terms of reference. Rather, as we explain above, a panel request forms the basis of a panel's terms of reference and establishes a panel's jurisdiction.[382] Importantly, the panel request also serves a due process function by providing the respondent notice as to the nature of the complainant's case.[383] We therefore reject Turkey's arguments.[384]

7.242. Accordingly, in respect of the WLP investigation, we find that 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. We now consider Turkey's Article 12.7 claims in respect of the provision of HRS for LTAR in the WLP investigation.

7.5.3.3 The Panel's evaluation of Turkey's claim regarding the use of facts available in the WLP investigation

7.243. Turkey argues that the USDOC's reliance on facts available and its decision to draw an adverse inference in the WLP investigation are inconsistent with Article 12.7 of the SCM Agreement because the USDOC drew an adverse inference to punish Borusan for its decision not to participate in the verification, and made various inaccurate determinations which led to an inaccurate subsidy calculation.[385] Turkey refers to two examples of alleged inaccurate determinations that the USDOC made.[386] Turkey argues that the USDOC made no effort to evaluate the facts available to determine which facts could reasonably replace "necessary information" that was missing from the record.[387] Turkey notes that there were substantiated facts on the record of the WLP investigation regarding Borusan's non-use of, and ineligibility for, many subsidy programmes, but the USDOC ignored these facts and instead selected the worst possible rates in order to punish Borusan for its alleged failure to cooperate.[388]

7.244. The United States argues that the USDOC properly applied facts available as a reasonable replacement for the missing information. The United States argues that Turkey has dramatically expanded the scope of its arguments under Article 12.7 with respect to the WLP investigation to include 14 additional subsidy programmes in its response to the Panel's questions. The United States requests that the Panel reject Turkey's challenge with respect to these 14 subsidy programmes because such a belated introduction of new evidence and arguments is contrary to the Panel's working procedures and basic procedural fairness.[389] With regard to the Provision of HRS for LTAR, the United States argues that Turkey has provided *no* substantive argumentation or

[381] Appellate Body Reports, *US – Carbon Steel*, para. 127; *EC and certain member States – Large Civil Aircraft*, para. 641. See also Appellate Body Reports, *EC – Bananas III*, para. 142; *US – Continued Zeroing*, para. 161; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

[382] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 639-640 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; and *US – Carbon Steel*, para. 125); *US – Continued Zeroing*, paras. 160-161; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; *Australia – Apples*, para. 416; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186.

[383] Appellate Body Reports, *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186; *US – Carbon Steel*, para. 126; and *EC and certain member States – Large Civil Aircraft*, para. 640.

[384] We note that Turkey has also argued that the United States could have asked for clarifications prior to filing its preliminary ruling request and asked for an extension of time to prepare its response, as doing so would avoid the need for Turkey to reinitiate consultations and file another dispute to address other subsidy programmes at issue in the WLP proceeding. (Turkey's response to the United States' preliminary ruling request, para. 31; response to Panel question No. 2, paras. 14-15). We also consider that these arguments are not relevant to our assessment.

[385] Turkey's response to Panel question No. 48, para. 96.

[386] Turkey's first written submission, para. 327. These two examples relate to the income tax related "subsidy programmes", and the Customs Duty Exceptions and VAT Exemptions "subsidy programmes".

[387] Turkey's responses to Panel question No. 48, para. 96, and No. 49, para. 100.

[388] Turkey's response to Panel question No. 49, paras. 97-101; second written submission, para. 125.

[389] United States' second written submission, paras. 137-141.

analysis.[390] According to the United States, as Turkey has not properly raised any claims under Article 12.7, the Panel's analysis may therefore end here.[391]

7.245. As discussed above in Section 7.5.3.2, we find that Turkey's Article 12.7 claims concerning subsidy programmes[392] other than the Provision of HRS for LTAR are not properly within our term of reference.

7.246. We reject the United States' argument that Turkey has provided no substantive argumentation concerning the Provision of HRS for LTAR. The principal arguments of Turkey are twofold: first, the subsidy rate calculations for all of the subsidy programmes in the WLP investigation, including the Provision of HRS for LTAR, are not reasonable replacements of the missing information[393]; and second, the USDOC purposefully selected the worst possible facts available in order to punish Borusan for its alleged failure to cooperate.[394] In its first written submission, Turkey also disputes the total subsidy rate that the USDOC calculated for Borusan.[395] Thus in our view, Turkey's arguments above were made with reference to all subsidy programmes it sought to challenge, including the Provision of HRS for LTAR.[396] We do not agree with the United States that Turkey must repeat its arguments with respect to each and every alleged subsidy programme.[397]

7.247. Given that we have concluded above that Turkey's Article 12.7 claim concerning the WLP investigation is limited to the Provision of HRS for LTAR only, the only issue before us is whether the USDOC acted inconsistently with Article 12.7 in selecting the subsidy rate for the Provision of HRS for LTAR.[398]

7.248. We recall that the USDOC selected the highest-calculated programme-specific subsidy rate for Toscelik, a cooperating respondent in the WLP investigation, for Borusan's Provision of HRS for LTAR. The USDOC's determination stated the following:

> It is the Department's practice in CVD proceedings to compute a total AFA rate for non-cooperating companies using the highest calculated program-specific rates determined for a cooperating respondent in the same investigation, or, if not available, rates calculated in prior CVD cases involving the same country.
>
> ...

[390] United States' second written submission, para. 142.

[391] United States' first written submission, para. 161; second written submission, para. 142; and response to Panel question No. 94, para. 91.

[392] We note that the USDOC referred to all investigated subsidies in the challenged proceedings generally as "program" or "programs". Our reference to the United States' use of the term "program(s)" or "subsidy program(s)" does not prejudge the issue whether the USDOC properly identified a "subsidy programme" for the purpose of determining *de facto* specificity under Article 2.1(c). As discussed at paragraph 7.153 above, such a generic reference to all investigated subsidies as "programs" is not sufficient to properly identify a "subsidy programme" for the purpose of determining *de facto* specificity under Article 2.1(c).

[393] Turkey's first written submission, paras. 323-326; response to Panel question No. 48, para. 96.

[394] Turkey's response to Panel question No. 49, para. 99; second written submission, para. 121.

[395] Turkey's first written submission, paras. 325-326 and 328.

[396] In this regard, we note that Turkey's more detailed analysis concerning the Income Tax and Customs Duty and VAT exemption programmes were provided by way of "examples". (Turkey's first written submission, para. 327 (where Turkey states that "[t]he following are *examples* of inaccurate determinations made by the USDOC in selecting the 152.2% rate for Borusan ..." (emphasis added))). We understand from this statement that these two examples are not intended to be exhaustive.

[397] United States' second written submission, para. 142.

[398] In response to the Panel's written questions after the first Panel meeting, the United States argues that Turkey has dramatically expanded the scope of its arguments under Article 12.7 with respect to the WLP investigation to include 14 additional subsidy programmes. The United States requests the Panel to reject Turkey's challenge with respect to these 14 subsidy programmes because Turkey's belated introduction of new evidence and arguments is contrary to the Panel's Working Procedures and basic procedural fairness. (United States' second written submission, paras. 137-141). Given that we will limit our consideration of Turkey's Article 12.7 claim to the Provision of HRS for LTAR only, there is no need for us to consider whether Turkey failed to timely submit any argument or evidence with respect to these 14 subsidy programmes.

> In applying AFA to Borusan, we are guided by the Department's methodology detailed above.
>
> ...
>
> [W]e are applying the above-zero rates calculated for Toscelik in this investigation for the following identical programs:
>
> - Provision of HRS for LTAR ...[.][399]

7.249. In response to questioning, Turkey clarified that its Article 12.7 claim regarding the WLP investigation concerns the *selection* of the facts available only, and does not concern whether the USDOC was entitled to resort to facts available under Article 12.7.[400] Accordingly, we consider whether an objective and unbiased investigating authority could have selected the highest-calculated programme-specific subsidy rates (above zero) for a cooperating respondent in the WLP investigation, Toscelik, for the Provision of HRS for LTAR as a reasonable replacement for the subsidy rate for Borusan in accordance with Article 12.7.

7.250. We recall that the USDOC had before it a verification report and exhibits from the CWP review proceeding, which covered some of the same subsidy programmes and the same time period as the WLP investigation. Borusan requested the USDOC to rely on information in the CWP verification report and exhibits for its determination in the WLP investigation.[401] The USDOC rejected Borusan's request, stating that the "[v]erification of data submitted in a separate proceeding related to a different industry does not satisfy the requirement in section 782(i) of the Act that the Department verify the information relied upon in making its final determination."[402]

7.251. We express no view as to whether the USDOC properly rejected the CWP verification report and exhibits in concluding that Borusan provided information that could not be verified in the WLP investigation, thus impeding the investigation and triggering the application of facts available under Article 12.7. We also express no view as to whether the verification report and exhibits for the CWP proceeding, which were brought to the attention of the USDOC by Borusan, were part of the pool of substantiated facts on the record of the WLP investigation, *as a secondary source*, and whether the USDOC may have selected a fact from this source.[403] We note however that the investigation record does not indicate that the USDOC engaged in a process of reasoning and evaluation of which facts available reasonably replaces the missing necessary information. Instead, the WLP Final Determination shows that the USDOC simply selected the highest possible rate for the same programme in the same proceeding.

7.252. For this reason, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing to engage in a process of reasoning and evaluation of which facts available reasonably replaces the missing necessary information in the WLP investigation for the Provision of HRS for LTAR.

7.5.4 The use of facts available in the HWRP investigation

7.5.4.1 Factual background

7.253. During on-site verification in the HWRP investigation, the USDOC found that MMZ and Ozdemir used certain subsidy programmes which were not previously reported. Specifically, the USDOC found that MMZ did not report its use of the Deduction from Taxable Income for Export Revenue and Provision of Electricity for LTAR Programmes, while Ozdemir did not report its use of the Exemption from Property Tax programme. The USDOC rejected MMZ's request for revision to its questionnaire response at the commencement of the verification due to the fact that it was not a minor correction to information already on the record. The USDOC found that MMZ and Ozdemir

[399] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), pp. 4-5. (fn omitted)
[400] Turkey's response to Panel question No. 48, para. 96.
[401] Borusan's decision not to participate in verification, (Exhibit TUR-101), pp. 1-2.
[402] USDOC's letter on WLP verification, (Exhibit USA-20).
[403] In its response to panel question No. 94, the United States argues that the CWP verification report and exhibits were not on the written record of the WLP investigation. (United States' Response to Panel question No 94, para. 97; see also Turkey's response to Panel question No. 94(a), para. 46).

failed to accurately answer questions regarding the subsidy programmes in their questionnaire responses and failed to provide necessary information that was in their possession. Therefore, the USDOC determined that adverse inferences were warranted. The USDOC applied subsidy rates for these programmes in the following manner[404]:

a. For MMZ:

   i. 0.06% for the Deduction from Taxable Income from Export Revenue, the subsidy rate calculated for another interested party Ozdemir in the same investigation; and

   ii. 2.08%[405] for the Provision of Electricity for LTAR, the subsidy rate calculated for the Provision of HRS for LTAR in its investigation of *OCTG from Turkey*, a rate that was in turn based on facts available and an adverse inference.

b. For Ozdemir:

   i. 14.01% for the Exemption from Property Tax, the subsidy rate calculated in the investigation of *CWP from Turkey* for an export tax rebate programme in effect in 1986.

7.5.4.2 The Panel's evaluation of Turkey's claim regarding the use of facts available in the HWRP investigation

7.254. Turkey argues that the USDOC acted inconsistently with Article 12.7 by selecting the highest subsidy rates for another interested party or for similar programmes from other countervailing duty proceedings related to Turkish imports for the purpose of punishing MMZ and Ozdemir. Turkey contends that these rates were selected for the purpose of "effectuat[ing] the statutory purposes of the [adverse facts available] rule to induce respondents to provide the Department with complete and accurate information".[406] Turkey also argues that the USDOC failed to ensure that the facts selected were reasonable replacements for the missing information.[407] Turkey contends that there is no evidence that these subsidy rates bear any relation to the subsidy programmes that MMZ and Ozdemir failed to identify in their initial questionnaire responses.[408]

7.255. The United States argues that the resort to facts available was warranted because MMZ and Ozdemir failed to accurately answer the USDOC's questions regarding the subsidy programmes, including reporting benefits which should have been discovered in the respondents' accounting system. The United States contends that the USDOC was under no obligation to accept new information at the stage of verification. The United States argues that the USDOC appropriately relied on facts available by applying subsidy rates calculated for the same or similar programmes. With respect to the Deduction from Taxable Income from Export Revenue, for which the USDOC selected a reasonable replacement based on the same programme in the same proceeding for another interested party, the United States notes that Turkey has not argued or provided evidence that the rate the USDOC selected is inconsistent with Article 12.7. With respect to the other programmes, the United States argues that the USDOC was not able to find a subsidy rate for the same programmes in the same proceeding. Therefore, the USDOC turned to a subsidy rate for each programme that was on a par with identical or similar subsidy programmes. According to the United States, these rates are not punitive, but instead reasonably estimate the level of subsidization, which is consistent with Article 12.7.[409]

[404] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), pp. 6-7.
[405] The USDOC applied a 15.58% rate for the Provision of Electricity for LTAR in its Final Determination. USDOC received comments from the GOT and MMZ to change the rate for the Provision of Electricity for LTAR based on the fact that the subsidy rate for HRS for LTAR in the OCTG investigation had been reduced from 15.58% to 2.08% following litigation.
[406] Turkey's first written submission, para. 439 (referring to HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 6).
[407] Turkey's response to Panel question No. 52, para. 111.
[408] Turkey's first written submission, para. 440.
[409] United States' first written submission, paras. 200-202; second written submission, paras. 157-159.

7.256. In response to a question from the Panel, Turkey clarified that its Article 12.7 claim regarding the HWRP proceeding concerns the *selection* of the facts available only, and does not concern whether the USDOC was entitled to resort to facts available under Article 12.7.[410]

7.257. With respect to the USDOC's selection of facts available for the Deduction from Taxable Income for Export Revenue programme, the USDOC selected the *same* rate (0.06%) for MMZ that it calculated (without resorting to facts available) for Ozdemir pertaining to the *same* programme in the *same* proceeding.[411] With respect to the Provision of Electricity for LTAR Programme and the Exemption from Property Tax Programme the USDOC selected subsidy rates for similar subsidy programmes in other proceedings. In particular, for the Provision of Electricity for LTAR, the USDOC selected a subsidy rate calculated for the Provision of HRS for LTAR in the *OCTG from Turkey* investigation, a rate that was in turn based on facts available and an adverse inference.[412] For the Exemption from Property Tax Programme, the USDOC selected a subsidy rate from the investigation of *CWP from Turkey* that was calculated for an export tax rebate programme in effect in 1986.[413] According to the United States, the USDOC matched the Provision of Electricity for LTAR and Exemption from Property Tax Programmes to similar programmes "based on program type and treatment of the benefit" from other Turkish countervailing duty proceedings.[414]

7.258. The USDOC Final Determination stated the following:

> The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the result is sufficiently adverse "as to effectuate the statutory purposes of the AFA rule to induce respondents to provide the Department with complete and accurate information in a timely manner." The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." In selecting AFA rates for programs on which a company has failed to fully cooperate, it is the Department's practice to use the highest calculated program-specific rates determined for a cooperating respondent in the same investigation, or, if not available, rates calculated in prior CVD cases involving the same country. Specifically, the Department applies the highest calculated rate for the identical program in the investigation if a responding company used the identical program, and the rate is not zero. If there is no identical program match within the investigation, or if the rate is zero, the Department uses the highest non-de minimis rate calculated for the identical program in another CVD proceeding involving the same country. If no such rate is available, the Department will use the highest non-*de minimis* rate for a similar program (based on treatment of the benefit) in another CVD proceeding involving the same country. Absent an above-de minimis subsidy rate calculated for a similar program, the Department applies the highest calculated subsidy rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies.
>
> In applying AFA to MMZ and Ozdemir, we are guided by the Department's methodology detailed above.[415]

7.259. Thus, the USDOC selected the *highest* calculated programme-specific rates determined for a cooperating respondent in the same investigation for the Deduction from Taxable Income for Export Revenue, and the *highest* subsidy rates calculated in prior CVD cases involving Turkey for the Provision of Electricity for LTAR and Exemption from Property Tax. In response to the Panel's question regarding the Provision of Electricity for LTAR, the United States confirmed that, for each category of subsidy programmes, the "USDOC noted the highest rate actually calculated".[416] In particular, the United States confirmed that the USDOC selected the 15.58% subsidy rate for the Provision of HRS for LTAR in the OCTG investigation instead of the 7.61% rate calculated for the

[410] Turkey's response to Panel question No. 52, para. 111.
[411] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 7.
[412] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 7.
[413] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 7.
[414] United States' first written submission, para. 202.
[415] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 6. (emphasis original; fns omitted)
[416] United States' response to Panel question No. 53, para. 153.

Provision of HRS for LTAR for MMZ in the HWRP investigation. The USDOC selected this rate because the latter was not the highest rate for a similar subsidy programme.[417]

7.260. We consider that the manner in which the USDOC selected the subsidy rates for the missing information in the HWRP proceeding does not comport with the legal standard as articulated by the Appellate Body in *US – Carbon Steel (India)* that "facts available" selected by the investigating authority must result from a process of reasoning and analysis. We note that this is not a situation when there were no other facts on the record for the USDOC to consider.[418] By selecting the highest subsidy rates to ensure that the result is sufficiently adverse "as to effectuate the statutory purposes of the AFA rule to induce respondents to provide the Department with complete and accurate information in a timely manner"[419], the USDOC failed to engage in an adequate and meaningful qualitative assessment as to which facts available might reasonably replace the missing necessary information. For this reason, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement.

7.261. In light of our finding that the USDOC failed to engage in a process of reasoning and evaluation in selecting the subsidy rates as "reasonable replacement" for the missing information in the HWRP investigation, we do not address Turkey's argument that the rates that the USDOC selected in the HWRP investigation have no connection with the "necessary information" missing from the record of that case.[420]

7.262. We therefore find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing to engage in an adequate and meaningful qualitative assessment, as to which facts available might reasonably replace the missing necessary information in the HWRP investigation.

7.5.5 Conclusions regarding Turkey's Article 12.7 claims

7.263. Turkey raised claims under Article 12.7 of the SCM Agreement regarding the USDOC's resort to facts available in connection with the OCTG, WLP and HWRP countervailing duty proceedings.

7.264. Turkey's claims in relation to the OCTG investigation concern the USDOC's selection of facts available regarding purchases of HRS by Borusan at two of its facilities. We find that Turkey has failed to establish that the USDOC acted inconsistently with Article 12.7 by failing to consider the difficulties experienced by Borusan in providing requested information in its questionnaire responses. However, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing 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.

7.265. Regarding Turkey's claims in relation to the WLP investigation, we find that Turkey's panel request refers only to claims under Article 12.7 of the SCM Agreement in connection with the Provision of HRS for LTAR, and thus claims under Article 12.7 concerning other subsidy programmes are outside the Panel's terms of reference. We find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing to engage in a process of reasoning and evaluation of which facts available reasonably replace the missing necessary information in the WLP investigation for the Provision of HRS for LTAR.

7.266. Regarding Turkey's claims in relation to the HWRP investigation, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing to engage in a process of reasoning and evaluation in selecting the subsidy rates as reasonable replacements for the missing information, in connection with MMZ's and Ozdemir's use of certain subsidies.

[417] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), pp. 6-7.

[418] For instance, we understand that there were subsidy rates for various programmes on the record, including the rate for the Provision of HRS for LTAR for MMZ in the HWRP investigation.

[419] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 6.

[420] Turkey's statement at the first meeting of the Panel, paras. 68-70; second written submission, paras. 133-138.

7.6 Turkey's claims under Article 15.3 of the SCM Agreement in relation to the cumulative assessment of the effects of imports in the OCTG, WLP, HWRP, and CWP proceedings

7.6.1 Introduction

7.267. Turkey claims that the USITC has a practice of cumulating the effects of dumped and subsidized imports in assessing injury when anti-dumping and countervailing proceedings are brought against imports of the same product from the same country or countries (i.e. "cross-cumulation"). Turkey makes the following claims:

a. the practice of "cross-cumulating" the effects of imports in original investigations is inconsistent "as such" with Article 15.3 of the SCM Agreement;

b. the cross-cumulation of the effects of imports in the OCTG, WLP, and HWRP original investigations is inconsistent with Article 15.3 of the SCM Agreement;

c. the practice of "cross-cumulating" the effects of imports in sunset reviews is inconsistent "as such" with Article 15.3 of the SCM Agreement; and

d. the cross-cumulation of the effects of imports in the 2011 CWP sunset review is inconsistent with Article 15.3 of the SCM Agreement.

7.268. In its first written submission, the United States requested the Panel to make a preliminary ruling, excluding Turkey's challenge to the alleged practices of "cross-cumulation" in both original investigations and sunset reviews from the Panel's terms of reference.

7.269. In addressing Turkey's claims, we first address the United States' request for a preliminary ruling before turning to the parties' arguments regarding the merits of Turkey's claims.

7.6.2 Whether Turkey's panel request adds a challenge regarding alleged injury determination "practices" that were not the subject of Turkey's request for consultations

7.270. The United States has requested the Panel to rule that Turkey's panel request improperly includes measures and claims regarding alleged injury determination "practices" that were not the subject of consultations.

7.271. We addressed a parallel request that the United States made in Section 7.3.2.1 above, regarding whether Turkey's panel request includes an alleged benefit "practice" and related "as such" claim that was not the subject of Turkey's request for consultations. In addressing that request, we recalled that a "precise and exact identity"[421] is not required between the measures identified in the request for consultations and the measures identified in the panel request so long as a complainant does not "expand the scope"[422] or change the "essence" of the dispute.[423] We also recalled that the "legal basis" for a complaint in a panel request may reasonably evolve from the consultations request, so long as the addition of provisions does not have the effect of changing the essence of the complaint.[424] Based on the content of Turkey's request for consultations and panel request, we found that Turkey's panel request did not improperly expand the scope or essence of the dispute by including a new measure and claim in connection with the alleged benefit "practice".[425]

7.272. We consider that our reasoning applies *mutatis mutandis* in the present instance.

7.273. Among the measures at issue, Turkey's panel request refers to "certain practices followed by the United States in the identified countervailing duty proceedings related to the cumulation of subsidized and non-subsidized imports in the assessment of injury".[426] Regarding the OCTG, WLP, and HWRP original investigations at issue, Turkey's panel request states that "the [US]ITC's practice

[421] Appellate Body Report, *Brazil – Aircraft*, para. 132.
[422] Appellate Body Report, *US – Upland Cotton*, para. 293.
[423] Appellate Body Reports, *Argentina – Import Measures*, para. 5.9; *Mexico – Anti-Dumping Measures on Rice*, para. 138; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.
[424] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[425] See paras. 7.84-7.98 above.
[426] Turkey's panel request, para. 7.

of 'cross-cumulating' subsidized and non-subsidized imports, with respect to which antidumping or countervailing duty petitions are filed on the same day, is inconsistent with Article 15.3 of the SCM Agreement both 'as such', as a practice, and as applied in this proceeding".[427] Regarding the CWP sunset review at issue, Turkey's panel request states that "the [US]ITC's practice of 'cross-cumulating' subsidized and non-subsidized imports, with respect to which five-year reviews of antidumping or countervailing duty orders are initiated on the same day, is inconsistent with Article 15.3 of the SCM Agreement both 'as such', as a practice, and as applied in this proceeding".[428]

7.274. We recall that section (A) of Turkey's request for consultations, entitled "Specific Measures at Issue", provides as follows:

> This request for consultations concerns the preliminary and final countervailing duty measures imposed by the United States on Turkish imports of Certain Oil Country Tubular Goods ("OCTG"); Welded Line Pipe; Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes; and Circular Welded Carbon Steel Pipes and Tubes, as identified in Annex 1.
>
> These measures include the determination by the United States to initiate the identified countervailing duty proceedings, the conduct of those proceedings, any preliminary or final countervailing duty or injury determinations issued in those proceedings, any definitive countervailing duties imposed as a result of those proceedings, as well as any notices, annexes, memoranda, orders, amendments, or other instruments issued by the United States, and related practices, in connection with the measures identified in Annex 1.[429]

7.275. As explained in Section 7.3.2.1 above, we found that the language in the first paragraph only identifies the preliminary and final countervailing duty measures that the United States imposed on imports of OCTG, WLP, HWRP, and CWP, as identified in Annex 1.[430] We observed that the second paragraph also refers to the preliminary and final countervailing duty measures imposed in the four challenged proceedings, but also refers to "related practices" in connection with the measures identified in Annex 1. While we did not find the term "related practices" to be particularly clear within this paragraph, we analysed whether the language elsewhere in Turkey's consultations request provides a sufficient basis for considering particular measures to be covered by our terms of reference.[431]

7.276. Concerning the injury determinations at issue, we note that section (B) of Turkey's request for consultations, entitled "Legal Basis of the Complaint" provides as follows in part:

> Turkey considers that the measures identified above, and in Annex 1, are inconsistent with the United States' obligations under the WTO Agreements. Turkey's concerns are particularly focused on, though not necessarily limited to, the following aspects of the measures and underlying administrative proceedings:
>
> ...
>
> 5. Injury Determination: The United States' determination of injury based on cumulated imports, including imports from countries not subject to countervailing duty investigations or reviews, which is inconsistent with Article 15.3 of the SCM Agreement.

[427] Turkey's panel request, paras. 8.(A).5.b, 8.(B).4.b, and 8.(C).4.b.
[428] Turkey's panel request, para. 8.(D).3.b.
[429] Fns omitted.
[430] Annex 1 lists certain documents for initiation; preliminary, post-preliminary, final, and amended final determinations; and countervailing duty orders as well as related decision memoranda, for each of the respective OCTG, WLP, and HWRP investigations, and the CWP review at issue.
[431] In this regard, we recall that the Appellate Body has made clear that a panel should view the request for consultations as a whole when determining whether the language of the request provides a sufficient basis for considering particular measures are covered by a panel's terms of reference. (Appellate Body Reports, *Argentina – Import Measures*, para. 5.14 (referring to Appellate Body Report, *US – Upland Cotton*, para. 291)).

...

> Turkey considers that the United States' administrative proceedings and measures are inconsistent with Article VI:3 of the GATT 1994, Articles 10, 19.4, and 32.1 of the SCM Agreement, and the specific provisions cited above. Turkey's concerns relate to both the aspects of the measures and underlying administrative proceedings cited above as well as ongoing practices applied in administrative proceedings more generally.

7.277. This excerpt also sets out that Turkey's concerns are focused on the United States' "Injury Determination" in respect of the four proceedings. In addition, the end of this excerpt specifies that "Turkey's concerns relate to both the aspects of the measures and underlying administrative proceedings cited above *as well as ongoing practices applied in administrative proceedings more generally*".[432]

7.278. Based on the inclusion of the reference to "ongoing practices applied in administrative proceedings more generally", as consistent with our approach in Section 7.3.2.1 above, we find that a reasonable reading of section (B) discussing the "Legal Basis of the Complaint" indicates that Turkey's concerns relate not only to preliminary and final countervailing duty measures imposed in the four challenged proceedings, but also to ongoing practices applied in connection with the different aspects of the identified "legal basis" of Turkey's consultations request. One of these aspects concerns "[t]he United States' determination of injury based on cumulated imports, including imports from countries not subject to countervailing duty investigations or reviews".

7.279. Accordingly, we do not consider that Turkey's inclusion of "practices" related to the cumulation of subsidized and non-subsidized imports in the assessment of injury in its panel request improperly expanded the scope or changed the essence of the dispute. Therefore, we reject the United States' request to exclude the alleged injury determination practice measures concerning original investigations and sunset reviews from our terms of reference. For the same reasons as set out in Section 7.3.2.1 above, we also reject the United States' request to exclude Turkey's "as such" claims in relation to the alleged injury determination practices from our terms of reference, as the United States' sole basis for arguing that Turkey's corresponding "as such" claims are outside our terms of reference is that the alleged injury determination practice measures are not within the terms of reference.[433]

7.280. We will therefore consider Turkey's claim in respect of "the [US]ITC's practice of 'cross-cumulating' subsidized and non-subsidized imports, with respect to which antidumping or countervailing duty petitions are filed on the same day".[434]

7.6.3 Turkey's claims concerning the cumulation of subsidized and dumped, non-subsidized imports in original countervailing investigations

7.281. We next consider Turkey's claims raised in the context of original investigations. Turkey claims that the USITC's "practice of 'cross-cumulating' subsidized and non-subsidized imports" in assessing injury in original investigations is inconsistent "as such" with Article 15.3 of the SCM Agreement. Turkey also claims that the USITC cumulated subsidized and dumped, non-subsidized imports in the OCTG, WLP, and HWRP original investigations inconsistently with Article 15.3 of the SCM Agreement.[435]

7.282. Article 15.3 of the SCM Agreement reads:

> Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de*

[432] Turkey's consultations request, p. 2. (emphasis added)
[433] We recall that the United States argued that the issue "is not that Turkey described its claims with respect to the alleged practices 'as such' claims in its panel request, but that Turkey failed to identify those alleged measures in its consultations request altogether". (United States' opening statement at the first meeting of the Panel, para. 8).
[434] Turkey's panel request, paras. 8.(A).5.b, 8.(B).4.b, and 8.(C).4.b.
[435] Turkey's first written submission, paras. 228-230, 343-344, and 456-457.

> *minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

7.283. Turkey submits that "the Appellate Body explained, in no uncertain terms, that there is 'no basis in the text of Article 15.3 of the SCM Agreement for cumulatively assessing the effects of subsidized imports with those of non-subsidized imports.'"[436] Furthermore, Turkey argues that "the Appellate Body interpreted Article 15.3 in *US − Carbon Steel (India)* and found that '[t]he text is clear in stipulating that *being subject to countervailing duty investigations* is a prerequisite for the cumulative assessment of the effects of imports under Article 15.3' and that 'the effects of imports *other than [] subsidized imports* must not be incorporated in a cumulative assessment pursuant to Article 15.3'".[437] Consequently, Turkey submits that the USITC's "practice of 'cross-cumulating' subsidized and non-subsidized imports, with respect to which antidumping or countervailing duty petitions are filed on the same day" is inconsistent with Article 15.3 of the SCM Agreement both "as such", as a practice, and as applied in the OCTG, WLP, and HWRP proceedings.[438]

7.284. The United States argues that the Panel must reject Turkey's claims because Turkey "has failed to make its legal case"[439] under Article 15.3 of the SCM Agreement. According to the United States, Turkey "has failed to engage in any analysis of Article 15.3 that would allow that burden to be met", in particular by "provid[ing] no interpretation of the text, in context, of Article 15.3, or of the object and purpose of the SCM Agreement".[440] The United States submits that simply quoting statements made by the Appellate Body in a previous dispute is not a sufficient basis on which to make a legal showing.[441] The United States explains:

> Under DSU Article 11, a panel must make an "objective assessment" of the matter before it, and that a breach has been made out by application of a covered Agreement, properly interpreted, to the facts before it. It is not for the Panel to supply evidence or arguments necessary to make out a claim for a party. Turkey has failed to provide the Panel with any argumentation that would allow the Panel to engage in such an interpretation, and its claims thus must fail.[442]

7.285. We reject the United States' argument that Turkey cannot establish a *prima facie* case by referring to the Appellate Body's interpretation in a previous dispute. A panel's task is to ascertain and apply the relevant law to the facts and evidence before it in making an objective assessment of the matter as required under Article 11 of the DSU.[443] Turkey requests us to follow the Appellate Body's interpretation of Article 15.3 in *US − Carbon Steel (India)* in resolving its claim. We recall that panels may take into account the reasoning followed in prior adopted panel and Appellate Body reports when resolving similar legal issues.[444] In this respect, we note that the panel and the Appellate Body in *US − Carbon Steel (India)* were confronted with the same interpretative issue that is pending before this Panel: whether Article 15.3 of the SCM Agreement permits the cumulation of subsidized and non-subsidized imports in the assessment of injury in original countervailing duty investigations. We therefore find it appropriate to consider Turkey's reliance on the Appellate Body's interpretation of Article 15.3 of the SCM Agreement in our objective assessment of Turkey's claim in this dispute.

7.286. Setting aside the alleged failure to make out its legal case, the United States argues that Turkey's claims must fail because a proper interpretation of Article 15.3 reveals that nothing in the

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[436] Turkey's first written submission, para. 227 (quoting Appellate Body Report, *US − Carbon Steel (India)*, para. 4.593).

[437] Turkey's first written submission, para. 231 (referring to Appellate Body Report, *US − Carbon Steel (India)*, para. 4.579 (emphasis added)). See also, first written submission, paras. 345 and 458.

[438] Turkey's panel request, paras. 8.(A).5.b, 8.(B).4.b, and 8.(C).4.b.

[439] United States' first written submission, para. 252.

[440] United States' first written submission, paras. 252−257; second written submission, para. 191.

[441] United States' second written submission, para. 192.

[442] United States' second written submission, para. 192.

[443] Appellate Body Report, *EC − Hormones*, para. 156.

[444] Appellate Body Report, *US − Shrimp (Article 21.5 − Malaysia)*, paras. 108-109. See also Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 188.

text of that provision prohibits the cumulation of subsidized imports with non-subsidized imports that are dumped.[445]

7.287. The United States submits that Article 15.3 of the SCM Agreement is silent on whether the effects of subsidized imports may be cumulated with the effects of non-subsidized imports that are dumped and such silence cannot be read as a prohibition of the cumulative assessment of dumped and subsidized imports in injury assessments.[446] The United States also argues that a prohibition on cumulation of subsidized and non-subsidized, dumped imports would not allow an investigating authority to capture the combined effect of dumped and subsidized imports causing simultaneously injury to the same domestic industry.[447] Finally, the United States submits that, pursuant to Article VI:6(a) of the GATT 1994, a Member shall not impose anti-dumping or countervailing duties "unless it determines that the effect of dumping or subsidization, as the case may be, is such as to cause or threaten to cause material injury to an established domestic industry".[448] In the United States' view, this provision provides important context to interpret Article 15.3 of the SCM Agreement. In particular, the expression "as the case may be" contemplates the possibility for an investigating authority to cumulatively assess the injurious effects of dumped and subsidized imports.[449]

7.288. We note that the United States raised these same arguments before the panel and the Appellate Body in *US − Carbon Steel (India)* concerning an "as such" challenge against 19 U.S.C. § 1677(7)(G), the provision in US law governing cumulative assessment of imports in injury determinations.[450] The United States further argues in this dispute that reliance on the Appellate Body Report in *US − Carbon Steel (India)* would have the Panel read the cumulation provisions of the Anti-Dumping Agreement and the SCM Agreement "in wilful isolation" from each other, disregarding the relevant context provided by Article VI of the GATT 1994.[451] We disagree with the United States' view. As we explain below, the panel and the Appellate Body in *US − Carbon Steel (India)* interpreted the text of Article 15.3 in the context of the SCM Agreement, the Anti-Dumping Agreement (in particular, in the context of Article 3.3 concerning cumulative assessment of dumped imports) and Article VI:6(a) of the GATT 1994. In making our own objective assessment of the matter before us, we are persuaded by and agree with the panel's and the Appellate Body's interpretations of Article 15.3 of the SCM Agreement in *US − Carbon Steel (India)*, and we therefore adopt their reasoning as our own in resolving Turkey's claim in this dispute.

7.289. We recall that, before the panel and the Appellate Body in *US − Carbon Steel (India)*, India argued that 19 U.S.C. § 1677(7)(G) requires the USITC to assess cumulatively the effects of subsidized imports with the effects of non-subsidized imports subject to anti-dumping investigations, and is therefore inconsistent with Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.[452] In its interpretation of Article 15.3, the panel in *US − Carbon Steel (India)* found that imports from more than one country being "simultaneously subject to countervailing duty investigations" is a necessary precondition for a cumulative assessment to be undertaken consistently with that provision.[453] On this basis, the panel found that the effects of imports that are not subject to a countervailing duty investigation cannot be assessed cumulatively with the effects of imports that are subject to a countervailing duty investigation. In reaching this conclusion, the panel dismissed the United States' argument that Article 15.3 of the SCM Agreement does not address the permissibility of "cross-cumulation".[454] In the view of the panel, that argument could not be reconciled with the text of the provision.[455] We share this view.

7.290. The panel found further support to its interpretation of Article 15.3 of the SCM Agreement in other paragraphs of Article 15 as well as in Article VI:6(a) of the GATT 1994. The panel found that

[445] United States' first written submission, paras. 251-263; second written submission, paras. 193-198.
[446] United States' first written submission, paras. 260-263; second written submission, para. 195.
[447] United States' first written submission, para. 265; second written submission, para. 196.
[448] United States' first written submission, para. 273; second written submission, para. 197.
[449] United States' first written submission, paras. 274-277; second written submission, para. 197.
[450] United States' first written submission, paras. 264-277; second written submission, paras. 195-198.
[451] United States' first written submission, paras. 270-271 (referring to Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 571).
[452] Panel Report, *US − Carbon Steel (India)*, paras. 7.324 and 7.328; Appellate Body Report, *US − Carbon Steel (India)*, paras. 4.605-4.606
[453] Panel Report, *US − Carbon Steel (India)*, para. 7.341.
[454] Panel Report, *US − Carbon Steel (India)*, para. 7.342.
[455] Panel Report, *US − Carbon Steel (India)*, para. 7.343.

the consistent reference to "subsidized imports" throughout Article 15 of the SCM Agreement limits the scope of imports that can be cumulated to assess injury.[456] The panel also noted that Article VI:6(a) concerns the effects of subsidization "or" dumping, "as the case may be", and that the use of the conjunction "or" implies that the provision addresses injury caused either by dumping or by subsidization, and not the effects of dumping and subsidization cumulatively.[457] Once again, we share this view.

7.291. The Appellate Body upheld the panel's finding that "cross-cumulation" is inconsistent with Article 15.3 of the SCM Agreement as well as Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.[458] On appeal, the United States had claimed that the panel erred in rejecting its argument that Article 15.3 of the SCM Agreement is silent on the issue of whether cross-cumulation is permitted.[459] To the contrary, the Appellate Body found that Article 15.3 of the SCM Agreement is not silent on the issue. In particular, the Appellate Body explained that Article 15.3 of the SCM Agreement stipulates that an investigating authority may cumulatively assess imports from countries that are simultaneously subject to countervailing duty investigations to determine injury, provided that the conditions established in the last clause of the provision are satisfied.[460] The Appellate Body also sided with the panel's contextual analysis of Article 15 of the SCM Agreement, pursuant to which the consistent reference to "subsidized imports" throughout the various paragraphs of Article 15 supports the understanding that the cross-cumulation of imports in injury assessments is prohibited.[461]

7.292. We note that the panel and the Appellate Body both rejected the United States' view that Article 3.3 of the Anti-Dumping Agreement as interpreted by the Appellate Body in *EC − Tube and Pipe Fittings* and *US − Oil Country Tubular Goods Sunset Reviews* supported the argument that cross-cumulation is permitted under the SCM Agreement.[462] The Appellate Body, for instance, noted that neither case involved the cumulation of the effects of dumped products with those of subsidized, non-dumped products, but concerned instead the cumulation of the effects of dumped imports from several countries. Thus, the Appellate Body concluded − and we agree − that the rationale of the findings in those disputes does not apply to the cumulation of subsidized and dumped, non-subsidized imports.[463]

7.293. The panel and the Appellate Body also rejected the United States' argument that Article 15 must allow an investigating authority to take account of the effects that all unfairly traded imports are having on a domestic industry.[464] Contrary to what the United States had argued, the Appellate Body noted that Article 15 does not contain the phrase "unfairly traded products" or similar language. Accordingly, the Appellate Body saw "no basis in the text of Article 15 for the proposition that, for the purposes of an injury determination pursuant to Article 15, an investigating authority may consider a single group of 'unfairly traded imports' rather than considering 'imports simultaneously subject to countervailing duty investigations' … as stipulated in Article 15.3".[465] In addition, the Appellate Body recalled the panel's finding that the analysis under Article 15 concerns injury caused by "subsidized imports" and not generically, by unfairly traded imports.[466] On this basis, the Appellate Body upheld the panel's findings and rejected the United States' argument that an analysis focusing solely on the effects of either dumped or subsidized imports alone would prevent the investigating authority from adequately taking into account the injurious effects of all unfairly traded imports, consequently frustrating the purpose of the SCM Agreement.[467] We also agree with the panel's and the Appellate Body's assessments in this regard.

[456] Panel Report, *US − Carbon Steel (India)*, para. 7.346.
[457] Panel Report, *US − Carbon Steel (India)*, paras. 7.347-7.348.
[458] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.629.
[459] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.588.
[460] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.589.
[461] Appellate Body Report, *US − Carbon Steel (India)*, paras. 4.580-4.585 and 4.591.
[462] Panel Report, *US − Carbon Steel (India)*, paras. 7.352-7.356; Appellate Body Report, *US − Carbon Steel (India)*, para. 4.593.
[463] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.593. See also Appellate Body Reports, *EC − Tube or Pipe Fittings*, para. 116; and *US − Oil Country Tubular Goods Sunset Reviews*, paras. 294-300.
[464] Panel Report, *US − Carbon Steel (India)*, para. 7.355; Appellate Body Report, *US − Carbon Steel (India)*, para. 4.594.
[465] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.594.
[466] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.596.
[467] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.595.

7.294. Finally, we share the panel's assessment that Article VI:6(a) of the GATT 1994 does not support a reading that cumulation of the effects of subsidized and dumped, non-subsidized imports is consistent with the provisions of Article 15 of the SCM Agreement.[468] The Appellate Body agreed with this view. Like the panel, in examining the phrase "the effect of the dumping or subsidization, as the case may be" in Article VI:6(a) within the structure of the overall provision, the Appellate Body found that the use of "or" or the singular "the effect" indicates that the provision refers separately to "dumping" or to "subsidization". Therefore, the Appellate Body agreed with the panel that the phrase "as the case may be" refers to one of two alternatives expressly listed in this provision only, and does not permit investigating authorities to cumulatively assess the effects of dumped and subsidized imports at the same time.[469]

7.295. In light of the above, we find the panel's and the Appellate Body's reasoning regarding the interpretation of Article 15.3 of the SCM Agreement in *US − Carbon Steel (India)* to be persuasive. We therefore adopt this reasoning as our own in making our own objective assessment of the matter before us. We find it all the more appropriate to do so given that the United States has raised essentially the same arguments in this dispute regarding the interpretation of Article 15.3 of the SCM Agreement as were before the panel and the Appellate Body in *US − Carbon Steel (India)* and were rejected in their entirety. We therefore find that Article 15.3 of the SCM Agreement does not permit the cumulative assessment of the effects of subsidized imports with the effects of dumped, non-subsidized imports in original countervailing investigations. We will now evaluate Turkey's "as such" and as applied claims in connection with Article 15.3 of the SCM Agreement.

7.6.3.1 Whether the USITC cumulated subsidized and dumped, non-subsidized imports in the OCTG, WLP, and HWRP original investigations inconsistently with Article 15.3 of the SCM Agreement

7.296. In the final injury determination in the OCTG investigation, Turkey submits that the USITC "cumulated imports of OCTG from countries subject to both antidumping and countervailing duty investigations (India and Turkey) with imports from countries subject to only antidumping investigations (Korea, Ukraine, and Vietnam)".[470] In the final injury determination in the WLP investigation, Turkey submits that the USITC cumulated "dumped and subsidized imports from Turkey with dumped imports from Korea".[471] In the final injury determination in the HWRP investigation, Turkey submits that the USITC cumulated dumped and subsidized imports from Turkey "with imports from countries subject to only antidumping investigations, Mexico and Korea".[472]

7.297. In each of the investigations, petitioners requested the launch of anti-dumping and countervailing investigations on the same day.[473] In the OCTG investigation, the USITC found that imports from the Philippines, Chinese Taipei, and Thailand were negligible, and only considered whether to cumulate subsidized and dumped, non-subsidized imports from India, Korea, Turkey, Ukraine, and Viet Nam.[474] The USITC then assessed the conditions of competition between subject imports and like domestic products to determine whether subject imports from each source competed with the domestic like products.[475] In each of the challenged investigations, the USITC was satisfied that the statutory conditions were met, and as a consequence, the USITC cumulated non-negligible imports from countries subject to both countervailing and anti-dumping investigations with imports from countries subject to anti-dumping investigations only. The United States does not

[468] Panel Report, *US − Carbon Steel (India)*, paras. 7.347-7.350.
[469] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.599.
[470] Turkey's first written submission, para. 228 (referring to Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 21).
[471] Turkey's first written submission, para. 344 (quoting Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), fn 37).
[472] Turkey's first written submission, para. 456 (referring to USITC HWRP Final Determination, (Exhibit TUR-38), pp. 10-13).
[473] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 21; Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), p. 10; and USITC HWRP Final Determination, (Exhibit TUR-38), p. 12.
[474] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 23.
[475] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), pp. 21-23; Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), pp. 10-12; and USITC HWRP Final Determination, (Exhibit TUR-38), pp. 12-13.

contest that the USITC cumulated subsidized and non-subsidized imports when assessing material injury in each of the investigations.

7.298. The evidence on the record shows that the USITC cumulated subsidized and dumped, non-subsidized imports in all three investigations under examination. In the OCTG investigation, the USITC cumulated imports from countries subject to both countervailing and anti-dumping investigations (India and Turkey) with imports from countries subject to anti-dumping investigations only (Korea, Ukraine, and Viet Nam).[476] In the WLP investigation, the USITC cross-cumulated imports from a country which was subject to both countervailing and anti-dumping investigations (Turkey) with imports from a country subject only to an anti-dumping investigation (Korea).[477] In the HWRP investigation, the USITC cross-cumulated imports from a country which was subject to both countervailing and anti-dumping investigations (Turkey) with imports from countries subject only to anti-dumping investigations (Mexico and Korea).[478]

7.299. We have found above[479], consistent with the panel and the Appellate Body's interpretation in *US – Carbon Steel (India)*, that Article 15.3 does not authorize the USITC to assess cumulatively the effects of imports that are not subject to simultaneous countervailing duty investigations with the effects of imports that are subject to countervailing duty investigations.

7.300. We therefore uphold Turkey's claim that the USITC cross-cumulated imports in the OCTG, WLP, and HWRP original investigations in a manner inconsistent with Article 15.3 of the SCM Agreement.

7.6.3.2 Whether the USITC has a practice of cumulating subsidized and dumped, non-subsidized imports in original investigations that is inconsistent "as such" with Article 15.3 of the SCM Agreement

7.301. Turkey claims that the USITC "has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, *i.e.*, non-subsidized imports", in cases when petitions are filed or investigations are initiated on the same day.[480] Turkey claims that this "practice" is "as such" inconsistent with Article 15.3 of the SCM Agreement.

7.302. Turkey argues that the USITC itself considers that it has such a "practice", "which it applies systematically in its injury determination in investigations", and which it considers "to be required by U.S. law, specifically the injury statute, 19 U.S.C. § 1677(7)(G), and judicial decisions interpreting the injury statute".[481] Turkey therefore argues that this practice should be considered "a rule or norm of general application, subject to challenge 'as such'".[482]

7.303. The United States argues that Turkey failed to identify the precise content of the contested practice, but used instead language that "mimics" the US statute governing cumulation, without indicating that subsidized and dumped imports "must" be cumulated.[483] The United States argues that Turkey's citation to the USITC's statements affirming a "practice" of cross-cumulating in two determinations is not sufficient to establish the existence of a practice of general and prospective application.[484] In any event, according to the United States, the fact that an authority may have

[476] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 23.
[477] Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), p. 13.
[478] USITC HWRP Final Determination, (Exhibit TUR-38), p. 13.
[479] See above, para. 7.295.
[480] Turkey's first written submission, para. 222.
[481] Turkey's first written submission, para. 224 and fn 526 (referring to USITC Final Determination on circular welded carbon-quality steel pipe from India, Oman, the United Arab Emirates, and Vietnam, (Turkey has submitted this determination as Exhibit TUR-187); Softwood Lumber from Canada: Final USITC Determination; and Court of Appeals for the Federal Circuit decision, Bingham & Taylor v. United States (Turkey has submitted this decision as Exhibit TUR-205)). See also statement at the first meeting of the Panel, para. 89.
[482] Turkey's first written submission, paras. 223-224 (referring to Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 19); paras. 342-343 (referring to Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), p. 9); and paras. 455-456 (referring to USITC HWRP Final Determination, (Exhibit TUR-38), p. 10).
[483] United States' first written submission, para. 247.
[484] United States' first written submission, para. 248.

employed a practice in the past is not enough to assign to it "an independent operational existence", if that authority can depart from the practice by explaining the reasons for doing so.[485]

7.304. As set out in Section 7.3.3 above, we recall that prior panels and the Appellate Body have recognized that a "practice" may be challenged as a measure if (a) it is attributable to the responding Member; (b) its precise content can be described; and (c) it has general and prospective application.[486] The examination of whether a rule or norm has general and prospective application may vary from case to case.[487] In determining whether a measure has prospective application, complainants are not required to show with "certainty" that a measure will continue to apply in the future.[488] When prospective application is not sufficiently clear from the constitutive elements of the rule or norm, it may be demonstrated through a number of factors, including: the existence of an underlying policy that is implemented by the rule or norm; proof of systematic application of the challenged rule or norm; the extent to which the rule or norm provides administrative guidance for future conduct; and the expectations it creates among economic operators that the rule or norm will be applied in the future.[489]

7.305. As evidence of the challenged practice, Turkey refers to the USITC's statement that is contained in the OCTG, HWRP, and WLP final injury determinations, indicating that the USITC itself considers the challenged practice to be "required" by law:

> For purposes of evaluating the volume and price effects for a determination of material injury by reason of subject imports, section 771(7)(G)(i) of the Tariff Act requires the Commission to cumulate subject imports from all countries as to which petitions were filed … on the same day, if such imports compete with each other and with the domestic like product in the U.S. market.[490]

7.306. Turkey asserts that judicial decisions interpreting the injury statute, 19 U.S.C. § 1677(7)(G), require the USITC to cumulate imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, in cases when petitions are filed or investigations are initiated on the same day.[491]

7.307. The United States argues that the USITC's statements and Turkey's reference to the US Court of Appeals for the Federal Circuit regarding the interpretation of 19 U.S.C. § 1677(7)(G) do not support the existence of the alleged practice. Since Turkey has not challenged the statute, the United States argues that the measure is not within the Panel's terms of reference and it would not be appropriate to examine the US Court of Appeals for the Federal Circuit's interpretation of the statute to establish the existence of the alleged practice.[492] The United States also objects that Turkey's reference to a decision of the US Court of Appeals for the Federal Circuit is untimely and thus inadmissible evidence.[493] Moreover, the United States submits that the USITC's statements in

[485] United States' first written submission, para. 248 (referring to Panel Report, *US − Export Restraints*, para. 8.126).

[486] See paras. 7.119 and 7.120 above. See also Appellate Body Reports, *US − Anti-Dumping Methodologies (China)*, para. 5.127; *US − Zeroing (EC)*, para. 198; and *Argentina − Import Measures*, para. 5.104.

[487] Appellate Body Report, *US − Anti-Dumping Methodologies (China)*, para. 5.133.

[488] Appellate Body Report, *US − Anti-Dumping Methodologies (China)*, para. 5.132.

[489] Appellate Body Report, *US − Anti-Dumping Methodologies (China)*, para. 5.132. See also Appellate Body Reports, *US − Zeroing (EC)*, paras. 198, 201, and 204-205; *US − Zeroing (Japan)*, paras. 85 and 88 (quoting Panel Report, *US − Zeroing (Japan)*, para. 7.52); and *US − Oil Country Tubular Goods Sunset Reviews*, para. 187.

[490] Turkey's first written submission, para. 223 (quoting Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 19); para. 343 (quoting Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), p. 9); and para. 456 (quoting USITC HWRP Final Determination, (Exhibit TUR-38), p. 10).

[491] Turkey's first written submission, para. 224. In particular, Turkey cites the decision of the US Court of Appeals for the Federal Circuit in Bingham & Taylor v. United States, which Turkey argues demonstrates that the USITC has consistently applied the challenged practice since 1987. (Turkey's statement at the first meeting of the Panel, paras. 89 and 92).

[492] United States' second written submission, para. 187.

[493] United States' second written submission, para. 187.

relation to 19 U.S.C. § 1677(7)(G) simply reflects the content of the US statute governing cumulation, and does not require that subsidized and non-subsidized imports must be cumulated.[494]

7.308. We disagree with the United States' assessment of the evidence that Turkey has submitted. As we found in Section 7.6.3.1 above, in the OCTG, HWRP, and WLP investigations at hand, the USITC cumulated the injurious effects of subsidized and dumped, non-subsidized imports after determining that the statutory requirements for cumulation were met. The United States contends that the USITC's statements in the OCTG, HWRP, and WLP injury determinations do not demonstrate that the USITC will always "cross-cumulate" imports. However, the statements in these determinations demonstrate that the USITC considers that it is *required* to cross-cumulate imports whenever the statutory conditions are met. The evidence thus suggests that the USITC will necessarily follow the contested practice when these conditions are met.

7.309. In particular, in the OCTG and HWRP determinations the USITC has also stated that it has a "long-standing practice"[495] of cumulating imports subject to affirmative subsidy determinations with imports subject to affirmative dumping determinations, when the conditions for cumulation are otherwise met. In describing this "long-standing practice", the USITC referred to injury determinations in Circular Welded Carbon-Quality Steel Pipe from India, Oman, the United Arab Emirates, and Viet Nam and Softwood Lumber from Canada, and also referred to a domestic judicial decision, Bingham & Taylor v. United States.[496] The United States asks us not to consider the USITC's statements or the Bingham & Taylor v. United States decision, both because this evidence was submitted late in the proceeding and because it does not support Turkey's allegations.[497] However, the USITC's statement that it has a "long-standing practice" is contained in the OCTG and HWRP final injury determinations, which Turkey provided in connection with its first written submission. The USITC refers to Bingham & Taylor v. United States in connection with its observation that the USITC has a long-standing practice. We consider statements by the USITC as relevant evidence of the existence of the challenged practice. We also disagree that we are precluded from considering the USITC's own assessment that it has a "long-standing practice" of cumulating subsidized imports with dumped, non-subsidized imports when assessing injury in original investigations.

7.310. We recall that "as such" challenges are "serious" challenges.[498] In particular, the Appellate Body in *US – Zeroing (EC)* warned that a panel "must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document".[499] A party bringing an "as such" claim must submit sufficient evidence to demonstrate that the challenged measure is attributable to the responding Member, its precise content and that it is of general and prospective application. Such evidence may include proof of the systematic application of the challenged rule or norm.[500] In the circumstances before us, the USITC itself considers that it has a long-standing practice of cumulating the effects of imports subject to affirmative subsidy determinations with imports subject to affirmative dumping determinations, when the conditions for cumulation are otherwise met. We therefore consider that Turkey, in the present case, has presented evidence to establish *prima facie* the existence of a practice.

7.311. In response to questioning from the Panel, the United States also submitted four determinations as examples of cases in which it asserts that the USITC in its injury determinations

[494] United States' first written submission, paras. 246-247; second written submission, paras. 181 and 187.

[495] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 20; USITC HWRP Final Determination, (Exhibit TUR-38), p. 12 and fn 44.

[496] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), fn 110.

[497] United States' second written submission, para. 187. Turkey referred to the Bingham & Taylor v. United States decision in its first written submission and at the first substantive meeting with the Panel. (Turkey's first written submission, fn 526; statement at the first meeting of the Panel, para. 89). Turkey submitted the Bingham & Taylor v. United States decision as Exhibit TUR-205 in response to questioning from the Panel following the first meeting. (Turkey's response to Panel question No. 57, para. 117).

[498] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

[499] Appellate Body Report, *US – Zeroing (EC)*, para. 196.

[500] Appellate Body Report, *US – Zeroing (EC)*, para. 198.

did not cumulate imports of subsidized products with non-subsidized imports subject to anti-dumping investigations initiated on the same day, when the conditions for cumulation were otherwise met.[501]

7.312. The examples that the United States provided, however, fail to rebut *prima facie* that the USITC has a practice of cross-cumulating imports. In each of the four examples, the USITC declined to consider imports from certain countries under investigation pursuant to statutory exceptions contained in 19 U.S.C. § 1677(7)(G)(ii). Pursuant to this provision, when assessing material injury, the USITC will not cumulate imports from (a) Israel, (b) countries concerning which injury determinations have been terminated because of a finding that the volume of imports is negligible, (c) countries concerning which the USDOC has made a preliminary negative anti-dumping or countervailing determination, and (d) beneficiary countries under the Caribbean Basin Economic Recovery Act (CBERA).[502] All that the United States' four examples prove is that the USITC excludes imports from *certain* countries from the injury assessment whenever one of the statutory exceptions applies. However, the USITC will still cumulate the effects of subsidized and dumped, non-subsidized imports from other countries in which petitions were filed, or investigations were initiated, on the same day.[503] This is exemplified in the OCTG final injury determination, in which the USITC excluded imports from certain countries from the investigation because they were negligible in volume. However, as we have found above, despite excluding certain imports from the Philippines, Chinese Taipei, and Thailand, the USITC cumulated imports subject to a countervailing duty investigation with imports subject only to anti-dumping investigations, specifically imports from Turkey, India, Korea, Ukraine, and Viet Nam.[504]

7.313. The United States has also objected to the Panel considering additional evidence submitted by Turkey in response to questioning from the Panel following the first meeting.[505] In its response, Turkey identified 36 determinations issued by the USITC between 1987 and 2017, in which it asserts that the USITC cumulated imports of subsidized products with imports subject to anti-dumping investigations initiated on the same day. The United States considers that the evidence is untimely and contrary to the Panel's Working Procedures.[506] However, as we found above that, on the basis of evidence submitted by Turkey in its first written submission, Turkey has demonstrated *prima facie* that the USITC has such a practice. Therefore, we do not need to address the United States' procedural objection.

7.314. In light of the foregoing, we find that Turkey has demonstrated that the USITC has a practice, in assessing injury in original investigations, of cumulating 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. We consider that this practice constitutes a rule or norm that has general and prospective application, as demonstrated based on the evidence before us.

7.315. We recall our conclusion above, consistent with the panel and the Appellate Body's interpretation in *US − Carbon Steel (India)*, that Article 15.3 does not authorize an investigating authority to assess cumulatively the effects of imports that are not subject to

[501] United States' response to Panel question No. 100, paras. 120-121.

[502] Turkey's comments on United States' response to Panel question No. 100, para. 47 and fn 91 (referring to USITC Preliminary Determination on certain cut-to-length steel plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia, (Exhibit TUR-243), p. 16 and fn 97).

[503] In three determinations the USITC did not cumulate imports from certain countries with imports from other sources because they were "negligible" in volume. (USITC Final Determination on stainless steel wire rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Chinese Taipei, (Exhibit TUR-242), pp. 9 and 12; USITC Preliminary Determination on certain cut-to-length steel plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia, (Exhibit TUR-243), p. 16; and Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 21). In a fourth determination, the USITC applied two of the four statutory exceptions. (USITC Preliminary Determination on carbon and certain alloy steel wire rod from Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela, (Exhibit TUR-244), pp. 12 and 15).

[504] See above, para. 7.297.

[505] Turkey's response to Panel question No. 56, paras. 113-114; United States' response to Panel question No. 100, paras. 117-119.

[506] United States' second written submission, paras. 182-185. We recall that paragraph 7 of our Working Procedures requires that "[e]ach party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purpose of rebuttal, answers to questions or comments on answers provided by the other party."

simultaneous countervailing duty investigations, with the effects of imports that are subject to countervailing duty investigations.[507]

7.316. Accordingly, we find that the USITC's practice of "cross-cumulating" the effects of subsidized imports with those of dumped, non-subsidized imports in original investigations is "as such" inconsistent with Article 15.3 of the SCM Agreement.[508]

7.6.4 Turkey's claims concerning cumulation of subsidized and dumped, non-subsidized imports in sunset reviews

7.317. We next address Turkey's claims that the United States has a practice of cumulating subsidized and dumped, non-subsidized imports in sunset reviews, that is inconsistent with Article 15.3 of the SCM Agreement, both "as such" and as applied in the 2011 CWP sunset review.

7.318. The parties have both cited the findings in *US – Carbon Steel (India)* as relevant to the Panel's assessment. Turkey argues that we should rely on the Appellate Body's finding in *US – Carbon Steel (India)* that cumulation of the effects of subsidized imports with those of dumped, non-subsidized imports in injury determinations in original investigations is prohibited, and find that cumulation of subsidized imports with those of dumped, non-subsidized imports is also prohibited under Article 15.3 in sunset reviews.[509] Turkey argues that the prohibition of such cumulation in sunset reviews is supported by the context of Article 15.3 as well as the object and purpose of the SCM Agreement and relevant negotiating history.[510]

7.319. The United States argues that Turkey's reliance on the Appellate Body's findings in *US – Carbon Steel (India)* concerning original investigations is misplaced. The United States argues that the Panel should instead rely on the panel's findings in *US – Carbon Steel (India)* which directly addressed the question of whether the provisions of Article 15 apply in the context of likelihood-of-injury determinations in sunset reviews. The United States argues that the panel found sunset review proceedings to be governed by Article 21, and not by Article 15 of the SCM Agreement.[511] These findings were not appealed. The United States further requests the Panel to reject Turkey's argument that the object and purpose of the SCM Agreement and negotiating history surrounding cumulation in injury determinations support Turkey's claim.[512]

7.320. In response, Turkey argues that the United States mischaracterizes the panel's findings in *US – Carbon Steel (India)* as that panel only found that Article 21 does not require investigating authorities to redetermine injury pursuant to Article 15 in sunset reviews, and consequently, investigating authorities are not mandated to follow the provisions of Article 15, when making a likelihood-of-injury determination pursuant to Article 21.3 of the SCM Agreement.[513] Turkey argues, however, that the text of Article 15.3 in its context, in light of the object and purpose of the Agreement as well as the negotiating history makes it clear that it prohibits cumulating subsidized imports with dumped, non-subsidized imports.[514]

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[507] See above, para. 7.295.

[508] We note that Japan in its third-party written submission expressed concerns similar to those raised by the United States that dumped imports and simultaneous subsidized imports in a country often have cumulative price or volume effects on the relevant domestic industry, and that the combined effects of subsidized and dumped imports from several countries may not be adequately taken into account if cross-cumulation is prohibited. Thus, the injurious effects of the subsidized or dumped imports may not be properly recognized simply because of the difficulty in disassociating the injury attributable to dumped and subsidized imports. (Japan's third-party submission, paras. 42-43 (referring to United States' first written submission, paras. 276-277)). We understand the United States' and Japan's practical concern, recognizing that economic and statistical methodologies available to investigating authorities do not easily permit separating the injurious effects of dumped and subsidized imports.

[509] Turkey argues that the Appellate Body's findings under Article 15.3 of the SCM Agreement apply "with equal force" to likelihood of injury determinations in sunset reviews. (Turkey's first written submission, para. 558). See also second written submission, paras. 152-153; response to Panel question No. 62, paras. 133-140; and statement at the second meeting of the Panel, para. 103.

[510] Turkey's second written submission, paras. 153-154.

[511] United States' first written submission, paras. 285-291; second written submission, para. 208.

[512] United States' second written submission, paras. 214-216.

[513] Turkey's response to Panel question No. 62, para. 126.

[514] Turkey's response to Panel question No. 62, para. 127.

7.321. We consider that the findings of the panel in *US − Carbon Steel (India)* are directly relevant to our assessment of Turkey's claim that the United States has a practice of cumulating subsidized and dumped, non-subsidized imports in sunset reviews, and Turkey's claim that the USITC cumulated Turkish imports (subject to both anti-dumping and countervailing duty orders) with imports from other countries that were subject only to anti-dumping duty orders in the CWP sunset review.

7.322. In *US − Carbon Steel (India)*, the panel was asked to consider whether Sections 1675a(a)(7) and 1675b(e)(2) governing the cumulative assessment of imports in sunset reviews were inconsistent with Articles 15.1-15.5 of the SCM Agreement. The panel found that, for the "review" of a determination of injury that has already been established in accordance with Article 15, Article 21.3 does not require that injury again be determined in accordance with Article 15. Consequently, the panel concluded that investigating authorities are not bound by the provisions of Article 15 when making a likelihood-of-injury determination under Article 21.3.[515]

7.323. The panel based its findings in *US − Carbon Steel (India)* on the Appellate Body's analysis in *US − Oil Country Tubular Goods Sunset Reviews* concerning the distinction between determinations of injury in original investigations and likelihood-of-injury determinations in the context of the Anti-Dumping Agreement. As the panel noted in *US − Carbon Steel (India)*, Article 21.3 of the SCM Agreement, which authorizes investigating authorities to conduct sunset reviews in the countervailing duty context, is "substantially identical" to Article 11.3 of the Anti-Dumping Agreement and close parallels can also be drawn between Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement.[516] In addition, the panel observed that footnote 45 to Article 15 of the SCM Agreement, defining the term "injury" for the whole Agreement, is identical in language to footnote 9 to Article 3 of the Anti-Dumping Agreement.[517]

7.324. The panel in *US − Carbon Steel (India)* found central to its assessment the Appellate Body's finding in *US − Oil Country Tubular Goods Sunset Reviews* that *determinations of injury* under Article 3 of the Anti-Dumping Agreement are distinct processes from *determinations of likelihood of continuation or recurrence of injury* under Article 11.3. The Appellate Body observed in that case that Article 3 requires investigating authorities to determine whether the domestic industry is facing injury (or threat thereof) at the time of the original investigation, while Article 11.3 concerns the review of an anti-dumping order that is already in place to determine whether that same order should be continued or removed.[518] The Appellate Body concluded that investigating authorities are not mandated to follow the provisions of Article 3 of the Anti-Dumping Agreement when making a likelihood of injury determination.[519]

7.325. While noting that Footnote 9 to Article 3 of the Anti-Dumping Agreement defines "injury" for the entire Anti-Dumping Agreement[520] the Appellate Body considered that this *definition of injury* does not equate to the *determination of injury*, a process that is governed by Article 3 of the Anti-Dumping Agreement.[521] Accordingly, the Appellate Body concluded that the *definition of injury* provided in Footnote 9 applies throughout the Anti-Dumping Agreement, including Article 11.3 which concerns *determinations of likelihood of continuation or recurrence of injury*. However, it found that the various rules contained in Article 3 pertaining to the determination of injury in original investigations do not necessarily apply to determinations of likelihood of continuation or recurrence of injury.[522] The Appellate Body therefore found that not all of the provisions of Article 3 apply to sunset determinations under Article 11.3 of the Anti-Dumping Agreement, especially in the absence

[515] Panel Report, *US − Carbon Steel (India)*, para. 7.389.
[516] Panel Report, *US − Carbon Steel (India)*, paras. 7.389-7.390.
[517] Panel Report, *US − Carbon Steel (India)*, para. 7.390.
[518] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 279 (referring to Appellate Body Report, *US − Corrosion-Resistant Steel Sunset Review*, para. 124).
[519] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 280.
[520] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 276. Footnote 9 to Article 3 of the Anti-Dumping Agreement provides:

> Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

[521] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 277.
[522] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 277.

of cross-references linking the two provisions.[523] On this basis, the Appellate Body further concluded that an investigating authority is not mandated to follow the provisions of Article 3 when making a likelihood-of-injury determination.[524]

7.326. The panel in *US − Carbon Steel (India)* applied this reasoning *mutatis mutandis* in its assessment of whether the provisions of Article 15 applied in the context of determinations of likelihood of continuation or recurrence of injury under Article 21.3.[525] The panel clarified that an investigating authority is not required to follow the provisions of Article 15 when reviewing a determination of injury that has already been established based on those rules.[526] According to the panel, likelihood-of-injury determinations in sunset reviews are instead governed by Article 21.3 of the SCM Agreement.[527]

7.327. We share the view of the panel in *US − Carbon Steel (India)* as based upon the Appellate Body's analysis in *US − Oil Country Tubular Goods Sunset Reviews* of analogue provisions in the Anti-Dumping Agreement, that Article 21.3 does not require that injury again be determined in accordance with Article 15, and consequently an investigating authority is not mandated to follow the provisions of Article 15 when making a likelihood-of-injury determination under Article 21.3. We will therefore follow that interpretation and adopt it as our own in making our own objective assessment of Turkey's claim in this dispute.

7.328. In the CWP sunset review, the USITC conducted an analysis of the "likelihood of continuation or recurrence of material injury if the antidumping and countervailing duty orders [were to be] revoked".[528] Moreover, Turkey did not submit arguments or evidence that the USITC, as a matter of practice, redetermines injury (as opposed to assessing a likelihood of the continuation of injury) in sunset reviews. Therefore, consistent with the panel's findings in *US − Carbon Steel (India)*, we find that the USITC was not mandated to follow the provisions of Article 15 of the SCM Agreement when making such a likelihood-of-injury determination under Article 21 of the SCM Agreement.[529]

7.329. In light of our approach, we also do not consider that the Appellate Body's findings in *US − Carbon Steel (India)* regarding cumulation of subsidized and dumped, non-subsidized imports in injury determinations in original investigations are relevant to our assessment. We also do not consider it necessary to address Turkey's arguments concerning the object and purpose of the SCM Agreement and relevant negotiating history.[530]

7.330. Accordingly, we find that Turkey has failed to establish a basis for its "as such" and as applied claims that the United States cumulates subsidized and dumped, non-subsidized imports in sunset reviews in a manner that is inconsistent with Article 15.3 of the SCM Agreement. We therefore do not need to address whether the USITC has a practice of cumulatively assessing the effects of subsidized and dumped, non-subsidized imports in sunset reviews, nor do we make findings as to whether the USITC cumulatively assessed the effects of subsidized and dumped, non-subsidized imports in the 2011 CWP sunset review.

7.6.5 Conclusions regarding Turkey's claims under Article 15.3 of the SCM Agreement

7.331. We reject the United States' request for a ruling that Turkey's challenge to alleged practices in relation to the injury determinations in original investigations and sunset reviews, and "as such" claims associated with these practices, are outside the Panel's terms of reference.

7.332. Regarding Turkey's claims in relation to original investigations, we find that the United States cumulated subject imports from countries as to which countervailing and anti-dumping petitions were filed on the same day in the OCTG, WLP, and HWRP original investigations,

[523] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 278.
[524] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 280.
[525] See above, para. 7.323.
[526] Panel Report, *US − Carbon Steel (India)*, para. 7.389.
[527] Panel Report, *US − Carbon Steel (India)*, para. 7.392.
[528] CWP Final Sunset Review Determination, (Exhibit TUR-16), p. 27.
[529] Panel Report, *US − Carbon Steel (India)*, para. 7.389.
[530] We note in any event that Turkey's reference to the negotiating history does not change our assessment. At most, drafting documents submitted by Turkey only demonstrate that certain Members expressed concern with the issue of cross-cumulation of imports in injury assessments. (Turkey's response to Panel question No. 62, paras. 139-140).

inconsistently with Article 15.3 of the SCM Agreement. We also find that the USITC has a practice of cumulating 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. We find that this practice constitutes a rule or norm of general and prospective application that is inconsistent "as such" with Article 15.3 of the SCM Agreement.

7.333. Regarding Turkey's claims in relation to sunset reviews, we reject Turkey's claims that the United States acted inconsistently with Article 15.3 of the SCM Agreement, both "as such" as a practice and as applied in the 2011 CWP sunset review proceeding at issue, 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.

7.7 Turkey's claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994

7.334. Turkey claims that the United States has acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 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.

7.335. Article 19.4 provides:

> No countervailing duty shall be levied[51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.
>
> [51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

7.336. The first sentence of Article VI:3 of the GATT 1994 provides in relevant part:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted …[.]

7.337. As reflected in its panel request, Turkey requests findings that the United States has violated Article 19.4 and Article VI:3 "[t]o the extent that the United States' practices described above are inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 12.7, 14(d) and 15.3 of the SCM Agreement".[531]

7.338. We recall that Turkey alleged two specific violations of Article 19.4 and Article VI:3 arising in connection with Article 12.7 claims in the WLP and HWRP investigations in its first written submission. In those investigations, Turkey claims that the USDOC applied countervailing duty rates that it had previously calculated for subsidy programmes in other investigations.[532] In addition to claiming violations of Article 12.7 by selecting these rates, Turkey argues that the United States also acted contrary to its obligations under Article 19.4 and Article VI:3 by applying countervailing duty measures in excess of the amount of subsidization attributable to either WLP or HWRP.[533]

7.339. In response to questioning from the Panel following the first meeting, Turkey characterized these Article 19.4 and Article VI:3 claims as merely "instances" when the USDOC inaccurately calculated the amount of subsidization. Turkey requested that we find Article 19.4 and Article VI:3

[531] Turkey's panel request, para. 9.

[532] In the WLP investigation, Turkey submits that "the USDOC applied countervailing duty rates it had previously calculated for 'similar' subsidy programs in investigations of pasta and OCTG and 'for any program identified in a Turkish CVD proceeding that could conceivably be used' by the respondent, Borusan". (Turkey's first written submission, para. 329). In the HWRP investigation, Turkey submits that "the USDOC applied a countervailing duty rate of 15.58 percent to MMZ for the alleged provision of electricity for less than adequate remuneration, a rate it had previously calculated based on the alleged provision of hot rolled steel for less than adequate remuneration in the OCTG investigation". (Turkey's first written submission, para. 441).

[533] Turkey's first written submission, paras. 329 and 441.

violations whenever we find a violation of Articles 1.1(a)(1), 1.1(b), 2.1(c), 14(d), and 15.3 of the SCM Agreement that results in the application of countervailing duties where no subsidy exists.[534]

7.340. The United States argues that Turkey's Article 19.4 and Article VI:3 arguments concerning the WLP and HWRP investigations constitute new, independent claims[535] that were not identified in Turkey's panel request, and has requested a ruling that these claims are outside our Panel's terms of reference.[536] The United States further requests that the Panel reject Turkey's Article 19.4 and Article VI:3 claims in connection with Articles 1.1(a)(1), 1.1(b), 2.1(c), 14(d), and 15.3, as these claims were only raised at a late stage of the proceedings.[537]

7.341. We note that Turkey considers that its Article 19.4 and Article VI.3 claims are dependent claims. Turkey essentially argues that a Member violates Article 19.4 and Article VI:3 to the extent that it imposes countervailing duties that are inconsistent with any provision of the SCM Agreement. In support, Turkey cites the Appellate Body's statement in *US − Countervailing Measures on EC Products* that, under Article 19.4 and Article VI:3, "investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation".[538]

7.342. The United States disputes that violations of the SCM Agreement may give rise to dependant violations of Article 19.4 and Article VI:3. According to the United States, Article 19.4 and Article VI:3 only prevent the imposition of duties in excess of the amount of the subsidy that is found to exist by an investigating authority. The United States submits that Turkey has not established that any countervailing duty levied had exceeded the relevant calculated amount.[539]

7.343. We are not persuaded by Turkey's argument that the inconsistencies that we have found in this dispute would necessarily give rise to dependant violations of Article 19.4 and Article VI:3. The relationship between the provisions at issue may be more complex than suggested by Turkey. However, in light of our findings above, we do not consider it necessary to address the potential complexities arising from Turkey's additional claims regarding the consistency of the USDOC's and USITC's actions with Article 19.4 and Article VI:3 to resolve the matter before us. We recall that, in order to secure a positive solution to a dispute, the Appellate Body has stated that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute".[540] Thus, panels need address only those claims "which must be addressed in order to resolve the matter in issue in the dispute", while panels "may refrain from ruling on every claim as long as it does not lead to a 'partial resolution of the matter'".[541] If Turkey's additional claims are genuinely dependant on other findings of WTO-inconsistency, we see little value in addressing such additional claims. We therefore refrain from doing so.

[534] Turkey's response to Panel question No. 63, para. 145.

[535] United States' first written submission, para. 35.

[536] United States' first written submission, paras. 34-35. The United States additionally argues that Turkey's Article 19.4 and Article VI:3 challenge with respect to the USDOC's application of countervailing duty rates calculated for "similar" subsidy programmes in the WLP proceeding, is a new, independent claim because "Turkey did *not* raise any arguments under Article 12.7 − the provision on which Turkey's claims under Articles 19.4 and VI:3 depend − regarding USDOC's use of such rates in its application of facts available". (United States' second written submission, para. 28 (emphasis original)).

[537] United States' second written submission, paras. 219-222.

[538] Turkey's first submission, paras. 329 and 441 (quoting Appellate Body Report, *US − Countervailing Measures on Certain EC Products*, para. 139).

[539] United States' first written submission, paras. 185-187.

[540] Appellate Body Reports, *Argentina − Import Measures*, para. 5.190. (emphasis original)

[541] Appellate Body Reports, *Argentina − Import Measures*, para. 5.190 (quoting Appellate Body Reports, *Canada − Wheat Exports and Grain Imports*, para. 133; *US − Wool Shirts and Blouses*, DSR 1997:I, p. 339; *US − Tuna II (Mexico)*, paras. 403-404; and *US − Upland Cotton*, para. 732).

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.

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WORLD TRADE ORGANIZATION

WT/DS523/R/Add.1

18 December 2018

(18-7938)

UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN PIPE AND TUBE PRODUCTS FROM TURKEY

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS523/R.

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LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX A

PANEL DOCUMENTS

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 8 November 2017

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Turkey requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Turkey shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause, including where the issue concerning translation arises later in the dispute. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party become aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Turkey could be numbered TUR-1, TUR-2, etc. If the last exhibit in connection with the first submission was numbered TUR-5, the first exhibit of the next submission thus would be numbered TUR-6.

Questions

10. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

11. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 12h00 (noon) the previous working day.

12. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Turkey to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 17h00 on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Turkey presenting its statement first.

13. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement,

followed by Turkey. If the United States chooses not to avail itself of that right, the Panel shall invite Turkey to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 17h00 of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 12h00 (noon) the previous working day.

16. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 17h00 of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to

which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive section

17. The description of the arguments of the parties and third parties in the descriptive section of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

18. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

19. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

20. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file three paper copies of all documents it submits to the Panel. Exhibits may be filed in two copies on a CD-ROM, DVD or USB key and two paper copies. The DS Registrar shall stamp the documents with the date and time of the filing.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, DVD or USB key or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to xxxxx@wto.org, with a copy to xxxxx@wto.org and xxxxx@wto.org. If a CD-ROM, DVD or USB key is provided,

it shall be filed with the DS Registry. The paper version of documents shall constitute the official version for purposes of the record of the dispute.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 17h00 (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive section, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

Adopted on 8 November 2017

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.

2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the U.S. Department of Commerce or the United States International Trade Commission as confidential or proprietary information protected by Administrative Protective Order in the course of the countervailing duty proceedings at issue in this dispute. In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned proceedings agrees in writing to make the information publicly available.

3. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in the proceedings at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Turkey and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of the proceeding. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorizing letter referred to above. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in this paragraph to grant such authorization.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. However, an outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the proceedings at issue in this dispute, or an officer or employee of an association of such enterprises.

5. A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

6. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. Documents previously submitted to the United States Department of Commerce containing information designated as BCI for purposes of these proceedings pursuant to paragraph 2, and marked as "Contains Business Proprietary Information", shall be deemed to comply with this requirement. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit TUR-1 (BCI)).

7. Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

8. Where a party or third party submits a document containing BCI to the Panel, the other party or third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked and treated as described in paragraph 7. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are present or observing the session at that time. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

9. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.

10. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party and, where BCI was submitted by a third party, that third party an opportunity to review the report to ensure that it does not contain any information that the party or third party has designated as BCI.

11. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Report of the Panel.

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

1.1. On 14 September 2018, the Panel issued its Interim Report to the parties. On 28 September 2018, Turkey and the United States submitted their written requests for review. In addition to its written request, the United States also requested the Panel to hold an interim review meeting with the parties. On 5 October 2018, Turkey submitted comments on the United States' written request for review. The Panel held an interim review meeting with the parties on 13 November 2018.

1.2. In accordance with Article 15.3 of the DSU, this Annex sets out our discussion of the arguments made at the interim review stage. We have revised certain aspects of the Interim Report in light of the parties' comments. In addition, we have made certain editorial changes to improve the clarity and accuracy of the Final Report, or to correct typographical and non-substantive errors, including those suggested by the parties. The footnote numbers in the Final Report have changed due to these revisions. The footnote numbers indicated in this Annex pertain to those in the Final Report. The paragraph numbers in the Final Report remain unchanged.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Paragraph 3.1

2.1. The United States requests us to modify paragraph 3.1 to clarify which claims Turkey brought "as such" and those claims it brought "as applied".[1] Turkey did not comment on this request.

2.2. We have modified this paragraph to specify which claims Turkey brought "as such" and those it brought "as applied".

2.2 Paragraphs 7.6 and 7.15

2.3. The United States requests us to delete the term "manager" in describing OYAK as a pension fund, as this term is not used in the description of OYAK in the USDOC's determinations.[2] Turkey did not comment on this request.

2.4. We have made the requested change in these two paragraphs.

2.3 Paragraph 7.17

2.5. The United States requests us to modify this paragraph to accurately describe its argument concerning OYAK.[3] Turkey asks us to reject the United States' request because Turkey considers that the USDOC did treat OYAK as a governmental entity or as governmental in the broader sense.[4]

2.6. We have made some changes to more closely reflect the actual language used by the United States in its submissions without making any of the requested changes objected to by Turkey. We consider that these changes reflect the United States' position.

[1] United States' request for interim review, para. 4.
[2] United States' request for interim review, paras. 5-6.
[3] United States' request for interim review, para. 7.
[4] Turkey's comments on the United States' request for interim review, para. 1.

2.4 Paragraph 7.21 and footnote 51

2.7. The United States requests us to modify footnote 51 to reiterate its argument that we should not consider Turkey's arguments with respect to OYAK in the context of its challenge to Erdemir and Isdemir because the claim was independently raised.[5] Turkey requests us to modify the last sentence to avoid suggesting that the parties have agreed on OYAK's status.[6]

2.8. We have made the requested changes to clarify the United States' argument and to address Turkey's concern.

2.5 Paragraph 7.27 and footnote 61

2.9. The United States requests us to modify this paragraph and footnote 61 to reflect the fact that Erdemir's ownership interest in Isdemir differed slightly in each of the challenged determinations.[7] Turkey did not comment on this request.

2.10. We have made changes to paragraph 7.27 and footnote 61 to reflect that Erdemir's ownership interest in Isdemir differed slightly in the context of each of the challenged determinations.

2.6 Paragraph 7.61

2.11. The United States requests us to delete the language "not legally 'relevant'" from this paragraph because the USDOC's determinations used the phrase "not dispositive".[8] Turkey asks us to reject the United States' request because the USDOC used the language "not legally 'relevant'" in the OCTG CVD Final Determination Memorandum.[9]

2.12. We reject the United States' request because, as Turkey notes, the USDOC used the word "relevant" in the OCTG CVD Final Determination Memorandum. The USDOC alternately used the term "dispositive" in the WLP, HWRP, and CWP CVD Final Determination Memoranda. Therefore, it is accurate to include both terms.

2.7 Paragraph 7.96

2.13. The United States requests us to delete the word "sole" before the word "basis" when referring to the United States' argument concerning Turkey's "as such" claim corresponding to the benefit determination in the OCTG investigation.[10] Turkey did not comment on this request.

2.14. We have made the suggested deletion.

2.8 Paragraph 7.102

2.15. The United States requests us to modify this paragraph to clarify that the United States requested the Panel to find that the OCTG Final Determination is outside the Panel's terms of reference.[11] Turkey did not comment on this request.

2.16. We have made the suggested change.

2.9 Paragraphs 7.103 and 7.105

2.17. The United States requests us to delete paragraph 7.103 concerning panels' discretion to rule on expired measures, and to additionally modify paragraph 7.105 to indicate that the Panel has no basis to make findings on a measure that ceased to have legal effect or was withdrawn

[5] United States' request for interim review, para. 8.
[6] Turkey's request for interim review, para. 2.
[7] United States' request for interim review, paras. 9-10.
[8] United States' request for interim review, para. 11.
[9] Turkey's comments on the United States' request for interim review, para. 2.
[10] United States' request for interim review, para. 12.
[11] United States' request for interim review, para. 13.

prior to the establishment of a panel.[12] The United States considers that prior panel reports support its position that panels have no discretion to make findings regarding measures that expire *before* a panel's establishment. In such instances, the United States considers that panels are required to rule that such measures fall outside of a panel's terms of reference.[13] Turkey did not comment on this request.

2.18. We see no basis to make either of the United States' requested changes. Paragraph 7.103 is correct as formulated. The Panel otherwise disagrees with the United States that panels have no discretion to make findings on measures at issue that ceased to have legal effect or were withdrawn prior to the establishment of a panel. We hold the view that the decision whether to make findings on a given measure that has expired − including measures that have expired prior to a panel's establishment − will depend on the circumstances of the case. A panel is therefore required to exercise its discretion in deciding whether to make findings depending on the circumstances.

2.10 Paragraph 7.106

2.19. The United States requests us to conform the language in this paragraph with the changes it has requested to paragraphs 7.103 and 7.105. In particular, the United States requests that the Panel state that it has no basis to make "as applied" findings, rather than stating that the Panel does not need to make findings on the WTO consistency of the initial benchmark determination.[14] Turkey asks us to reject this request in the view that the phrases "see no basis" and "do not need to make" have different meanings, and because Turkey disagrees with the United States' view that the Panel had no discretion in deciding whether to make findings or not.[15]

2.20. We decline to make this change for the same reason as we declined to make changes to paragraphs 7.103 and 7.105.

2.11 Paragraph 7.123

2.21. The United States requests us to adjust language in this paragraph to indicate that the United States submitted examples in response to the Panel's questions seeking such examples.[16] Turkey did not comment on this request.

2.22. We have made the requested change.

2.12 Paragraphs 7.153, 7.157, 7.209, 7.213, 7.217, 7.220, and 7.249

2.23. The United States requests us to replace the phrase "reasonable and unbiased investigating authority" with "objective and unbiased investigating authority" in last sentence of paragraph 7.153, as well as in paragraphs 7.157, 7.209, 7.213, 7.217, 7.220, and 7.249, to reflect the standard of review as articulated in prior panel reports.[17] Turkey did not comment on this request.

2.24. We have made the requested changes to improve consistency and to conform the language to the applicable standard of review as set out in, *inter alia*, paragraphs 7.2, 7.3, 7.205, and 7.222.

2.13 Paragraph 7.190

2.25. The United States requests us to replace the word "determine" with "make determinations" in the first sentence of paragraph 7.190 to more accurately reflect the text of Article 12.7 of the SCM Agreement.[18] Turkey did not comment on this request.

[12] United States' request for interim review, para. 18.
[13] United States' request for interim review, paras. 15-17.
[14] United States' request for interim review, para. 19.
[15] Turkey's comments on the United States' request for interim review, para. 3.
[16] United States' request for interim review, para. 20.
[17] United States' request for interim review, paras. 21-22.
[18] United States' request for interim review, para. 23.

2.26. We have made the requested change.

2.14 Subsection 7.5.2.2.2 heading and paragraph 7.203

2.27. The United States requests us to modify the heading of this subsection to read "Punitive application of facts available" rather than "Punitive facts available". The United States also requests us to make similar modifications to the third and fifth sentences of paragraph 7.203.[19] Turkey did not make any comment on this request.

2.28. We have made the requested changes.

2.15 Paragraph 7.200

2.29. The United States requests us to replace "this data" in the second sentence of paragraph 7.200 with "the data provided by Borusan regarding its purchases of HRS for the Gemlik mill" to specify which data that is being discussed.[20] Turkey did not comment on this request.

2.30. We have made the requested change.

2.16 Paragraph 7.202

2.31. The United States requests us to modify this paragraph to more accurately reflect the United States' argument that the use of weighted average transaction prices would in general "require a finding that is necessarily *better* than some of the outcomes for cooperating entities".[21] In particular the United States requests that we replace the language "have led to a finding which would have made Borusan necessarily better off" with the language "in general lead to findings that are necessarily better than some of the outcomes for cooperating entities". Turkey did not comment on this request.

2.32. We have made the requested change.

2.17 Paragraph 7.204

2.33. The United States requests us to modify the language in the second sentence to reflect that the alleged punitive nature of the USDOC's application of facts available is an argument advanced by Turkey and contested by the United States.[22] Turkey did not comment on this request.

2.34. We have made the requested change.

2.18 Paragraph 7.215

2.35. The United States requests us to strike the phrase "to discourage non-cooperation" in the second sentence in paragraph 7.215 to avoid giving the impression that the USDOC inferred adversely by selecting the lower price on the record to discourage non-cooperation. According to the United States, there is no statement in the USDOC's Final Determination to this effect.[23] Turkey disagrees that the sentence is inaccurate as currently drafted. In the event that the Panel were to modify this paragraph, Turkey requests us to indicate that the USDOC inferred adversely in selecting the lowest price on the record because of Borusan's non-cooperation.[24]

2.36. We do not consider that the United States' requested change is a fair reflection of the USDOC's determination in this regard. Although the USDOC does not explicitly state in its determination that it inferred adversely in order to discourage non-cooperation, the USDOC's OCTG Final Determination nevertheless clearly connects its decision to apply an adverse inference

[19] United States' request for interim review, paras. 24 and 27.
[20] United States' request for interim review, para. 25.
[21] United States' request for interim review, para. 26 (referring to United States' response to Panel question No. 47, para. 146).
[22] United States' request for interim review, para. 28.
[23] United States' request for interim review, para. 29.
[24] Turkey's comments on the United States' request for interim review, para. 4.

to its finding that Borusan failed to cooperate.[25] We have accordingly modified this paragraph to reflect the USDOC's statements in the OCTG Final Determination that the USDOC inferred adversely in selecting the lowest price on the record because of Borusan's non-cooperation.

2.19 Paragraph 7.250

2.37. The United States requests us to modify this paragraph to indicate that the CWP review and the WLP investigation did not cover the identical subsidy programmes, but only some of the same programmes.[26] Turkey did not comment on this request.

2.38. We have made the requested change.

2.20 Paragraph 7.260, footnote 418

2.39. The United States requests us to delete footnote 418 because it does not support the proposition in the text.[27] Turkey did not comment on this request.

2.40. We have modified the footnote to more clearly support our statement that this is not a situation in which the USDOC did not have other facts on the record to consider.

2.21 Paragraphs 7.267, 7.317, 7.330, and 7.333

2.41. Turkey requests us to identify the CWP sunset review at issue as the 2011 CWP sunset review.[28] The United States did not comment on this request.

2.42. We have made the requested change.

2.22 Paragraph 7.275, footnote 431

2.43. The United States requests us to modify footnote 431 to more accurately reflect the text of the Appellate Body's report in *Argentina – Import Measures*.[29] Turkey did not comment on this request.

2.44. We have made the requested changes.

2.23 Paragraphs 7.285-7.295 and footnote 444

2.45. The United States requests us to revise our approach as set out in paragraphs 7.285 to 7.295 and footnote 444 regarding the interpretation of Article 15.3 of the SCM Agreement. The United States submits that the Panel erred in enquiring whether the United States has identified "cogent reasons" for deviating from the conclusions reached by the panel and the Appellate Body in *US – Carbon Steel (India)* regarding the interpretation of Article 15.3. According to the United States, the Panel's understanding of the value of prior adopted panel or Appellate Body reports is inconsistent with the relevant provisions of the DSU and the WTO dispute settlement system. The United States thus asks us to eliminate any reference to the notion of "cogent reasons" or to otherwise engage with specific provisions in Article 3.9 of the DSU and Article IX:2 of the WTO Agreement, and with arguments that have been presented against a "cogent reasons" approach.[30]

2.46. At an interim review meeting held with the Panel, the United States elaborated on its position that the DSU does not assign precedential value to adopted panel and Appellate Body

[25] See, e.g. OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 12 ("[W]e find that Borusan failed to cooperate by not acting to the best of its ability because Borusan withheld requested information on its purchases of HRS, despite having two opportunities, and never requested an extension to provide this information in accordance with 19 CFR 351.302(c). Consequently, an adverse inference is warranted in the application of facts available.")

[26] United States' request for interim review, para. 30.

[27] United States' request for interim review, para. 32.

[28] Turkey's request for interim review, para. 2.

[29] United States' request for interim review, para. 33.

[30] United States' request for interim review, paras. 34-36 and 41.

reports and the interpretations contained in those reports. According to the United States, a panel (or the Appellate Body) is to apply customary rules of interpretation of public international law in assisting the DSB to determine whether a measure is inconsistent with a Member's commitments under the covered agreements. The United States also argues that those rules of interpretation do not assign to interpretations given as part of dispute settlement a precedential value for purposes of discerning the meaning of the text of the covered agreements. The United States further elaborated on why it considers that there are flaws in the Appellate Body's statement that a panel must follow an Appellate Body interpretation absent undefined "cogent reasons" for departing from that interpretation. In this respect, the United States considers that the Appellate Body's "cogent reasons" approach is flawed because (a) it fails to appreciate the functions of panels and the Appellate Body in the WTO dispute settlement system; (b) it is based on an erroneous interpretation of Article 3.2 of the DSU; (c) it relies on previous reports that do not support it; (d) it misunderstands why parties cite previous reports in WTO disputes; (e) it rests on inappropriate analogies to other international adjudicative fora; and (f) it incorrectly assumes the existence of a hierarchical structure that does not reflect the role assigned to the Appellate Body in the DSU.[31] Although the United States disagrees that adopted panel and Appellate Body reports have precedential value, the United States considers it appropriate for a panel to consider and refer to prior Appellate Body or panel reasoning in conducting its own objective assessment of the matter.[32]

2.47. Turkey disagrees with the United States' requests. Turkey considers that, although the concept of "cogent reasons" does not appear in the text of the DSU, it can be derived from a reading of Article 3.2, 17.6, and 17.13 of the DSU, and it is well-established that a panel will resolve the same legal question in the same way in a subsequent case, absent cogent reasons to rule differently. Turkey further submits that the Panel correctly concluded that the United States provided no cogent reasons for why the Panel should depart from prior guidance in interpreting Article 15.3, and that the Panel did not fail to engage with the United States' arguments.[33]

2.48. We have made certain modifications to paragraphs 7.283 and 7.285-7.295, and accompanying footnotes to clarify our approach and the reasoning supporting our conclusions. In making our own objective assessment of the matter before us, we have recalled that panels may take into account the reasoning followed in prior adopted panel and Appellate Body reports when resolving similar legal issues. In this respect, the Report explains that we are persuaded by and agree with the panel's and the Appellate Body's interpretations of Article 15.3 of the SCM Agreement in *US − Carbon Steel (India)*, and we therefore adopt the reasoning contained in these reports as our own in making our objective assessment of Turkey's claim in this dispute. We found it all the more appropriate to do so given that the United States has raised essentially the same arguments in this dispute regarding the interpretation of Article 15.3 of the SCM Agreement as were before the panel and the Appellate Body in *US − Carbon Steel (India)* and were rejected in their entirety.

2.24 Paragraphs 7.288 and 7.295

2.49. The United States requests us to modify these paragraphs to avoid suggesting that the United States did not raise any new arguments in this dispute concerning the interpretation of Article 15.3 of the SCM Agreement apart from those raised before the panel and the Appellate Body in *US − Carbon Steel (India)*. The United States also disagrees that the Appellate Body in *US − Carbon Steel (India)* dismissed those arguments raised by the United States in their entirety. Accordingly, the United States requests us to replace the phrase "identical arguments" with "these same arguments".[34] The United States also requests that we specify the US statute that is discussed in this paragraph.[35] Turkey did not comment on these requests.

2.50. We have made the requested clarifications in the context of addressing other comments made by the United States in connection with paragraphs 7.285-7.295.

[31] United States' statement at the interim review meeting, paras. 55-82.
[32] United States' statement at the interim review meeting, para. 27.
[33] Turkey's comments on the United States' request for interim review, paras. 5-6; statement at the interim review meeting, paras. 6-7.
[34] United States' request for interim review, paras. 37 and 39-40.
[35] United States' request for interim review, para. 38.

2.25 Paragraph 7.327, footnote 528

2.51. The United States requests us to delete footnote 528 for the same reasons as it requests us to make changes to paragraph 7.285 and footnote 444 as discussed above.[36] Turkey asks us to reject the United States' request because it considers that it is well-established that adopted panel and Appellate Body reports create legitimate expectations among WTO Members and that absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.[37]

2.52. We have deleted footnote 528 consistently with our modifications to paragraphs 7.285-7.295 as discussed above.

_____

[36] United States' request for interim review, para. 42.

[37] Turkey's comments on the United States' request for interim review, para. 7 (referring to Appellate Body Reports, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 143; and *US – Stainless Steel (Mexico)*, para. 160).

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. EXECUTIVE SUMMARY OF TURKEY'S FIRST WRITTEN SUBMISSION

1. This dispute relates to the countervailing duty measures imposed by the United States pursuant to its investigations of Turkish imports of Certain Oil Country Tubular Goods ("OCTG") (C-489-817); Welded Line Pipe ("WLP") (C-489-823); and Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes ("HWRP") (C-489-825); and pursuant to its sunset and administrative reviews, for calendar years 2011 and 2013, respectively, of the countervailing duty order on Turkish imports of Circular Welded Carbon Steel Pipes and Tubes ("CWP") (C-489-502).

2. The United States' determinations in these proceedings suffer from a number of manifest defects. As discussed in greater detail below, these measures are inconsistent with core WTO obligations, namely: Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.4, 12.7, 14(d), and 15.3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). Moreover, the United States' approach is particularly surprising because in most of these instances, the problematic approach is very similar, and in some cases identical, to that in previous determinations which the Appellate Body and prior panels have found to be inconsistent with the SCM Agreement.

3. At its core, this dispute originates with the United States' post-preliminary determinations in the OCTG proceeding. Specifically, in the OCTG proceeding, the U.S. Department of Commerce ("USDOC") first made a preliminary determination that no countervailing duty measures were warranted because it calculated *de minimis* subsidy rates. If that preliminary result had been left undisturbed, there would be no countervailing duty measures on Turkish imports of OCTG, and likely none on WLP or HWRP either.

4. However, the USDOC reversed its negative preliminary determination when it issued post-preliminary determinations increasing the calculated subsidy rates above the *de minimis* level and thus finding countervailable subsidies where originally it had not. In these post-preliminary determinations, the USDOC treated the private occupational pension fund for employees of the Turkish military, Ordu Yardimlasma Kurumu ("OYAK"), as well as Eregli Demir ve Celik Fabrikalari T.A.S. ("Erdemir") and Iskenderun Iron & Steel Works Co. ("Isdemir"), two of Turkey's three integrated iron and steel producers, as public bodies. The USDOC then relied on these and other erroneous findings in the OCTG proceeding to reach positive findings of subsidization in the investigations of WLP and HWRP and in a subsequent administrative review of the order on CWP. The U.S. International Trade Commission's ("ITC") injury determinations in these proceedings also suffer fatal flaws.

5. The United States' determinations in these proceedings are now enshrined in its countervailing duty regime, resulting in further WTO-inconsistent rulings and subjecting Turkey's steel imports to countervailing duty measures that should not exist.

A. Overview of Occupational Pension Funds, Turkey's Pension Fund System, the Turkish Steel Industry, and the United States Countervailing Duty Measures against Certain Turkish Steel Pipe and Tube Products

6. Like many other countries, Turkey has a diversified pension fund system, consisting of: a mandatory public social security system; mandatory and voluntary private occupational pension funds; and voluntary personal savings funds. This "three pillar" system is precisely the organizational structure recommended by the World Bank. There are two supplementary mandatory private occupational pension funds in the Turkish pension fund scheme. One of these funds is the Armed Forces Pension Fund, OYAK.

7. OYAK is the mandatory private occupational pension fund established in 1961 for employees of the Turkish military. OYAK operates as a non-profit foundation, providing pension plans and

other benefits such as retirement, disability, death, and mortgage and consumer loans for its over 300,000 members. OYAK is not part of the Turkish Armed Forces or affiliated with the Turkish Ministry of National Defense, or any other government agency. Turkey notes that the investigating authorities of other WTO Members that have investigated OYAK concluded it is not a public body. In 2014, for example, the Canada Border Services Agency found that "Ordu Yarimlasma Kurumu (OYAK) is a private pension fund established by law in 1961 with the objective of providing retirement benefits to member {*sic*} of the Turkish Armed Forces."

8. The challenged measures in this dispute all relate to OYAK and its alleged subsidization of Turkey's steel industry. As such, it may be useful to provide some background on that industry as well, including its development over time, and privatization. As previously mentioned, Erdemir and Isdemir are two of Turkey's three integrated iron and steel producers. Erdemir and Isdemir were previously owned by the GOT. Turkey established Erdemir in 1965 to produce flat steel products. Isdemir is one of Erdemir's subsidiaries.

9. Turkey began the process of privatizing its steel industry in 1996, when it entered into a free trade agreement with the European Coal and Steel Community to regulate trade in steel and eliminate customs duties on steel products. Pursuant to this agreement, Turkey committed to privatizing its steel industry and banning all forms of state aid.

10. In October 2005, the GOT, through the Turkish Privatization Administration, held a public tender to sell the entirety of its ownership interest in the Erdemir Group. OYAK participated in the public tender and was selected as the winning bid, with the terms of the sale finalized in 2006. Since then, *i.e.*, more than a decade ago and more than seven years prior to the countervailing duty petition that lay at the basis of the various measures now challenged in this dispute, Erdemir and its subsidiary Isdemir have operated on a commercial basis, fully independent from the GOT.

11. On July 2, 2013, several U.S. steel companies filed a petition with the USDOC alleging that the GOT provides countervailable subsidies to Turkish producers of OCTG. Petitioners alleged that the GOT, through OYAK and Erdemir, provides hot rolled steel, the primary input used to produce OCTG, for less than adequate remuneration. The USDOC agreed with petitioners, erroneously finding that OYAK, Erdemir, and Isdemir are "public bodies" because the GOT allegedly exercises "meaningful control" over OYAK. The USDOC also made similarly inadequate findings that the GOT's supposed "meaningful control" of OYAK extends to Erdemir and Isdemir.

12. The USDOC repeated the same errors in subsequent investigations of WLP and HWRP, and in a subsequent administrative review of the order on CWP, applying the same incorrect legal standard in its public body findings, which again were unsupported by the evidence. The USDOC consequently imposed additional, WTO-inconsistent countervailing duties measures on these other Turkish steel pipe and tube products. In short, the USDOC made a WTO-inconsistent set of findings in one determination, and then kept repeating that same set of mistakes over and over again.

B. Legal Standards

13. Turkey's claims in this dispute are based on several provisions of the SCM Agreement, namely: Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.4, 12.7, 14(d), and 15.3. The common thread among all of these claims is the United States' repeated failure to apply the correct legal standard and ground its findings in the evidence on the record.

C. The United States' Countervailing Duty Measures on Certain Oil Country Tubular Goods from Turkey Are Inconsistent with Its WTO Obligations

14. *First*, in determining that OYAK is a "public body," the USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) of the SCM Agreement and follow the Appellate Body's guidance regarding the interpretation of that standard. The USDOC failed to make any findings that OYAK meets the public body standard articulated by the Appellate Body, *i.e.*, that it possesses, exercises, or is vested with governmental authority. Instead, the USDOC found OYAK is a public body, within the meaning of Article 1.1(a)(1) of the SCM Agreement, alleging that the GOT exercises meaningful control over OYAK. However, the USDOC failed completely to assess how the GOT's alleged control of OYAK has been exercised in a meaningful way. The USDOC,

moreover, failed to engage in any analysis whatsoever of the overall relationship between OYAK and the GOT within the Turkish legal order.

15. The USDOC also failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its finding that OYAK is a public body. The evidence cited by the USDOC does not support its finding that OYAK is a public body; moreover, the USDOC failed to give proper consideration to evidence that contradicted its finding and which demonstrates that OYAK acts independently from the GOT. The USDOC made the same errors in finding that Erdemir and Isdemir are public bodies, within the meaning of Article 1.1(a)(1) of the SCM Agreement. In particular, (1) the evidence cited by the USDOC does not support its public body findings; and (2) the USDOC improperly failed, or outright refused, to consider evidence which contradicted its findings.

16. *Second*, the USDOC's determination that sales of hot rolled steel conferred a benefit and were made for less than adequate remuneration is inconsistent with Articles 1.1(b) and 14 of the SCM Agreement. The USDOC has a practice, in assessing whether a good is provided for less than adequate remuneration 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. This USDOC practice is inconsistent with Article 14(d) of the SCM Agreement both "as such" and as applied in this investigation. Furthermore, because the USDOC failed to properly establish that Erdemir and Isdemir provided hot rolled steel to the respondents for less than adequate remuneration under Article 14(d), it also failed to establish that the alleged provision of hot rolled steel conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

17. *Third*, the USDOC's application of "facts available" and use of an "adverse inference" is inconsistent with Article 12.7 of the SCM Agreement in light of difficulties the respondent, Borusan, experienced in gathering and reporting requested information. The USDOC's application of "facts available" is also inconsistent with Article 12.7 of the SCM Agreement because the USDOC applied an "adverse inference" for the purpose of punishing Borusan for its alleged non-cooperation.

18. *Fourth*, the USDOC's determination that the alleged provision of hot rolled steel for less than adequate remuneration is "specific" is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement, because the USDOC failed to sufficiently identify or substantiate, based on positive evidence on the record as required under Article 2.4, the existence of a "subsidy programme" related to the provision of hot rolled steel. Moreover, the USDOC's determination is inconsistent with Article 2.1, because the USDOC failed to consider the two factors specified in the last sentence of subparagraph (c).

19. *Fifth*, the ITC's cumulation of imports in its determination of injury is inconsistent with Article 15.3 of the SCM Agreement. The ITC has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, *i.e.*, non-subsidized imports. This practice of "cross-cumulating" subsidized and non-subsidized imports, with respect to which antidumping or countervailing duty petitions are filed on the same day, is inconsistent with Article 15.3 of the SCM Agreement both "as such" and as applied in its investigation of OCTG.

D. The United States' Countervailing Duty Measures on Welded Line Pipe from Turkey Are Inconsistent with Its WTO Obligations

20. *First*, the USDOC repeated the same errors it made in the OCTG investigation in determining that OYAK is a "public body." The USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) of the SCM Agreement and follow the Appellate Body's guidance regarding the interpretation of that standard. The USDOC failed to make any findings that OYAK meets the public body standard articulated by the Appellate Body, *i.e.*, that it possesses, exercises, or is vested with governmental authority. Instead, the USDOC found that OYAK is a public body, within the meaning of Article 1.1(a)(1) of the SCM Agreement, because the GOT exercises meaningful control over OYAK. However, the USDOC failed completely to assess how the GOT's alleged control of OYAK has been exercised in a meaningful way. The USDOC, moreover, failed to engage in any analysis whatsoever of the overall relationship between OYAK and the GOT within the Turkish legal order.

21. The USDOC also failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its finding that OYAK is a public body. The evidence cited by the USDOC does not support its finding that OYAK is a public body; moreover, the USDOC failed to give proper consideration to evidence that contradicted its finding and which demonstrates OYAK acts independently from the GOT. The USDOC again repeated the same errors in finding that Erdemir and Isdemir are public bodies, within the meaning of Article 1.1(a)(1) of the SCM Agreement.

22. *Second*, the USDOC's application of "facts available" and use of an "adverse inference" is inconsistent with Article 12.7 of the SCM Agreement because the USDOC applied an "adverse inference" for the purpose of punishing the respondent, Borusan, for its alleged non-cooperation. Furthermore, the United States has acted contrary to its obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by applying countervailing duty measures in excess of the amount of subsidization attributable to WLP.

23. *Third*, the USDOC's determination that the alleged provision of hot rolled steel for less than adequate remuneration is "specific" is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement, because the USDOC failed to sufficiently identify or substantiate, based on positive evidence on the record as required under Article 2.4, the existence of a "subsidy programme" related to the provision of hot rolled steel. Moreover, the USDOC's determination is inconsistent with Article 2.1, because the USDOC failed to consider the two factors specified in the last sentence of subparagraph (c).

24. *Fourth*, the ITC's cumulation of imports in its determination of injury is inconsistent with Article 15.3 of the SCM Agreement. The ITC has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, *i.e.*, non-subsidized imports. This practice of "cross-cumulating" subsidized and non-subsidized imports, with respect to which antidumping or countervailing duty petitions are filed on the same day, is inconsistent with Article 15.3 of the SCM Agreement both "as such" and as applied in its investigation of WLP.

E. The United States' Countervailing Duty Measures on Heavy Walled Rectangular Welded Carbon Steel Pipes from Turkey Are Inconsistent with Its WTO Obligations

25. *First*, the USDOC again repeated the same errors it made in the OCTG investigation in determining that OYAK is a "public body." The USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) of the SCM Agreement and follow the Appellate Body's guidance regarding the interpretation of that standard. The USDOC failed to make any findings that OYAK meets the public body standard articulated by the Appellate Body, *i.e.*, that it possesses, exercises, or is vested with governmental authority. Instead, the USDOC found that OYAK is a public body, within the meaning of Article 1.1(a)(1) of the SCM Agreement, because the GOT exercises meaningful control over OYAK. However, the USDOC failed completely to assess how the GOT's alleged control of OYAK has been exercised in a meaningful way. The USDOC, moreover, failed to engage in any analysis whatsoever of the overall relationship between OYAK and the GOT within the Turkish legal order.

26. The USDOC also failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its finding that OYAK is a public body. The evidence cited by the USDOC does not support its finding that OYAK is a public body; moreover, the USDOC failed to give proper consideration to evidence that contradicted its finding and which demonstrates OYAK acts independently from the GOT. The USDOC again repeated the same errors in finding that Erdemir and Isdemir are public bodies, within the meaning of Article 1.1(a)(1) of the SCM Agreement.

27. *Second*, the USDOC's application of "facts available" and use of an "adverse inference" is inconsistent with Article 12.7 of the SCM Agreement because the USDOC applied "adverse inferences" for the purpose of punishing the respondents, MMZ and Ozdemir, for their alleged non-cooperation. Furthermore, the United States has acted contrary to its obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by applying countervailing duty measures in excess of the amount of subsidization attributable to HWRP.

28. *Third*, the USDOC's determination that the alleged provision of hot rolled steel for less than adequate remuneration is "specific" is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement, because the USDOC failed to sufficiently identify or substantiate, based on positive evidence on the record as required under Article 2.4, the existence of a "subsidy programme" related to the provision of hot rolled steel. Moreover, the USDOC's determination is inconsistent with Article 2.1, because the USDOC failed to consider the two factors specified in the last sentence of subparagraph (c).

29. *Fourth*, the ITC's cumulation of imports in its determination of injury is inconsistent with Article 15.3 of the SCM Agreement. The ITC has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, *i.e.*, non-subsidized imports. This practice of "cross-cumulating" subsidized and non-subsidized imports, with respect to which antidumping or countervailing duty petitions are filed on the same day, is inconsistent with Article 15.3 of the SCM Agreement both "as such" and as applied in its investigation of HWRP.

F. The United States' Countervailing Duty Measures on Circular Welded Carbon Steel Pipes and Tubes from Turkey Are Inconsistent with Its WTO Obligations

30. *First*, the USDOC again repeated the same errors it made in the OCTG investigation in determining that OYAK is a "public body." The USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) of the SCM Agreement and follow the Appellate Body's guidance regarding the interpretation of that standard. The USDOC failed to make any findings that OYAK meets the public body standard articulated by the Appellate Body, *i.e.*, that it possesses, exercises, or is vested with governmental authority. Instead, the USDOC found that OYAK is a public body, within the meaning of Article 1.1(a)(1) of the SCM Agreement, because the GOT exercises meaningful control over OYAK. However, the USDOC failed completely to assess how the GOT's alleged control of OYAK has been exercised in a meaningful way. The USDOC, moreover, failed to engage in any analysis whatsoever of the overall relationship between OYAK and the GOT within the Turkish legal order.

31. The USDOC also failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its finding that OYAK is a public body. The evidence cited by the USDOC does not support its finding that OYAK is a public body; moreover, the USDOC failed to give proper consideration to evidence that contradicted its finding and which demonstrates OYAK acts independently from the GOT. The USDOC again repeated the same errors in finding that Erdemir and Isdemir are public bodies, within the meaning of Article 1.1(a)(1) of the SCM Agreement.

32. *Second*, the USDOC's determination that the alleged provision of hot rolled steel for less than adequate remuneration is "specific" is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement, because the USDOC failed to sufficiently identify or substantiate, based on positive evidence on the record as required under Article 2.4, the existence of a "subsidy programme" related to the provision of hot rolled steel. Moreover, the USDOC's determination is inconsistent with Article 2.1, because the USDOC failed to consider the two factors specified in the last sentence of subparagraph (c).

33. *Third*, the ITC's cumulation of imports in its determination of injury is inconsistent with Article 15.3 of the SCM Agreement. Similar to its practice in investigations, the ITC has a practice, in assessing material injury in five-year reviews, of cumulating imports that are subject to countervailing duty orders with imports that are subject only to antidumping duty orders, *i.e.*, non-subsidized imports, with respect to which the five-year reviews are initiated on the same day. This practice of "cross-cumulating" subsidized and non-subsidized imports, with respect to which five-year reviews of antidumping or countervailing duty orders are initiated on the same day, is inconsistent with Article 15.3 of the SCM Agreement both "as such" and as applied in its review of the countervailing duty order on CWP.

34. Moreover, because the United States' imposition of countervailing duty measures was inconsistent with its obligations under Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.4, 12.7, 14(d), 15.3, and 19.4 of the SCM Agreement, as well as Article VI:3 of the GATT 1994, the United States is also in violation of its obligations under Articles 10 and 32.1 of the SCM Agreement.

II. EXECUTIVE SUMMARY OF TURKEY'S OPENING STATEMENT AT THE FIRST MEETING OF THE PANEL

35. This dispute relates to several countervailing measures imposed by the United States on imports of steel products from Turkey in violation of its obligations under the SCM Agreement, specifically the United States' countervailing duty measures imposed pursuant to its investigation of Certain Oil Country Tubular Goods; Welded Line Pipe; and Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes; and pursuant to its sunset and administrative reviews, for calendar years 2011 and 2013, respectively, of the countervailing duty order on Circular Welded Carbon Steel Pipes and Tubes. As the two governments were unable to resolve this matter through consultations, the Government of Turkey has found it necessary to request the establishment of this Panel.

36. The United States' determinations in these proceedings are flawed in numerous respects, which are detailed in Turkey's First Submission. In this statement, Turkey will focus on a few key issues that should inform the Panel's examination of the measures at issue in this dispute. First, Turkey will address the legal standards for "governmental" entities, both for "public body" and "government organ", under Article 1.1(a)(1) of the SCM Agreement and explain why the USDOC failed to apply the correct legal standards with regard to OYAK and Erdemir (and its subsidiary Isdemir). Second, Turkey will explain why the USDOC failed to provide a reasoned and adequate explanation for its findings that OYAK and Erdemir are public bodies, within the meaning of Article 1.1(a)(1) of the SCM Agreement.

37. Third, Turkey will explain why the USDOC's rejection of in-country or "tier one" benchmarks, for purposes of assessing the level of benefit under Articles 1.1(b) and 14(d) of the SCM Agreement, based solely on evidence of government ownership or control of domestic suppliers is a "practice," subject to challenge "as such," and why this practice is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, both "as such" and "as applied" in the OCTG investigation. Fourth, Turkey will address the USDOC's reliance on facts available and its drawing of adverse inferences in choosing among the facts available for punitive purposes, which is inconsistent with Article 12.7 of the SCM Agreement.

38. Fifth, Turkey will address the USDOC's failure to identify a subsidy programme, within the meaning of Article 2.1(c) of the SCM Agreement, or evaluate the two specificity factors in the final sentence of Article 2.1(c). Finally, Turkey will address the legal standard for cumulation of imports under Article 15.3 of the SCM Agreement and explain why the ITC's practice of cross-cumulating subsidized and non-subsidized imports is inconsistent with Article 15.3, both "as such" and "as applied" in the proceedings at issue.

A. The USDOC Applied Incorrect Legal Standards for "Governmental" Entities, for Either "Government Organ" or "Public Body", Under Article 1.1(a)(1)

39. *First*, the United States' subsidy determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement because the USDOC failed to apply the correct legal standards for "governmental" entities, either for "public body" or "government organ", in its assessments of OYAK and Erdemir. The Appellate Body has defined "public body," within the meaning of Article 1.1(a)(1) of the SCM Agreement, as "an entity that possesses, exercises or is vested with governmental authority."

40. The United States does not dispute that this is the legal standard for "public body" under Article 1.1(a)(1) articulated by the Appellate Body, and Turkey considers that it is the correct standard. Moreover, Turkey has shown that the USDOC failed to apply this standard in its analysis of whether OYAK and Erdemir are public bodies. In particular, not once in any of the four proceedings at issue did the USDOC refer to the correct legal standard for "public body," that is, an entity that possesses, exercises, or is vested with governmental authority," let alone find that OYAK or Erdemir meet this standard. The United States' arguments to the contrary are nothing more than a *post hoc* rationale created for the benefit of this Panel in a belated attempt to reconcile the USDOC's public body findings with the requirements of Article 1.1(a)(1).

41. *Second*, contrary to the United States' argument, the USDOC did not examine OYAK as a "government organ". The United States provides no citation or evidentiary support for this assertion, and, indeed, nowhere in any of the USDOC's determinations did it make such a

statement regarding OYAK, or even mention the term "government organ." Moreover, the USDOC's reasoning and analysis in its published determinations compels the conclusion that it implicitly found OYAK to be a "public body."

42. However, assuming, *arguendo*, that the United States' characterization of the USDOC's analysis regarding OYAK is correct and that the USDOC did in fact examine OYAK as a "government organ," the USDOC still applied the incorrect legal standard under Article 1.1(a)(1). In particular, the legal standard for a "government organ" is actually a *stricter* one than the legal standard for "public body" articulated by the Appellate Body, *i.e.*, "an entity {that} possesses, exercises or is vested with governmental authority." The USDOC made no findings regarding OYAK that would suggest it applied this standard; rather, its findings were strictly limited to the concept of "meaningful control." As Turkey demonstrated in its First Submission, this is not the correct standard for a "public body," let alone for a "government organ."

43. *Third*, the lack of a financial contribution determination with regard to OYAK is irrelevant to this Panel's assessment of the USDOC's "public body", or "government organ", determination under Article 1.1(a)(1) of the SCM Agreement. The Appellate Body's guidance in interpreting Article 1.1(a)(1) makes clear that it is first necessary to determine whether an entity is governmental or a private body in order to establish that a financial contribution exists, because an additional showing of entrustment or direction is necessary if the entity is *not* governmental. Accordingly, the fact that the USDOC did not find that OYAK itself made a financial contribution does not mean that the USDOC could not make an analysis regarding OYAK's status, within the meaning of Article 1.1(a)(1). Moreover, Turkey submits that the United States' interpretation of Article 1.1(a)(1) raises serious concerns regarding the reviewability of an investigating authority's determinations.

B. The Evidence on the Records of the Underlying Proceedings Does Not Support the USDOC's Public Body Findings

44. The second issue Turkey will address is the lack of evidentiary support for the USDOC's public body findings. In each of the underlying proceedings, the USDOC provided a bulleted list of the pieces of evidence which it relied on in finding that OYAK and Erdemir are public bodies. While the USDOC may have considered these pieces of evidence in their totality, as the United States asserts, the Panel must enquire whether those particular pieces of evidence, taken individually and as a whole, support the USDOC's public body findings.

45. As Turkey discussed in its First Submission, the USDOC failed to provide a reasoned and adequate explanation for its findings that OYAK and Erdemir are public bodies. In particular, the evidence relied on by the USDOC does not support its public body findings and consists almost entirely of evidence that demonstrates, at most, "formal indicia" of government control. Turkey considers that indicia of government control can demonstrate, at most, that a government has the *ability* to control an entity; they are not evidence of that entity's functions or conduct and, in particular, they are not evidence that the government in fact *exercises* its ability to control an entity, or that entity's *conduct*. Turkey explained in detail in its First Submission these and other errors which the USDOC made in evaluating the evidence it relied on to find that OYAK and Erdemir are public bodies, and Turkey reaffirms those arguments.

46. Turkey also observes that the United States discusses in its First Submission several facts on the record of the underlying proceedings which the USDOC did not rely upon in finding that OYAK, Erdemir, and Isdemir are public bodies. As the United States acknowledges elsewhere in its First Submission, the Panel must consider the investigating authority's, *i.e.*, the USDOC's, explanations and conclusions on their own terms, not the United States' *post hoc* justifications for the USDOC's findings.

47. Moreover, while it is well established that a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority, a panel must take into account all of the evidence on the record before the investigating authority and, in the context of reviewing individual pieces of evidence, a panel should examine whether the evidence may reasonably be relied on in support of the particular inference drawn by the investigating authority. In this regard, Turkey submits that it is appropriate for this Panel to examine the immediate context of certain statements in Erdemir's Annual Reports which the USDOC cited and that, in light

of this context, the two statements cannot reasonably be relied on to support an inference that Erdemir implements governmental policies.

48. Finally, Turkey submits that the USDOC's public body findings lack evidentiary support because the USDOC failed to give proper consideration to evidence which contradicts its conclusions regarding OYAK and Erdemir. The Appellate Body has made it clear that evidence of an entity's conduct *is* relevant to whether that entity is a public body. As Turkey explained in its First Submission, there was a considerable amount of evidence on the record regarding OYAK's and Erdemir's conduct which demonstrates that these entities operate on a commercial basis, autonomously from the Government of Turkey.

C. The USDOC's Practice of Rejecting In-Country Benchmarks for Benefit Based on Evidence of Government Ownership or Control is Inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement

49. The third issue Turkey will address is the USDOC's practice of rejecting in-country prices as potential benchmarks in benefit determinations. Turkey has shown in its First Submission that the USDOC has a practice of rejecting in-country benchmarks for benefit based solely on evidence of government ownership or control of domestic suppliers and that this practice is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, both "as such" and "as applied" in the OCTG investigation.

50. Turkey considers that the practice at issue is expressed in a written document, namely the Preamble to the Department's regulations. Turkey also provided examples of several cases, including the OCTG investigation, which confirm the USDOC's understanding and application of the Preamble in practice; thus, there can be no uncertainty as to the existence or content of this practice.

51. Turkey has also demonstrated that the USDOC's practice of rejecting in-country prices as potential benchmarks is a rule or norm which has both "general" and "prospective" application. In particular, the Preamble explains that the USDOC will normally reject in-country benchmarks where the government owns or controls a majority or substantial portion of domestic production. This practice therefore has general application, because it may apply to an unidentified number of economic operators, and prospective application, because it embodies the USDOC's administrative guidance for future benefit determinations and the USDOC applies it systematically, such that economic operators have an expectation the practice will be applied in future. Turkey also submits that the USDOC's departure from its normal practice, under protest and at the direction of a U.S. domestic court, is not dispositive evidence that the practice does not exist or cannot be challenged "as such."

52. Accordingly, Turkey asks this Panel to find that the USDOC's practice of rejecting in-country prices as potential benchmarks based solely on evidence of majority or substantial government ownership or control of domestic production is a measure subject to challenge "as such," and that this practice is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, both "as such" and "as applied" in the OCTG investigation, as Turkey explained in its First Submission.

D. The USDOC Impermissibly Drew Adverse Inferences in Selecting among the Facts Available for the Purpose of Punishing Respondents

53. Fourth, Turkey will address several issues related to Turkey's claim under Article 12.7 of the SCM Agreement that the USDOC improperly applied adverse inferences in selecting among facts available, including by doing so for the express purpose of punishing respondents in the OCTG, WLP, and HWRP investigations. At the outset, Turkey reiterates that its claims under Article 12.7 of the SCM Agreement are not limited to particular subsidy programs as the United States suggests, but rather relate to the USDOC's application of facts available in general in these proceedings.

54. Turkey notes that the United States does not dispute that the USDOC applies adverse inferences in a manner specifically designed to punish respondents or that the USDOC did so in these proceedings. Nor does the United States dispute that the Appellate Body has found such

practices to be inconsistent with Article 12.7, because it could result in inaccurate subsidization determinations.

55. Turkey submits that if there is no connection between the "necessary information" that is missing and the "facts available" on which a determination is based, a subsidy determination cannot be considered "accurate" within the meaning of Article 12.7. The USDOC failed to establish a connection between the rates it selected by drawing adverse inferences and the "necessary information" missing from the record in these proceedings, and it is clear from the record of the underlying proceedings that this resulted in inaccurate subsidy determinations. Moreover, the USDOC's application of facts available and drawing of adverse inferences was clearly intended to be punitive, which is not permissible under Article 12.7.

E. The USDOC Failed to Identify a Subsidy Programme, Within the Meaning of Article 2.1(c), or Evaluate the Specificity Factors in Article 2.1(c)

56. Next, Turkey will address the USDOC's failure to identify a "subsidy programme," within the meaning of Article 2.1(c) of the SCM Agreement, or evaluate the factors in the last sentence of Article 2.1(c).

57. *First*, Turkey demonstrated in its First Submission that the USDOC failed to sufficiently identify or substantiate the existence of a "subsidy programme," *i.e.*, a "plan" or "scheme", related to the provision of hot rolled steel. In response, the United States points to evidence which was on the record of the OCTG investigation but on which the USDOC did not rely, in any way, in its specificity findings. Turkey respectfully submits that this is yet another example of *post hoc* justification by the United States. Turkey also submits that evidence that there was more than one transaction for which respondents' purchase prices for hot rolled steel were below the benchmark price is not positive evidence of a *systematic* series of actions, let alone a *plan* or *scheme* to provide hot rolled steel for less than adequate remuneration.

58. *Second*, Turkey demonstrated in its First Submission that the USDOC failed to take into account the two factors identified in the last sentence of Article 2.1(c) of the SCM Agreement. While consideration of these two factors need not be done explicitly, prior panels have made it clear that there must be *some* evidence on the record that the investigating authority took the two factors in the final sentence of Article 2.1(c) into account, either explicitly or implicitly. The United States points to no such evidence, and indeed it cannot, because the USDOC *did not* consider the two factors in Article 2.1(c), even implicitly. Moreover, Turkey submits that the USDOC's obligation to consider the two factors in the last sentence of Article 2.1(c) exists independent of whether any interested party raised the relevance of these factors in the underlying proceedings.

F. The ITC's Practice of Cross-Cumulating Subsidized and Non-Subsidized Imports Is Inconsistent with Article 15.3 of the SCM Agreement

59. Finally, Turkey will address the ITC's practice of cross-cumulating subsidized and non-subsidized imports in injury determinations. As Turkey explained in its First Submission, the ITC has a long-standing practice of cross-cumulating imports subject to the USDOC's affirmative subsidy determinations with imports subject to the USDOC's affirmative dumping determinations, when certain other conditions are met. Turkey would like to focus on this practice in the context of injury investigations.

60. Turkey provided evidence that this practice satisfies the three-prong test for measures which are challengeable "as such" articulated by the Appellate Body in *US – Zeroing (EC)*. *First*, Turkey identified the precise content of the ITC's practice in investigations: namely, the cumulation of subject imports from all countries as to which petitions were filed and/or investigations self-initiated by the USDOC on the same day, if such imports compete with each other and with the domestic like product in the U.S. market, regardless of whether those imports are subject to subsidy determinations or not. The ITC developed this practice in its cases over time, both as a result of its own interpretation of the Tariff Act and the interpretation of U.S. domestic courts.

61. *Second*, this practice is clearly attributable to the United States and, in particular, the ITC. The ITC is the sole U.S. agency responsible for making injury determinations in countervailing duty

investigations and reviews. In this regard, Turkey notes that the ITC discusses its practice of cross-cumulating subsidized and non-subsidized imports in its injury determinations in which it applies this practice.

62. *Third*, the ITC's practice has general and prospective application. It is a practice which the ITC developed based on its own and U.S. domestic court interpretations of the statute. As a result, the ITC considers this practice to be *required* under section 771(7)(G)(i) of the Tariff Act. The ITC applies this practice in *all* investigations involving subsidized and non-subsidized imports for which petitions were filed on the same day and/or investigations self-initiated by the USDOC on the same day. The practice thus affects an unidentified number of economic operators and therefore has "general application."

63. With regard to its "prospective application," the ITC has consistently applied the challenged practice in injury investigations since 1987, demonstrating a systemic application of the measure. Finally, the fact that the ITC interprets the statute to *require* this practice demonstrates that the practice provides administrative guidance for future conduct and creates expectations among economic operators that it will be applied in the future. In this regard, Turkey notes that the United States does not assert that the ITC has the authority to depart from its cross-cumulating practice in injury investigations. To the contrary, the ITC's own statements demonstrate that it *may not* depart from this practice in investigations, because it considers the practice to be *required* under the statute.

64. Turkey also demonstrated in its First Submission that the ITC's practice is inconsistent with Article 15.3 of the SCM Agreement, both "as such" and as applied in the underlying injury investigations. In particular, in its First Submission, Turkey discussed the legal standard for cumulation under Article 15.3 and the Appellate Body's approach to interpretation of Article 15.3 in *US − Carbon Steel (India)*. Turkey considers this to be the correct approach to interpreting Article 15.3 and one that this Panel should follow.

65. The United States presents an alternative approach to interpreting Article 15.3, but fails to explain why the Panel should deviate from the approach taken by the Appellate Body. Turkey respectfully submits that ensuring security and predictability in the dispute settlement system implies that, absent cogent reasons, panels should resolve the same legal questions in the same way in subsequent cases. The United States has provided no cogent reasons for why this Panel should interpret Article 15.3 in a manner that differs from the Appellate Body's approach in *US − Carbon Steel (India)*. Turkey also notes that the United States presented many of the same arguments regarding its preferred interpretation of Article 15.3 in *US − Carbon Steel (India)*, and both the Appellate Body and the panel in that case specifically rejected these arguments.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. EXECUTIVE SUMMARY OF TURKEY'S SECOND WRITTEN SUBMISSION

1. This submission by the Government of Turkey ("Turkey") responds to the arguments presented by the United States in its First Submission, during the first meeting of the Panel and in its responses to questions from the Panel concerning the countervailing duty measures imposed by the United States pursuant to its investigations of Turkish imports of Certain Oil Country Tubular Goods ("OCTG") (C-489-817); Welded Line Pipe ("WLP") (C-489-823); and Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes ("HWRP") (C-489-825); and pursuant to its sunset and administrative reviews, for calendar years 2011 and 2013, respectively, of the countervailing duty order on Turkish imports of Circular Welded Carbon Steel Pipes and Tubes ("CWP") (C-489-502).

2. At the outset, Turkey makes a few overarching observations. The first issue is the United States' continued, and repeated, efforts to rely on *post hoc* justification and explanations for actions that the USDOC and the ITC took in the past. Turkey recalls that the Appellate Body has made it very clear that WTO Members may not justify an investigating authority's determinations by providing reasoning and explanation that the authority itself did not provide. Thus, the Panel should disregard the United States' arguments to the extent those arguments are not reflected in the reasoning and evaluation provided by the USDOC, or the ITC, in the challenged determinations.

3. The second issue Turkey addresses upfront is the importance of the legal reasoning in previously adopted panel and Appellate Body reports. Turkey finds the United States' arguments during the first substantive meeting and in its responses to the Panel's questions regarding the alleged limited or non-existing relevance of prior panel and/or Appellate Body findings to be concerning.

4. The third issue is that Turkey observes that the United States appears to not dispute several key issues: (1) that the USDOC's benefit determination as applied in the OCTG investigation was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement; (2) that the USDOC's application of facts available based on adverse inferences for purposes of punishing a respondent is impermissible under Article 12.7 of the SCM Agreement; and (3) that the ITC has a practice of cross-cumulating subsidized and non-subsidized imports in injury determinations. Turkey believes that it is important to note this as this means that the Panel can now also consider that these issues are no longer in dispute.

5. The final issue is the United States' continued portrayal of OYAK and Turkish pension funds in general as some sort of anomaly. In reality, as noted in Turkey's First Submission, occupational pension fund schemes, both public and private, are widespread and a major source of capital in OECD countries, and OYAK is very comparable to the occupational pension fund schemes found in many countries.

A. The United States Has Failed to Rebut Turkey's Claim that the USDOC's Public Body Findings with Regard to OYAK and Erdemir and Isdemir are Inconsistent with Article 1.1(a)(1) of the SCM Agreement

6. As explained in Turkey's First Submission, the USDOC's findings in the underlying proceedings that OYAK, Erdemir, and Isdemir are "public bodies," within the meaning of Article 1.1(a)(1) of the SCM Agreement, are fundamentally flawed in two respects. First, the USDOC applied an incorrect legal standard for "public body." Second, the USDOC failed to provide a "reasoned and adequate" explanation for its public body findings. In its prior submissions and during the Panel meeting, the United States presented a number of arguments in an attempt to rebut Turkey's arguments to this effect. Each of these attempted counter arguments fails.

7. *First*, the United States argues that the USDOC did apply the correct standard, at least with regard to Erdemir and Isdemir, because "USDOC {} considered numerous indicia of the GOT's meaningful control over Erdemir and Isdemir" and "this evidence demonstrated that Erdemir and Isdemir possess, exercise or are vested with governmental authority." The United States' argument is nothing more than a *post hoc* rationale created for the benefit of this Panel. Not once in any of the four proceedings at issue did the USDOC refer to the correct legal standard for "public body," that is, an entity that possesses, exercises, or is vested with governmental authority," let alone find that OYAK, Erdemir, or Isdemir meets this standard. Moreover, to the extent the United States is arguing that this Panel should interpret Article 1.1(a)(1) in a manner differently than the Appellate Body, the United States has failed to provide any cogent reasons for why this Panel should depart from the Appellate Body's guidance in interpreting Article 1.1(a)(1) of the SCM Agreement.

8. *Second*, the United States argues that the USDOC evaluated OYAK as a "government organ" not a "public body" and made no legal findings regarding OYAK. This argument is demonstrably false, based on the reasoning and findings of the USDOC in its published determinations. In particular, the USDOC articulated its preferred legal standard for "public body" and applied that legal standard to OYAK in each of the challenged proceedings.

9. *Third*, the United States argues that the USDOC did not make a "financial contribution" finding with regard to OYAK, and thus did not find OYAK to be a "public body." As Turkey previously explained, the USDOC *did* investigate OYAK under its preferred public body standard, and thus this argument is just another example of *post hoc* rationalization. Moreover, the United States is incorrect that a "financial contribution" finding is a necessary prerequisite for application of the disciplines of Article 1.1(a)(1) to an investigating authority's "public body" finding regarding a particular entity. Turkey also considers that the United States' interpretation of Article 1.1(a)(1), and its argument that the requirements of Article 1.1(a)(1) do not apply to the USDOC's examination of OYAK, raise serious concerns regarding the reviewability of an investigating authority's determinations.

B. The United States Has Failed to Rebut Turkey's Claim that the USDOC Failed to Provide a Reasoned and Adequate Explanation for its Public Body Findings

10. The USDOC's determinations are also inconsistent with Article 1.1(a)(1) of the SCM Agreement because the USDOC failed to provide a "reasoned and adequate" explanation for its findings that OYAK, Erdemir, and Isdemir, are public bodies for two reasons. First, the evidence cited by the USDOC does not support its public body findings. Second, the USDOC improperly refused to consider evidence which contradicted its findings. Specifically, the USDOC failed to give proper consideration to conflicting evidence on the record regarding the relationship between the Government of Turkey and OYAK (or Erdemir and Isdemir) "and, in particular, the degree of control by the {Government of Turkey} and the degree of autonomy enjoyed by" OYAK or Erdemir and Isdemir, such as evidence of the latters' commercial conduct. The United States makes several arguments in response, none of which has any merit.

11. *First*, the United States argues that Turkey essentially asks the Panel to act as an initial trier of facts. The United States is incorrect; Turkey merely asks that the Panel examine the USDOC's conclusions in a critical and searching manner, based on the information on the record and the explanations given by the USDOC in its published determinations, to determine if the USDOC's conclusions are "reasoned" and "adequate." Turkey also encourages the Panel to focus its analysis on the evidence actually relied upon by the USDOC in finding that OYAK, Erdemir, and Isdemir are public bodies.

12. *Second*, the United States argues that Turkey focuses narrowly on individual pieces of evidence and ignores that the USDOC's determinations were based on the totality of the evidence on the record. Turkey submits that the United States ignores the Appellate Body's guidance that there is no error in a panel's review of individual pieces of evidence, even where the investigating authority draws its conclusions from the totality of the evidence. The Panel should assess whether the particular pieces of evidence relied upon by the USDOC, taken individually and as a whole, support the inferences and conclusions drawn by the USDOC in its public body determinations. Turkey respectfully submits that they do not.

13. *Third*, the United States argues that evidence on the record of indicia of government control support the USDOC's public body determinations. As Turkey has previously explained, indicia of government control are insufficient to support a public body determination without evidence that the alleged government control has been exercised in a meaningful way. Turkey respectfully submits that there was, in fact, *no* evidence on the record of the Government of Turkey *ever* exercising its alleged control, or ability to control, OYAK (or Erdemir and Isdemir). Moreover, the evidence on the record demonstrates that OYAK, Erdemir, and Isdemir are autonomous and independent from the Government of Turkey. The USDOC improperly *refused* to consider this evidence, and its evaluation of this evidence would not risk conflating the "financial contribution" and "benefit" analyses, as the United States argues.

C. The United States Has Failed to Rebut Turkey's Claim that the USDOC's Practice of Rejecting In-Country Benchmarks for Benefit Based Solely on Evidence of Government Ownership or Control of Domestic Producers is Inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement

14. Turkey demonstrated in its First Submission that the USDOC has a practice of rejecting in-country benchmarks for benefit based solely on evidence of government ownership or control of domestic suppliers and that this practice is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, both "as such" and "as applied" in the OCTG investigation. Turkey observes that the United States has not disputed that it would be impermissible under Articles 1.1(b) and 14(d) for the USDOC to reject in-country prices based solely on evidence of government ownership or control of domestic suppliers or even attempted to rebut Turkey's claim that this practice as applied in the OCTG investigation is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

15. The United States argues instead that Turkey has not sufficiently demonstrated that the USDOC's practice of rejecting in-country benchmarks for benefit based solely on evidence of government ownership or control of domestic suppliers exists as a rule or norm of "general" and "prospective" application. The United States' argument is incorrect. Turkey has provided evidence, including the Preamble to the USDOC's regulations and numerous examples of cases, demonstrating that the USDOC, systematically and as a matter of practice, rejects in-country market prices based *solely* on a finding of majority or substantial government ownership or control of domestic suppliers and with *no* consideration or investigation of whether in-country market prices are, in fact, distorted. Thus, there can be no uncertainty as to the existence or content of this practice or its "general" and "prospective" application with regard to an unidentified number of economic operators in future benefit determinations.

16. The United States also argues that Turkey has failed to establish the existence of a rule of "general" and "prospective" application because the USDOC exercised its discretion to depart from this practice on remand in the OCTG investigation and in the subsequent WLP, HWRP, and CWP proceedings. However, the USDOC's exercise of its discretion to deviate from its normal practice, under protest and at the direction of a U.S. domestic court, is not dispositive evidence that the USDOC's practice is not a rule of "general" or "prospective" application, challengeable "as such." Turkey notes in this regard that it submitted several other examples of cases following the OCTG investigation in which the USDOC has continued to apply the challenged practice. Moreover, nowhere has the USDOC or the United States confirmed that the USDOC will no longer apply the challenged practice in future cases.

D. The United States Has Failed to Rebut Turkey's Claim that the USDOC Did Not Identify, Based on Positive Evidence on the Record, a "Subsidy Programme" or Evaluate the Two Factors in the Last Sentence of Article 2.1(c) of the SCM Agreement

17. Turkey demonstrated in its First Submission that the USDOC's specificity determinations in the underlying proceedings are inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement for two reasons. First, the USDOC failed to sufficiently identify or substantiate, based on positive evidence on the record as required under Article 2.4, the existence of a "subsidy programme" related to the provision of hot rolled steel. Second, the USDOC failed to consider the two factors in the last sentence of Article 2.1(c). The United States has failed to rebut either of these two arguments.

18. *First*, the United States argues that evidence regarding Turkey's National Restructuring Plan, OYAK's alleged policies of boosting output for export-oriented production, and two statements in Erdemir's Annual Reports demonstrate the existence of a "subsidy programme." Turkey notes that the USDOC did not rely on *any* of this evidence in its *de facto* specificity determinations. Moreover, Turkey disputes that this evidence demonstrates the existence of a subsidy programme for the provision of hot rolled steel for less than adequate remuneration.

19. *Second*, the United States argues that evidence of a series of transactions for the provision of hot rolled steel for less than adequate remuneration demonstrates the existence of a subsidy programme. Turkey respectfully submits that a list of transactions, some of which are above and some of which are below a benchmark price, is not positive evidence of a *systematic* series of actions, let alone a *plan* or *scheme* to provide hot rolled steel for less than adequate remuneration.

20. Moreover, there is *no* explanation whatsoever in the USDOC's determinations for how the evidence cited by the United States in its submissions demonstrates or otherwise reflects a *systematic* series of actions, or a "plan" or "scheme" to provide hot rolled steel for less than adequate remuneration. Thus, to the extent the USDOC purports to have relied on this evidence, it failed to provide a reasoned and adequate explanation for its specificity determinations.

21. *Third*, the United States argues that the USDOC implicitly considered the two factors in the final sentence of Article 2.1(c) because there was evidence on the record of the length of time Erdemir and Isdemir have been in operation and because of certain statements in Erdemir's annual reports. Turkey respectfully submits that these facts are not evidence of the duration of the alleged subsidy programme, particularly in light of the fact that Erdemir and Isdemir were privatized in 2006. Moreover, the USDOC did not rely upon or even cite this evidence, or any of the other evidence the United States discusses in its submissions, in its *de facto* specificity determinations in the challenged proceedings. Thus the United States' argument is simply another example of *post hoc* rationalization.

E. The United States Has Failed to Rebut Turkey's Claim that the USDOC Improperly Used Facts Available and Drew Adverse Inferences for the Purpose of Punishing Respondents, Resulting in Inaccurate Subsidy Determinations That Are Inconsistent with Article 12.7 of the SCM Agreement

22. Turkey explained in its First Submission that the USDOC's use of facts available and drawing of adverse inferences in the OCTG, WLP, and HWRP proceedings is inconsistent with Article 12.7 of the SCM Agreement. In particular, in the OCTG investigation, the USDOC's determination to use facts available and draw adverse inferences is inconsistent with Article 12.7 for two reasons: first, because the USDOC failed to take "due account" of the difficulties Borusan experienced in gathering the requested information; and second, because the USDOC, in drawing adverse inferences, chose the *worst* facts available, in order to punish Borusan for its alleged non-cooperation. The USDOC's use of facts available in the WLP and HWRP investigations is also inconsistent with Article 12.7 for the latter reason—in drawing adverse inferences, the USDOC purposefully selected the *worst* possible facts available in order to punish respondents for their alleged failure to cooperate.

23. The United States appears to not dispute that the USDOC uses facts available and draws adverse inferences for the purpose of punishing respondents, or that the Appellate Body has found such practices to be inconsistent with Article 12.7, because it could result in inaccurate subsidization determinations. Instead, the United States argues that the USDOC's use of facts available was not punitive in these cases because the USDOC selected facts that were a "reasonable replacement" for the missing "necessary information" and because it did not result in inaccurate subsidy determinations. Each of these arguments fails.

24. *First*, the USDOC did not select facts that "reasonably replace" the missing necessary information. The USDOC did not engage in a process of "reasoning and evaluation" involving "a degree of comparison" of all the substantiated facts on the record, but instead simply chose the worst possible facts in order to punish respondents.

25. *Second*, the USDOC failed to identify or explain the connection between the selected "facts available" and the missing "necessary information." Thus, the resulting determinations cannot be considered "accurate" for purposes of Article 12.7. In this regard, Turkey submits that the lack of a connection between the allegedly missing "necessary information" and the rates selected by the USDOC is particularly egregious with regard to the programs for which the USDOC used rates calculated in the 1996 investigation of Certain Pasta from Italy and the 1986 investigation of CWP.

F. The United States Has Failed to Rebut Turkey's Claim that the ITC's Cross-Cumulation of Subsidized and Non-Subsidized Imports in Injury Determinations is Contrary to Article 15.3 of the SCM Agreement

26. Turkey explained in its First Submission that the ITC has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations or reviews with imports that are subject only to antidumping duty investigations or reviews, *i.e.*, non-subsidized imports. Turkey also explained that the ITC's practice of "cross-cumulating" subsidized and non-subsidized imports is inconsistent with Article 15.3 of the SCM Agreement both "as such" and as applied in the OCTG, WLP, HWRP, and CWP proceedings. In response, the United States argues that Turkey has failed to demonstrate that the ITC's practice exists or can be challenged "as such" and that cross-cumulation is permissible under Article 15.3. Neither of these arguments has any merit.

27. *First*, Turkey has met its burden of proof to show the ITC's practice of cross-cumulating exists and is challengeable "as such." Turkey has explained that the ITC cumulates all imports from countries as to which antidumping or countervailing duty petitions were filed (or investigations self-initiated) on the same day, and therefore cumulates subsidized and *non-subsidized* imports. The ITC developed this practice in its cases over time, both as a result of its own interpretation of the Tariff Act and the interpretation of U.S. domestic courts. Turkey has also demonstrated that the ITC's practice has "general" and "prospective" application, both in investigations and in reviews. The ITC considers its cross-cumulation practice to be *required* under the statute in investigation, and while the ITC has discretion to depart from its normal practice in reviews, the United States has not identified any cases in which the ITC has declined to cross-cumulate subsidized and non-subsidized imports when the conditions for cumulation are met.

28. *Second*, Turkey has explained that cross-cumulation is not permitted under Article 15.3 of the SCM Agreement, in any circumstances. This is confirmed by the Appellate Body's interpretation of Article 15.3 in *US − Carbon Steel (India)*, as well as the object and purpose of the SCM Agreement and its negotiating history. Contrary to the United States' argument, the text of Article 15.3 is not silent on this issue, and the United States has failed to identify any cogent reasons for why this Panel should interpret Article 15.3 in a manner that differs from the Appellate Body's approach in *US − Carbon Steel (India)*.

29. Moreover, the United States' reliance on the Appellate Body's reasoning in *US − Oil Country Tubular Goods Sunset Reviews* and *EC − Tube or Pipe Fittings* is misplaced. The Appellate Body *did not* address the permissibility of cross-cumulation of subsidized imports and dumped (non-subsidized) imports in those cases. Turkey respectfully submits that the *cross-cumulation* of subsidized and *non-subsidized* imports presents distinct concerns from the cumulative assessment of subsidized (or dumped) imports from multiple countries, and indeed is contrary to the very object and purpose of the SCM Agreement.

II. EXECUTIVE SUMMARY OF TURKEY'S OPENING STATEMENT AT THE SECOND MEETING OF THE PANEL

30. In its prior submissions, Turkey explained that the United States' determinations in the challenged proceedings suffer from a number of manifest defects in violation of core obligations under the SCM Agreement. In today's statement, Turkey will not repeat those points. Instead, we will focus on a few overarching points raised by the United States in its submissions and some of the key issues at stake in this dispute.

A. The Panel Should Reject the United States' Challenge to Factual Evidence Submitted by Turkey in Its Responses to the Panel's Questions

31. The first issue Turkey would like to discuss is the United States' argument in its Second Submission that the Panel should reject factual evidence which Turkey submitted in its responses to the Panel's questions—including evidence regarding the USDOC's practice of rejecting in-country benchmarks and the ITC's practice of cross-cumulation—as "untimely and contrary to the Panel's Working Procedures." Turkey respectfully submits that the complained-of evidence falls within the scope of paragraph 7 of the Panel's Working Procedures both because this evidence is necessary to rebut arguments made by the United States and to answer questions posed by the Panel.

32. Turkey recalls that Article 11 of the DSU does not establish time limits for the submission of evidence to a panel. Moreover, contrary to the United States' arguments, a complainant is not required to submit *all* factual evidence in its First Submission in order to make a *prima facie* case. Turkey observes that the United States failed to cite a single example of a panel or Appellate Body refusing to consider factual evidence submitted in response to questions from the panel following the First Substantive Meeting of the parties. The United States has also failed to demonstrate how Turkey's submission of additional factual information in response to questions from the Panel has prejudiced its ability to present its defense.

B. The United States Has Failed to Rebut Turkey's Claim that the USDOC Applied an Incorrect Legal Standard and Failed to Provide Reasoned and Adequate Explanations for Its Public Body Determinations Under Article 1.1(a)(1) of the SCM Agreement

33. Turkey will next address some of the United States' counter arguments regarding Turkey's claims under Article 1.1(a)(1) of the SCM Agreement. *First*, the United States argues that the USDOC did apply the correct legal standard, at least with regard to Erdemir and Isdemir, because the USDOC considered numerous indicia of the Government of Turkey's meaningful control and that this evidence demonstrated that Erdemir and Isdemir possess, exercise, or are vested with governmental authority. However, as Turkey has previously noted, not once in any of the four proceedings at issue did the USDOC refer to the correct legal standard for "public body." Instead, the USDOC simply substituted its preferred concept of "meaningful control" for the public body standard articulated by the Appellate Body. The Appellate Body in *US – Carbon Steel (India)* did not adopt the concept of "meaningful control" as the legal standard for "public body," and indeed criticized the panel in that dispute for doing so.

34. The United States also argues that standard for "public body" articulated by the Appellate Body erroneously collapses the concepts of "public body" and "government" or "government agency." While the United States may disagree with the Appellate Body's interpretation of Article 1.1(a)(1) of the SCM Agreement, it has failed to provide any cogent reasons for why this Panel should not follow the Appellate Body's guidance and apply this standard to OYAK, Erdemir, and Isdemir.

35. *Second*, the United States argues that the record evidence supports the USDOC's conclusion that the Government of Turkey exercised meaningful control over Erdemir and Isdemir. As Turkey has previously demonstrated, the *substantive legal question* to be answered by the USDOC, and this Panel, is whether one or more of the characteristics of a public body exist, *i.e.*, whether OYAK, Erdemir, and Isdemir *possess*, *exercise*, or are *vested with* governmental authority, not whether the Government of Turkey exercised meaningful control over them.

36. Moreover, the alleged "formal indicia" of government control cited by the USDOC are insufficient to support a public body determination without further analysis and corroborating evidence of an entity's *conduct*. In this regard, consideration of evidence of OYAK's, Erdemir's, and Isdemir's conduct does not conflate the issues of "financial contribution" and "benefit," as the United States argues. The USDOC's outright refusal to consider evidence of OYAK's, Erdemir's, and Isdemir's conduct demonstrates a clear failure to provide a reasoned and adequate explanation for its determinations.

37. *Third*, the United States is incorrect that the USDOC did not, and did not need to, make a public body finding regarding OYAK. As Turkey has previously observed, the USDOC articulated its preferred standard for "public body" in the OCTG investigation and applied that standard to OYAK in all of the challenged determinations; the USDOC thus plainly *found* OYAK to be a public body. The United States' assertions to the contrary are nothing more than *post hoc* rationalization. Furthermore, the United States is incorrect that it was unnecessary for the USDOC to make a public body finding regarding OYAK because the USDOC did not find that OYAK itself provided a countervailable subsidy.

C. The United States Has Failed to Rebut Turkey's Claim that the USDOC's Practice of Rejecting In-Country Benchmarks Is Contrary to Articles 1.1(b) and 14(d) of the SCM Agreement

38. The next issue Turkey would like to address is the USDOC's practice of rejecting in-country prices as potential benchmarks for benefit with no consideration of price distortion. Turkey has already demonstrated that this practice exists as a rule or norm of general and prospective application and is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, both "as such" and "as applied" in the OCTG investigation. Turkey would like to make two brief additional points regarding the United States' arguments.

39. *First*, the United States argues that in several of the examples Turkey provided the USDOC considered evidence of price distortion such as import penetration. Turkey submits that according to the Appellate Body's guidance in *US − Countervailing Measures (China)* and *US − Carbon Steel (India)*, an investigating authority cannot presume that government ownership or control of domestic producers results in price distortion but rather must conduct a market analysis that explains how the alleged government ownership or control results in price distortion. Evidence of import penetration may be relevant to such a market analysis, but in the examples cited by the United States that is not how the USDOC used evidence of import penetration.

40. *Second*, the United States argues that because the USDOC exercised its discretion to depart from its normal practice in the WLP, HWRP, and CWP determinations, Turkey cannot establish a rule or norm necessarily leading to WTO-inconsistent action. The United States' argument appears to be based on a GATT-era distinction between mandatory and discretionary legislation, which is not relevant in this case. Indeed, Turkey submits that the fact that the USDOC does not apply the complained-of practice in all instances, or that it has the discretion to depart from its normal practice, does not mean the practice is not challengeable "as such," or that the practice does not *necessarily* result in a WTO inconsistency.

D. The United States Has Failed to Rebut Turkey's Claim that the USDOC Failed to Identify a Subsidy Programme, Within the Meaning of Article 2.1(c), or Evaluate the Specificity Factors in Article 2.1(c)

41. The next issue Turkey will address is the USDOC's failure to identify a "subsidy programme," within the meaning of Article 2.1(c) of the SCM Agreement, or evaluate the factors in the last sentence of Article 2.1(c). Turkey demonstrated in its prior submissions that the USDOC failed to sufficiently identify or substantiate the existence of a "subsidy programme" related to the provision of hot rolled steel. In response, the United States points to certain evidence on the record, namely the respondents' transaction-specific accounting and statements in Erdemir's annual reports.

42. Turkey observes that the USDOC did not cite any of this evidence now referenced by the United States in its *de facto* specificity findings. Moreover, to the extent the USDOC purports to have relied upon this evidence in its *de facto* specificity findings, it failed to provide a reasoned and adequate explanation for how this information demonstrates a "plan," "scheme," or "systematic series of actions" to provide subsidies.

43. Turkey also demonstrated in its First Submission that the USDOC failed to take into account the two factors identified in the last sentence of Article 2.1(c) of the SCM Agreement, namely the length of time the alleged "subsidy programme" was in operation and the extent of diversification of the Turkish economy. In response, the United States argues that the USDOC's implicit consideration of these factors is reflected in the USDOC's examination of certain pieces of record evidence.

44. Turkey explained in detail in its Second Submission why this evidence is not relevant to an analysis of the two factors in the last sentence of Article 2.1(c). Moreover, as Turkey also previously explained, the USDOC did not rely upon or even *cite* this evidence in any way in its *de facto* specificity findings. Thus, there is *no* indication in the USDOC's determinations that it explicitly or even *implicitly* considered the two factors in the last sentence of Article 2.1(c), which it was obligated to do regardless of whether any interested party raised the issue.

E. The United States Has Failed to Rebut Turkey's Claim that the USDOC Impermissibly Drew Adverse Inferences in Selecting among the Facts Available for the Purpose of Punishing Respondents

45. Next, Turkey addresses several of the United States' arguments regarding Turkey's claims under Article 12.7 of the SCM Agreement that the USDOC improperly applied adverse inferences in selecting among facts available, including by doing so for the express purpose of punishing respondents in the OCTG, WLP, and HWRP investigations.

46. *First*, the United States argues with respect to the OCTG investigation that the USDOC appropriately resorted to facts available and that the outcome was less favorable to Borusan does not mean the application of facts available was punitive or otherwise inconsistent with Article 12.7. The United States also argues that Turkey has failed to explain how the USDOC's use of facts available was not accurate because Borusan's actual prices for hot rolled steel for the Halkali and Izmit mills could have been lower than the lowest price it paid for the Gemlik mill.

47. Turkey submits that the United States' argument is yet another example of *post hoc* rationalization. Moreover, it is entirely speculative and has no basis in the actual record of the case. The USDOC did not engage in any reasoning or evaluation of which of the substantiated facts available on the record of the OCTG investigation could "reasonably replace" the missing necessary information. Instead, the USDOC simply applied an adverse inference to select the *lowest* price Borusan paid for hot rolled steel. The USDOC's reasoning suggests that it viewed this price as the *worst* possible information on the record and that it selected this price to punish Borusan for alleged non-cooperation.

48. *Second*, the United States argues that Turkey dramatically expanded the scope of its arguments with respect to the WLP proceeding in its responses to the Panel's questions. Turkey has already explained that its claim under Article 12.7 regarding the WLP proceeding is not limited to certain subsidy programs, as the United States suggests, but rather relates to the USDOC's application of "facts available" in general. In any event, and as previously discussed, a complainant is not required to submit all arguments and evidence in its First Submission to make a *prima facie* case and Turkey submitted the evidence in question in response to a question from the Panel, as expressly permitted under paragraph 7 of the Panel's Working Procedures.

49. *Third*, the United States argues that Turkey has failed to demonstrate that the subsidy rates the USDOC selected in the WLP and HWRP proceedings were not "accurate," because the rates were based on information provided in other Turkish countervailing duty proceedings and reflect the actual subsidy practices of the Turkish government. Turkey strongly disputes that subsidy rates calculated in a previous Turkish countervailing duty proceeding can be used as "facts available" to replace *any* missing "necessary information," if the subsidy programs are "similar" or if a rate is otherwise "based on information provided by cooperating companies." As Turkey has previously explained, there was no connection between the USDOC's selected facts available and the missing "necessary information" in the challenged proceedings. Moreover, the USDOC's methodology of selecting the *highest* possible rates—or, in other words, the *worst* possible information—as "facts available" is clearly intended to be punitive, as Turkey has discussed in its prior submissions.

F. The United States Has Failed to Rebut Turkey's Claims Regarding the ITC's Practice of Cross-Cumulating Subsidized and Non-Subsidized Imports, Both in Investigations and in Sunset Reviews, in Violation of Article 15.3 of the SCM Agreement

50. The final issue Turkey addresses is the ITC's practice of cross-cumulating subsidized and non-subsidized imports in injury determinations and sunset reviews, which is inconsistent with

Article 15.3 of the SCM Agreement both "as such" and as applied in the challenged proceedings. Turkey has already addressed the United States' challenge to the factual evidence which Turkey submitted in its responses to the Panel's questions. Turkey will briefly respond to three additional points raised by the United States in its Second Submission.

51. *First*, the United States argues that Turkey failed to make a *prima facie* case in support of its claims under Article 15.3 because Turkey failed to engage in an interpretation of Article 15.3 according to the customary rules of interpretation of international law. Turkey explained why the United States' argument, and its contrary interpretation of Article 15.3, are incorrect in Turkey's prior submissions. What is more, and in any event, Turkey does not believe that the United States' argument is correct that to meet its burden of proof, a party must engage in a detailed interpretation of the legal provisions on which it relies. Indeed, these are two very different issues.

52. *Second*, the United States argues that Turkey failed to adequately describe all of the conditions of competition which the ITC examines to determine if the conditions for cumulation are met. Turkey disputes that it has not accurately described the factors which the ITC evaluates in determining whether to exercise its discretion to cumulate imports in sunset reviews, although it also does not believe that this is necessarily its burden. Regardless, however, this does not alter the fact that the ITC's conditions for cumulation, and thus its exercise of discretion in reviews, *do not even relate* to whether subject imports are subsidized or not.

53. *Third*, the United States argues that if investigating authorities are not mandated to follow the provisions of Article 15 in making a likelihood-of-injury determination under Article 21.3, then Article 15 cannot prohibit cross-cumulation in sunset reviews. Turkey does not argue that all of the requirements for injury determinations in Article 15 apply with equal force in sunset reviews. Rather, Turkey considers that the cumulative assessment of subsidized and dumped, *non-subsidized* imports for purposes of determining injury is fundamentally inconsistent with Article 15.3, in light of its context and the object and purpose of the SCM Agreement.

54. None of the United States' arguments explain why or how it would be a correct interpretation of the SCM Agreement to prohibit cross-cumulation in investigations but allow it in sunset reviews. Indeed, it would be an absurd and irrational result if, after having reached a positive injury determination based on the effects of only *subsidized* imports, investigating authorities were permitted in sunset reviews to also cumulatively consider the effects of *dumped*, non-subsidized imports for purposes of determining whether revocation of a countervailing duty order is likely to result in recurrence of injury.

ANNEX B-3

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. PRELIMINARY RULING REQUEST

A. Turkey's Panel Request Improperly Included Measures and Claims that Were Not the Subject of Consultations

1. DSU Article 4.4 provides that a request for consultations must state the reasons for the request, "including identification of the measures at issue and an indication of the legal basis for the complaint." Under DSU Article 6.2, a panel request must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint[.]" The panel request may neither "expand the scope" nor change the essence of a consultations request. A panel should "compare the respective parameters of the consultations request and the panel request to determine whether an expansion of the scope or change in the essence of the dispute occurred through the addition of instruments in the panel request that were not identified in the consultations request."

2. In its consultations request, Turkey identifies the specific measures at issue as the "preliminary and final countervailing duty measures imposed by the United States on Turkish imports of Certain Oil Country Tubular Goods ('OCTG'); Welded Line Pipe [WLP]; Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes [HWRP]; and Circular Welded Carbon Steel Pipes and Tubes [CWP]." The legal basis for Turkey's complaint is that USITC's "determination of injury based on cumulated imports" in the OCTG, WLP, HWRP, and CWP proceedings is inconsistent with Article 15.3 of the SCM Agreement.

3. Turkey has attempted to expand the scope of this dispute by improperly introducing in its panel request new measures and claims. First, Turkey's panel request challenges USITC's "practice of 'cross-cumulating' subsidized and non-subsidized imports" as being inconsistent with Article 15.3 of the SCM Agreement "both '*as such*', as a practice and as applied" in the OCTG, WLP, HWRP, and CWP proceedings. Turkey had identified no "practice" of cross-cumulating in its consultation request. Moreover, Turkey failed to request consultations on this alleged practice "as such," instead limiting its claims to the injury determinations made in the specific investigations identified in its consultations request. Thus, Turkey's newly added "as such" legal claims are not within the Panel's terms of reference.

4. Second, Turkey also has attempted to expand the scope of this dispute by improperly introducing in its panel request new measures and claims with respect to benefit. Turkey claims that USDOC has a practice 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," and asserts that this practice is inconsistent with Article 14(d) of the SCM Agreement "both '*as such*', as a practice, and as applied in [the OCTG] proceeding." Turkey failed to request consultations on this alleged "practice" of rejecting in-country prices as a benchmark. A measure on which Turkey failed to consult cannot be included in its panel request and falls outside the Panel's terms of reference. In addition, Turkey's panel request challenges this alleged practice "as such," but this claim was not included in its consultation request. Because the consultation request was limited to claims concerning the benefit determination made in the OCTG proceeding, Turkey's newly added legal claims are not within the Panel's terms of reference.

B. Turkey's First Written Submission Improperly Included Claims that Are Not Within the Panel's Terms of Reference

5. Article 6.2 requires two elements to be included in a panel request, namely: (a) identification of the specific measures at issue; and (b) a brief summary of the legal basis of the complaint. These elements comprise the "matter referred to the DSB," which is the basis for a panel's terms of reference under Article 7.1 of the DSU. "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."

6. First, Turkey's claim with respect to Article 12.7 of the SCM Agreement in the WLP investigation is expressly limited to the application of facts available by USDOC "[i]n connection with the alleged Provision of Hot Rolled Steel [HRS] for Less Than Adequate Remuneration [LTAR]." The other 29 subsidy programs are not the subject of any claims in Turkey's panel request, including any claims under Article 12.7, and are thus outside the Panel's terms of reference.

7. In its first written submission, however, Turkey has dramatically expanded its arguments. In addition to the application of facts available with respect to the Provision of HRS, Turkey challenges its application for all 30 subsidy programs at issue in the WLP investigation. Having failed to raise claims regarding these other 29 programs in either its consultations request or panel request, Turkey may not argue for the first time in its first written submission that the applications of facts available for these programs are inconsistent with Article 12.7.

8. Second, in its request for establishment of a panel, Turkey includes claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 that are expressly dependent on the Panel finding that the United States' practices are inconsistent with other provisions of the SCM Agreement.

9. Turkey attempts to raise independent arguments with respect to Article 19.4 and Article VI:3 in its first written submission. Since the only claims Turkey included in its panel request under Article 19.4 and Article VI:3 were expressly contingent on the Panel finding a violation of Articles 1.1(a)(1), 1.1(b), 2.1(c), 12.7, 14(d) and/or 15.3 of the SCM Agreement, these new, independent claims are not within the Panel's terms of reference.

C. The Benchmark Measure Challenged by Turkey Ceased to Have Legal Effect Prior to The Date of The Panel's Establishment

10. With respect to its Articles 1.1(b) and 14(d) claims, Turkey challenges an aspect of USDOC's benefit determination in the OCTG investigation that was superseded and ceased to have any legal effect prior to the establishment of the Panel. Accordingly, it is thus outside its terms of reference.

11. When the DSB establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint." As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."

12. However, the measure challenged by Turkey in this dispute—USDOC's rejection of in-country benchmarks to determine whether HRS was provided to the Turkish respondents for LTAR—was no longer the legal basis for USDOC's benefit determination at the time of establishment of the Panel in this case. Rather, the benchmarks determination supporting the CVD order at the time of panel establishment was reflected in the OCTG remand determination, issued on remand pursuant to domestic litigation. On March 10, 2016, USDOC published notice of its OCTG amended final determination, which effectuated USDOC's new benchmark and benefit determination reflected in the OCTG remand determination.

13. Therefore, when the OCTG amended final determination was published on March 10, 2016, USDOC's determination to use of out-of-country benchmarks ceased to have any legal effect, and was replaced by USDOC's remand determination, in which it determined to use in-country benchmarks. The Panel subsequently was established on June 19, 2017. Because the task of a panel is to determine whether the measure at issue is consistent with the relevant obligations *at the time of establishment of the Panel*, Turkey's challenge to the benchmark and benefit determination in the OCTG final determination falls outside the Panel's terms of reference.

II. TURKEY'S "AS SUCH" CHALLENGE UNDER ARTICLES 1.1(B) AND 14(D)

14. Turkey's "as such" claim with respect to the benchmark determination is not within the Panel's terms of reference. For completeness, the United States notes that Turkey's challenge also

fails on the merits. Turkey alleges that "[t]he USDOC has a practice, in assessing whether a good is provided for less than adequate remuneration 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."

15. The Appellate Body explained in *US − Zeroing (EC)* that "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document." In finding the existence of a rule or norm in *US − Zeroing (EC)*, the Appellate Body noted that the "evidence consisted of considerably more than a string of cases, or repeated action, based on which the Panel would simply have divined the existence of a measure in the abstract."

16. Turkey's showing with respect to USDOC's alleged rule falls far short of its burden. In support of its claim, Turkey points only to a statement in the final benchmark determination for OCTG − which, as explained, was reversed by a U.S. domestic court and amended by USDOC − and the preliminary benchmark determinations in four other investigations, one of which also was reversed in the final benchmark determination. Turkey has not explained how these determinations support its claim, only merely citing to conclusory sentences from the determinations. Turkey also attempts to support its claim by citing to language in the preamble of USDOC's regulations; however, Turkey concedes just two paragraphs prior in its submission that the USDOC regulation is consistent with Article 14(d) of the SCM Agreement.

17. Moreover, in none of the four cases challenged by Turkey in this dispute did USDOC "reject[] 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," as alleged by Turkey. Rather, as demonstrated, in each case, USDOC discussed and considered evidence relevant to the distortion of in-country prices, in addition to the government's market share, to determine whether in-country prices are an appropriate benchmark. Therefore, the United States respectfully requests that the Panel reject Turkey's "as such" claim because Turkey has not met the "high" evidentiary burden in these circumstances to establish a rule or norm of general and prospective application.

III. TURKEY'S ARTICLE 1.1(A)(1) CLAIMS

18. Turkey claims, "[t]he USDOC's determinations that OYAK, Erdemir, and Isdemir are public bodies is inconsistent with Article 1.1(a)(1)." Contrary to Turkey's claims, USDOC did not find, in any of the determinations, that OYAK provided a financial contribution, and thus did not find OYAK to be a public body for purposes of Article 1.1(a)(1). Such a finding was neither necessary, nor appropriate, because USDOC did not find that OYAK provided a countervailable subsidy. Rather, in determining that HRS was provided for LTAR, USDOC found Erdemir and Isdemir to be public bodies.

19. Therefore, because USDOC did not find a countervailable subsidy with respect to OYAK, and thus did not find that OYAK provided a financial contribution, Turkey's claim must fail because the requirements of Article 1.1(a)(1) of the SCM Agreement do not apply to USDOC's analysis of OYAK.

20. Regarding Erdemir and Isdemir, after consideration of the record as a whole, USDOC determined Erdemir and Isdemir to be public bodies, based on numerous considerations, including the involvement of OYAK in Erdemir. USDOC first described the legal basis for OYAK's authority as the pension fund for the Turkish military and the functions it performs pursuant to this authority. In carrying out this function, USDOC noted that Law No. 205 specifies that OYAK's property "shall enjoy the same rights and privileges as State property" and that OYAK is exempt from corporate and other taxes in parallel with the privileges granted to all actors operating within the social security system in Turkey. USDOC likewise observed that "members of the armed forces must by law contribute part of their salaries to OYAK."

21. USDOC also described the extensive overlap between OYAK's leadership structure and the Turkish Armed Forces, as well as other organs of the GOT. In the OCTG final determination, USDOC explained that a study by the Turkish Economic and Social Studies Foundation concluded

that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control."

22. USDOC next examined the functions and conduct of Erdemir and Isdemir, specifically the meaningful control by the GOT. USDOC examined the ownership of Erdemir and Isdemir. USDOC then tied the stated corporate objectives and accomplishments of Erdemir and Isdemir to certain macroeconomic goals defined by the GOT, demonstrating that Erdemir and Isdemir designed their corporate priorities to adhere to state-crafted policy. In doing so, USDOC established that Erdemir's and Isdemir's purview extends beyond that of a typical profit-oriented private firm to encompass considerations that are governmental in the legal order of Turkey. Specifically, in the OCTG final determination, USDOC explained that Erdemir's 2012 Annual Report is "in line with the GOT's...2012-2014 Medium Term Programme." Similarly, in the WLP, CWP and HWRP determinations, USDOC examined Erdemir's 2013 Annual Report, and determined that it was "in line with the GOT's stated policy in its 2012-2014 Medium Term Programme to improve Turkey's balance of payments."

23. USDOC then examined Erdemir's Annual Report and Articles of Association. USDOC found evidence indicating that "OYAK effectively decides the composition of the majority of Erdemir's board through its majority shareholder voting rights in Erdemir." In each of the determinations, USDOC also examined the role of the Turkish Prime Ministry Privatization Administration (TPA). USDOC examined Erdemir's Annual Reports, which state that OYAK and the TPA both maintain members on Erdemir's Board of Directors. In addition, USDOC cited the TPA's veto power over any decision related to the closure, sale, merger, or liquidation of Erdemir and Isdemir. Accordingly, USDOC provided reasoned and adequate explanations in each determination that the GOT, through OYAK and the TPA, exercised "meaningful control" over Erdemir and Isdemir.

24. Turkey also argues that the evidence cited by USDOC does not support a determination that OYAK is a public body. In arguing that the evidence relied upon by USDOC does not support its examination concerning OYAK, Turkey mainly points to a position paper authored by a law firm, and the GOT's and Borusan's case briefs. Throughout its submission, Turkey presents as objective facts, statements from these non-objective pieces of record evidence.

25. Specifically, in countering the OCTG, HWRP and WLP determinations, Turkey relies on a position paper authored by a law firm that was on the record of the three proceedings. As USDOC explained, however, this position paper was commissioned by OYAK as a result of a report from WYG, a consulting firm, ("WYG Report"), "that OYAK qualified as a public undertaking and that State aid rules are applicable to OYAK's investment decisions." Specifically, the position paper explains that OYAK asked the law firm to "provide assessments of sections of the WYG report" and that its "legal analysis ... should result in rectifying any erroneous statements, especially as to any misrepresentations contained in the WYG report that could potentially be very damaging to OYAK if further relied upon by the Commission." Because the position paper was created for the express purpose of rebutting statements in the WYG report, that is, a report that opined that OYAK was a public undertaking and that State aid rules were applicable to OYAK's investment decisions, *USDOC asked the GOT twice* to submit the referenced WYG report and other documents that this position paper cited. However, the GOT claimed that it could not submit the documents under its confidentiality agreements with the European Union or provide public summaries of their contents.

26. As for the CWP determination, in attempts to undermine USDOC's finding, Turkey points repeatedly to Borusan's case brief in the proceeding. A case brief in a USDOC administrative proceeding, at which point parties are not permitted to submit new record evidence, is simply argument made by an interested party in a proceeding. Moreover, the statements that Turkey has pulled from Borusan's case brief are themselves unsupported by record evidence, and are merely assertions presented by an interested party. Thus, by relying on administrative case briefs and the law firm position paper, Turkey does no more than proffer, in a conclusory manner, its alternative interpretation of the record facts.

27. Turkey argues that USDOC refused to consider evidence that demonstrates that OYAK operates independently of the government, and that Erdemir operates on a commercial basis. However, USDOC considered this information and provided a reasoned and adequate explanation for its rejection. As USDOC explained, "a firm's commercial behavior is not dispositive in determining whether that firm is a government 'authority.'" Specifically, USDOC explained, "this line of argument conflates the issues of the 'financial contribution' being provided by an authority

and 'benefit.'" This reasoning is consistent with the approach taken by dispute settlement panels in prior proceedings, for example, in *Korea – Commercial Vessels (Panel)*. Moreover, this reasoning is supported by the structure of the SCM Agreement. Accordingly, contrary to Turkey's claims, consideration of whether a financial contribution was provided consistent with market principles is not germane to the determination of the existence of a financial contribution, as determined by USDOC.

28. As discussed above, USDOC considered the evidence that was submitted and, taking into account the totality of the evidence before it, came to a different conclusion than that for which Turkey now argues. The Panel should, as the Appellate Body has found previously, "seek to review the [USDOC's] decision on its own terms, in particular, by identifying the inference drawn by [*USDOC*] from the evidence, and then by considering whether the evidence could sustain that inference." For the reasons given above, the Panel should find that USDOC's public body determinations with respect to Erdemir and Isdemir are consistent with Article 1.1(a)(1) of the SCM Agreement.

IV. TURKEY'S CLAIMS UNDER ARTICLE 12.7 OF THE SCM AGREEMENT

29. Article 12.7 provides a Member's authority to make determinations on the basis of the facts available. The extent to which the investigating authority must evaluate the possible "facts available," and the form that evaluation may take, "depend[s] on the particular circumstances of a given case." A non-cooperating party's knowledge of the consequences of failing to provide information can be taken into account by an investigating authority, along with other procedural circumstances in which information is missing, in ascertaining those "facts available" on which to base a determination. "[A]n investigating authority must nevertheless evaluate and reason which of the 'facts available' reasonably replace the missing 'necessary information', with a view to arriving at an accurate determination."

A. USDOC's Application of Facts Available in the OCTG Investigation

30. Turkey argues that USDOC's determination to rely on facts available is inconsistent with Article 12.7 because USDOC allegedly failed to take "due account" of the difficulties Borusan experienced in gathering and reporting the requested information. Turkey claims that USDOC improperly failed to select a "reasonable replacement" for the missing information in light of these difficulties.

31. Turkey's argument is not supported by record evidence. USDOC took due account of Borusan's difficulties in gathering data regarding its HRS purchases, including by granting an extension and by issuing a supplemental questionnaire to allow Borusan to remedy its initial deficient reporting, which permitted Borusan significant additional time to gather such data. USDOC also selected a reasonable replacement for the missing information by relying on the HRS purchase data that Borusan had provided for another of its facilities. Therefore, USDOC's application of facts available was not punitive and fully complied with Article 12.7.

B. USDOC's Application of Facts Available in the WLP Investigation

32. Turkey claims that USDOC acted inconsistently with Article 12.7 because its use of facts available resulted in an inaccurate subsidy calculation that has no factual connection to the programs under investigation. Turkey only included argumentation and evidence in its written submission for two categories of subsidy programs: (1) programs for which USDOC was unable to identify above-zero rates calculated for the same or similar programs in prior Turkish countervailing proceedings, and (2) income tax reduction or elimination programs.

33. For those programs where USDOC was unable to identify above-zero rates for the same or similar programs, USDOC applied the highest calculated subsidy rate for any program in a Turkish countervailing duty proceeding that could be used by Borusan. USDOC appropriately selected this rate as a reasonable replacement for necessary benefit information that was not on the record due to Borusan's failure to cooperate, and specifically excluded any rates from company-specific programs or from programs that would not benefit the industry to which Borusan belongs. USDOC thus sought to arrive at an accurate benefit determination.

34. With respect to the income tax programs, USDOC found that the programs "pertained to either the reduction of income tax paid or the payment of no income tax." USDOC inferred that Borusan had paid no income tax during the period of investigation and determined that the amount of that benefit was 20 percent, the standard income tax rate for corporations in Turkey. USDOC thus acted consistently with Article 12.7, and Turkey has not shown otherwise.

35. Turkey also claims that USDOC acted contrary to its obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 "by applying countervailing duty measures in excess of the amount of subsidization attributable to HWRP [sic]." Turkey's arguments are based upon a flawed understanding of these provisions. Consistent with Article VI:3, Article 19.4 requires that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist." There is no argument by Turkey that any amounts levied have exceeded the subsidy amount calculated. The United States has thus acted consistently with Article 19.4 and Article VI:3 by not applying countervailing duties in excess of the amount of subsidy found to exist by USDOC.

C. USDOC's Application of Facts Available in the HWRP Investigation

36. Turkey argues that USDOC's application of facts available is inconsistent with Article 12.7 because the subsidy rates applied to MMZ and Ozdemir "are not accurate and have no factual connection to the alleged subsidy programs actually investigated." Turkey disagrees with USDOC's selection of the "*highest* subsidy rate for *similar* programs" from other Turkish countervailing duty proceedings.

37. Turkey has provided no evidence or substantive argumentation that the rate USDOC selected for the Deduction from Taxable Income program was determined contrary to Article 12.7. The rate USDOC selected is the *same* rate that USDOC calculated for Ozdemir for the *same* program in the *same* proceeding. With respect to the remaining programs — Provision of Electricity for LTAR and Exemption from Property Tax — USDOC was unable to find a rate for the same programs, and therefore turned to "facts available" for similar subsidy programs. Because the subsidy rate for each program was on a par with identical or similar subsidy programs, the rate is not a punitive one, but instead provides a reasonable estimate of the level of subsidization provided by the government consistent with Article 12.7.

38. Turkey also claims that USDOC acted contrary to its obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 "by applying countervailing duty measures in excess of the amount of subsidization attributable to HWRP." Turkey's arguments are based upon a flawed understanding of these provisions.

39. Consistent with Article VI:3, Article 19.4 requires that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist." There is no argument by Turkey that any amounts levied have exceeded the subsidy amount calculated. The United States has thus acted consistently with Article 19.4 and Article VI:3 by not applying countervailing duties in excess of the amount of subsidy that was found to exist by USDOC.

V. TURKEY'S CLAIMS UNDER ARTICLES 2.1(C) AND 2.4

40. Turkey alleges that USDOC failed to identify or evidence the existence of a "subsidy programme" for the provision of HRS. In *US − Countervailing Measures (China)*, the Appellate Body considered the significance of the term "programme" in paragraph (c) of Article 2.1, and envisioned that a subsidy program, in the form of an unwritten "plan or scheme" could be evidenced by "a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises."

41. Here, the record supports USDOC's determination that the provision of HRS for LTAR is a "subsidy program" in the form of "plan or scheme" through a systematic series of actions. In particular, in each challenged proceeding, the HRS for LTAR subsidy program was first identified in the application submitted by the petitioners, which USDOC found to be substantiated by record evidence. USDOC thereafter determined to investigate the program, including by asking questions of Turkey and other interested parties and reviewing their responses, identified the program in the preliminary determinations, gave all parties the opportunity to comment, and ultimately made a

final determination with respect to the program in each of the cases. Specifically, the respondents provided USDOC with a complete transaction-specific accounting of the provision of HRS for LTAR. USDOC in each proceeding relied on this evidence in identifying the subsidy program alleged by petitioners.

42. Turkey also asserts in its submission that USDOC did not consider in its specificity determination the factors listed in the final sentence of Article 2.1(c). However, Turkey has not even asserted a *prima facie* case of inconsistency, because it fails to explain how USDOC allegedly neglected the factors set out in the third sentence of Article 2.1(c).

43. USDOC took all required factors into account in its specificity determinations. The third sentence of Article 2.1(c) does not impose a purely formalistic requirement. An authority takes a factor into account when it deals or reckons with it. Where these factors are not relevant to the authority's determination, it need not include express discussion of each factor. Rather, an authority satisfies its obligation by implicitly taking into account the factors. Accordingly, previous panels have found that "taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly." Such implicit findings are all the more reasonable where, as here, none of the parties to the countervailing duty proceedings ever argued or suggested that the factors had any bearing on the facts at issue.

44. Here, neither of the two factors identified in the third sentence of Article 2.1(c) was alleged in the proceedings at issue to have any bearing on the specificity inquiries, nor does Turkey point to any such evidence now. Accordingly, USDOC's specificity findings in each of the four challenged determinations are consistent with the SCM Agreement.

VI. TURKEY'S CLAIMS UNDER ARTICLE 15.3 OF THE SCM AGREEMENT

45. Turkey claims that "the ITC has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, *i.e.*, non-subsidized imports," and that this "practice" is inconsistent "as such" with Article 15.3. Turkey argues that this alleged practice should be considered a rule or norm of general application, subject to challenge "as such."

46. "[A] panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document." A "high [evidentiary] threshold" must be reached by a complaining party, who must clearly establish that the alleged "rule or norm" is attributable to the responding Member; its precise content; and that it does have general and prospective application.

47. Turkey's showing falls far short of its burden. First, Turkey states that the alleged "practice" it challenges is *considered by the USITC to be required by U.S. statute*. The statement cited by Turkey from each determination similarly states that "section 771(&)(G)(i) of the Tariff Act requires the Commission" to take certain action. However, Turkey has not challenged that U.S. law. Irrespective of what the U.S. statute may or may not require, Turkey has not alleged, much less demonstrated, that a "practice" autonomous from the U.S. statute exists.

48. Second, Turkey has not proven the content of the alleged practice, much less its existence. Turkey cites only to the specific injury determinations at issue. The fact that USITC cumulated the effects of subsidized and non-subsidized imports in the investigations at issue, however, does not demonstrate "systemic application" or that the alleged practice has "general and prospective application." Furthermore, the statement by the USITC in each determination to which Turkey next specifically refers does not describe the cumulation of subsidized imports and dumped, non-subsidized imports. Rather, the statement says that the relevant statute requires USITC "to cumulate subject imports from all countries as to which petitions were filed ... on the same day, if such imports compete with each other and with the domestic like product in the U.S. market." This statement does not indicate that both subsidized and dumped imports must be cumulated.

49. Finally, under U.S. law a U.S. investigating authority may depart from a practice as long as it explained its reasons for doing so. As the panel in *US − Export Restraints* found, this "prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action."

A. The Cumulation of Dumped and Subsidized Imports In Original Investigations

50. A proper interpretation of a provision of the WTO Agreements "must be made on the basis of a careful examination of the text, context and object and purpose of that provision." Turkey has claimed that USITC's cumulation of imports in the OCTG, WLP, and HWRP investigations is inconsistent with Article 15.3. The burden of proving those claims thus falls on Turkey. Yet Turkey has failed to engage in any analysis of Article 15.3 that would allow that burden to be met. Turkey has provided no interpretation of Article 15.3's text, context, object, or purpose. Instead, Turkey has simply quoted statements made by the Appellate Body in a previous dispute. This is not a sufficient basis upon which to make a legal showing.

51. Even in the absence of argumentation by a party, under DSU Article 11, a panel must satisfy itself that a breach has been made out by application of a covered agreement, properly interpreted, to the facts before it. A proper interpretation reveals that nothing in the text of Article 15.3 prohibits the cumulation of subsidized imports with imports that are dumped. Article 15.3 addresses the conditions under which an authority may cumulatively assess the effects of imports from multiple countries that are found to be subsidized. Article 15.3 does not address — and certainly does not set any prohibition against — an investigating authority conducting a cumulative assessment of the effects on the domestic industry of subsidized imports and dumped imports. In fact, it does not address dumped imports at all. Article 15.3 is *silent* on the issue of whether cumulation of dumped and subsidized is permissible.

52. The fact that Article 15.3 does not specifically authorize an authority to cumulate subsidized imports with imports that are dumped does not, in and of itself, indicate that such an approach is prohibited by the SCM Agreement. Turkey's claim would have the Panel read into Article 15.3 terms that are not there. Such an interpretation is not consistent with proper rules of interpretation, and should therefore be rejected by the Panel.

53. An analysis that focused solely on the injurious effects of either dumped or subsidized imports alone when both types of imports are injuring the industry at the same time would prevent the investigating authority from "adequately tak[ing] into account" the injurious effects of all unfairly traded imports, rendering the authority's injury analysis less than complete. In *US − Oil Country Tubular Goods Sunset Reviews (AB)* and *EC − Tube or Pipe Fittings*, the Appellate Body emphasized that a cumulative assessment of the effects of unfairly traded imports from multiple countries is a critical component of the injury analysis authorized in the AD Agreement. The Appellate Body's reasoning is similarly applicable to a situation where dumped *and* subsidized imports are having a simultaneous injurious impact on an industry. The AD and SCM Agreements contain nearly identical provisions governing an authority's injury analysis, including cumulation, in original investigations. Both contemplate that an authority may consider the cumulative injurious effects of unfairly traded imports from multiple sources, given that these imports can have a cumulative injurious impact on the domestic industry.

54. Turkey, through its reliance on the Appellate Body report in *US − Carbon Steel (India)* alone, would have the Panel read the cumulation provisions of the AD and SCM Agreements "in willful isolation" from each other, resulting in a reading of Article 15.3 that makes little sense in light of the policies underlying the cumulation provisions of each Agreement.

55. Article VI also provides important context for considering the object and purpose of the SCM Agreement and its relationship with the AD Agreement. Article VI:6(a) provides that a Member shall not impose antidumping or countervailing duties "unless it determines that the effect of *dumping or subsidization*, as the case may be, is such as to cause or threaten to cause material injury to an established domestic industry ... ." The phrase "as the case may be" acknowledges that cumulation of dumped and subsidized imports may be appropriate in particular injury investigations.

56. Prohibiting investigating authorities from cross-cumulating, such that the same volume of subsidized imports from a country can be countervailed in some circumstances (where exporters in other countries also happen to be subsidized) but not in others (where the unfairly traded imports from other countries are dumped but not subsidized), will impair the right afforded to Members under the SCM Agreement to countervail injurious subsidized imports. The United States urges the Panel to interpret the SCM Agreement in a way that ensures that the treatment of those imports is consistent under all the applicable provisions of the WTO agreements.

B. The Cumulation of Dumped and Subsidized Imports in Sunset Reviews

57. Turkey's "as such" challenge to USITC's alleged practice of cross-cumulation in sunset reviews must fail because Turkey has not established the existence of a rule or norm of general and prospective application. The alleged practice it challenges *is subject to USITC's discretion*. To succeed in an "as such" challenge, a complainant must show that the application of the measure necessarily leads to WTO inconsistent action. Turkey has made no such showing. Turkey does not claim that the statute itself is inconsistent with the SCM Agreement. Therefore, Turkey must prove its claim that USITC has exercised this discretion "in practice" in a manner that would constitute a "rule or norm" of "general and prospective application." Turkey's reference to the single sunset determination at issue in this dispute is insufficient to do so.

58. Turkey also has failed to show that Article 15.3 prohibited the cumulation of dumped and subsidized imports in the sunset review determination at issue. Review proceedings, including sunset review proceedings, are governed by Article 21 of the SCM Agreement — not Article 15.3. Therefore, Article 15.3 does not apply directly to the review determination at issue.

59. The provisions of the WTO Agreements governing dumping, subsidies, and injury findings in original investigations do *not* apply to an authority's likely injury analysis in sunset reviews. The Appellate Body has expressly rejected claims that the Agreements' specific requirements relating to cumulation in original investigations can be applied directly in sunset reviews.

60. Article 21 of the SCM Agreement does "not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review," nor does it "identify any particular factors that authorities must take into account in making such a determination." Accordingly, the SCM Agreement imposes no specific limitation on an authority's cumulation decisions in a sunset review.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

I. TURKEY'S RESPONSE TO THE U.S. PRELIMINARY RULING REQUEST

61. Turkey attempts to argue in response to the U.S. Preliminary Ruling Request that it identified the injury and benefit "practices" by including the phrase "and related practices" at the end of a description of the challenged measures. This reference to "related practices" is so general that it does not identify any "practices" at issue.

62. Turkey further argues that its "identification of the measures at issue as the United States' preliminary and final countervailing duty measures imposed in the OCTG, WLP, HWRP, and CWP proceedings does not limit Turkey's legal claims to 'as applied' claims." The issue, however, is not that Turkey described its claims with respect to the alleged practices as "as such" claims, but that Turkey failed to identify those alleged measures in its consultations request.

63. With respect to its claims under Article 12.7, Turkey attempts to draw a distinction between the "claims" being asserted and the "arguments put forth by a party in support of its claims." For purposes of DSU Article 6.2, a "claim" refers to an "allegation that the respondent party has violated . . . an identified provision of a particular agreement," whereas "arguments . . . are statements put forth by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision." Here, Turkey *alleged* that the U.S. application of facts available in connection with the Provision of HRS for LTAR breached Article 12.7 of the SCM Agreement. Turkey's *arguments* with respect to that allegation would be any "statements put forth . . . to demonstrate" that the application of facts available in connection

with the Provision of HRS for LTAR did indeed breach Article 12.7. If Turkey had intended to raise legal claims regarding the application of facts available with respect to subsidy programs other than the Provision of HRS for LTAR program, it should have identified those claims in its panel request.

64. By contrast, with respect to the HWRP proceeding, Turkey not only identified two claims under the SCM Agreement "[i]n connection with the alleged Provision of Hot Rolled Steel for Less than Adequate Remuneration," Turkey also raised a separate claim under Article 12.7 regarding the application of facts available "[i]n connection with 'other subsidies' not previously reported to the USDOC." In contrast to the HWRP proceeding, in the WLP proceeding Turkey failed to raise any claims regarding subsidy programs other than the Provision of HRS for LTAR program.

65. Turkey also claims that USDOC's determination to apply facts available in the WLP proceeding was not a "program-specific determination," but was based on respondent Borusan's decision not to participate in verification. However, Turkey's characterization of USDOC's findings regarding Borusan cannot have the effect of curing the deficiencies in its panel request, and does not change the fact that the only claim Turkey raised in its panel request regarding Article 12.7 was with respect to the Provision of HRS for LTAR subsidy program.

66. Turkey also claims that the United States was not "prejudiced" by its deficient panel request. However, the Panel need not make a finding of prejudice to the United States in order to find the additional claims under Article 12.7 to be outside its terms of reference.

67. Regarding the challenge to USDOC's use of benchmarks, Turkey "acknowledges that the USDOC reversed its benefit determination on remand, but disputes that the measures at issue has {sic} ceased to have legal effect." Turkey claims that because of potential subsequent domestic litigation, there was still the possibility that the OCTG remand determination still *could have been* reversed at the time of its panel request. This is both factually inaccurate and legally irrelevant.

68. As a result of the U.S. Court of International Trade sustaining USDOC's remand determination, USDOC issued an amended final determination on March 10, 2016, which effectuated USDOC's remand determination to use in-country benchmarks. On that date, the OCTG final determination with respect to the use of out-of-country benchmarks ceased to have any legal effect. The potential for a subsequent appeal did not alter the legal effect of the amended OCTG final determination, which changed the subsidy rates and served as the legal basis for the collection of cash deposits on entries at the time of the Panel's establishment.

69. If a challenge were permitted based on Turkey's arguments, it would mean that a complainant could equally challenge a countervailing duty order in which no inconsistency was identified or claimed, based on the possibility that a domestic legal challenge to that order might result in an inconsistency at some time in the future. This would lead to absurd results, and is not consistent with a proper interpretation of the DSU.

70. Turkey has also claimed that the OCTG benefit determination "continues to have legal effect because it reflects the USDOC's long-standing practice of rejecting in-country or 'tier one' benchmarks based on evidence of government ownership or control of domestic producers," which Turkey has also attempted to challenge in this dispute. Contrary to Turkey's claims, not only has the United States demonstrated that no such practice exists, Turkey's suggestion that the existence of a "practice" would preserve the legal effect *under U.S. law* of a superseded USDOC countervailing duty determination makes no sense. A U.S. court determined that USDOC's use of out-of-country benchmarks in the OCTG proceeding was *not* consistent with U.S. law, and remanded the determination to USDOC for that reason.

71. Therefore, the United States requests that the Panel find Turkey's claims with respect to USDOC's use of out-of-country benchmarks in the OCTG investigation to be outside the Panel's terms of reference, and to decline to make findings on those claims accordingly.

EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE FIRST SUBSTANTIVE MEETING

U.S. RESPONSE TO PANEL QUESTION 7

72. In its determinations, USDOC did not make a legal finding regarding the status of OYAK for purposes of Article 1.1(a)(1) of the SCM Agreement. Therefore, the U.S. statement concerning USDOC's examination of OYAK "as an organ of the GOT" does not require the Panel to determine whether USDOC's findings with respect to OYAK comply with any legal standard regarding a "government organ" under the SCM Agreement. In making this statement in its first written submission, the United States was distinguishing USDOC's factual assessment of OYAK from the legal standard of "government or any public body" found in Article 1.1(a)(1) of the SCM Agreement. As the United States explained in its first written submission, because USDOC did not determine that a financial contribution was provided by OYAK, there is no legal issue before the Panel with respect to OYAK's status under Article 1.1(a)(1).

73. Instead, USDOC found that Erdemir and Isdemir are public bodies by virtue of the meaningful control exercised over the two entities by the GOT, including, through OYAK. Therefore, the inquiry for the Panel with respect to OYAK is a factual one that must be examined as part of the Panel's analysis of whether USDOC properly found Erdemir and Isdemir to be public bodies within the meaning of Article 1.1(a)(1).

74. The text of Article 1.1(a)(1) does not define "government or any public body within the territory of a Member," nor does it prescribe the relationship between these two types of entities. The United States has explained that a proper interpretation of the text, in context, demonstrates that a public body is any entity that has the ability or authority to transfer government financial resources, including, for example, because that entity is meaningfully controlled by the government. The Appellate Body also has found that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions" such that the entity could be deemed a "public body" under Article 1.1(a)(1).

75. USDOC having found the GOT's meaningful control through OYAK of Erdemir and Isdemir (which were then found to be "public bodies"), the inquiry before the Panel with respect to OYAK is whether OYAK was found as a matter of fact to be capable of exercising meaningful control over Erdemir and Isdemir, such that the controlled entities would be public bodies within the meaning of Article 1.1(a)(1). Nothing in the text of that provision, or in the interpretations described above, suggests that only a particular type of governmental entity, such as a government "organ," could exercise such control over another entity. Rather, the characteristics of such an entity might be consistent with those of a government "organ" or "agency," or they might be consistent with those of a "public body," for example, or any other "governmental" entity.

76. While no legal standard under the SCM Agreement would apply to USDOC's findings with respect to OYAK, the Panel may find relevant to its factual assessment of OYAK's status in Turkey the characteristics examined by other panels or the Appellate Body with respect to "government," "public body," and other governmental entities in other contexts. As discussed, the record evidence concerning OYAK before USDOC exhibits the attributes associated with "government" in this broader sense. Therefore, this record evidence provided a sufficient factual basis for USDOC to examine OYAK as an entity through which the GOT meaningfully controlled Erdemir and Isdemir, and supported its determination that Erdemir and Isdemir are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement.

U.S. RESPONSE TO PANEL QUESTION 59

77. There is no provision in the DSU or the covered agreements that establishes a system of "case-law" or "precedent," or otherwise requires that a panel apply the provisions of the covered agreements consistently with the adopted findings of the Appellate Body absent "cogent reasons" to depart from those findings. Indeed, were a panel to decide to apply the reasoning in prior Appellate Body reports alone, and decline to fulfill its duty under Article 11 to make an objective assessment of the matter before it, the panel would risk creating additional obligations for

Members that are beyond what has been provided for in the covered agreements − an act strictly prohibited under Article 3.2.

78. To the extent a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel of course may rely on that reasoning in conducting its own objective assessment of the matter. But that is very different from a conclusion that the interpretation is *controlling* in a later dispute. To say that an Appellate Body interpretation in one dispute is controlling for later disputes would appear to convert that interpretation into an authoritative interpretation of the covered agreement.

79. Such an approach would directly contradict the agreed text of the Marrakesh Agreement, which provides in Article IX:2 that: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." The DSU confirms that panel and Appellate Body reports do not set out authoritative interpretations in Article 3.9.

80. The Appellate Body itself has recognized that prior reports may not bind future adjudicators in its report in *Japan − Alcohol*. According to the Appellate Body, a *negative* consensus report adoption procedure *by the DSB* cannot supplant the "exclusive authority" of *the Ministerial Conference and the General Council* to adopt, by *positive* consensus, an "authoritative interpretation" of a covered agreement, as explicitly established in DSU Article 3.9 and WTO Agreement Article IX:2.

81. The United States refers the Panel to its first written submission, in which it set out a proper interpretation of the text of Article 15.3 of the SCM Agreement in accordance with the ordinary meaning of the text, in context, and in the light of the object and purpose of the SCM Agreement. If the Panel agrees that a proper interpretation of that provision leads to a different conclusion regarding whether "cross-cumulation" is prohibited under Article 15.3 in original investigations, that would provide all the reason the Panel needs not to concur with the interpretation in *US − Carbon Steel (India) (AB)*.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. PRELIMINARY RULING REQUEST

A. Turkey's Panel Request Adds Measures and Claims that Were Not the Subject of Consultations

1. In its responses to the Panel's questions, Turkey argues that Section A of its consultation request, including its reference to "related practices," is "sufficient to establish that Turkey's challenges extend beyond the preliminary and final countervailing duty determinations in the OCTG, WLP, HWRP, and CWP proceedings." Turkey further argues that "panels have found there to be a 'natural evolution' of claims where there is 'some connection' between the claims set forth in the panel request and those identified in the request for consultations" and that the claims in its panel request regarding the United States' alleged injury and benefit practices are "clearly connected" to the claims in its consultation request.

2. However, Turkey's "some connection" argument has almost no limit, and would effectively read out the consultation requirement in DSU Article 4. Perhaps for this reason, in none of the disputes cited to by Turkey had the complainant failed to identify the measure at issue in its consultations request altogether. Since Turkey failed to identify the measures at issue in its consultation request, the addition of these new measures in its panel request cannot be a "natural evolution" from its consultation request. There is nothing in Turkey's consultation request for these measures to "evolve" *from*.

3. Turkey argues that "the obligation to identify a specific countervailing measure at issue in a consultations or panel request does not limit the nature of the claims that may be brought concerning those measures to 'as applied' claims," but this argument is equally unavailing. The issue is not that Turkey set out "as such" claims with respect to the alleged practices in its panel request, but that Turkey failed to identify those alleged measures in its consultations request altogether. The obligation, and opportunity, to consult is a requirement of DSU Article 4 and is designed to promote the resolution of disputes. By including new measures and corresponding claims in its panel request that were not the subject of its consultations request, Turkey has ignored a DSU requirement and expanded the scope of the dispute in contravention of the DSU.

4. Turkey has impermissibly expanded the scope and changed the essence of the dispute, contrary to DSU Article 4.4, and thus its challenges to alleged U.S. injury and benefit practices, as well as its "as such" claims with respect to those practices, fall outside the Panel's terms of reference.

B. Turkey's First Written Submission Improperly Included Claims that Are Not Within the Panel's Terms of Reference

5. Turkey's request for establishment of a panel limited its claims under Article 12.7 of the SCM Agreement with respect to the WLP investigation to a single subsidy program: the Provision of Hot-Rolled Steel (HRS) for Less Than Adequate Remuneration (LTAR). However, Turkey's written submission includes a number of new claims regarding USDOC's application of facts available that were not identified in its panel request.

6. Turkey argues that the United States was "sufficiently notified" of the legal basis of Turkey's claim and that the United States' "due process" rights were only affected to a limited extent. Turkey also argues that the United States "could have asked for clarification following Turkey's request for the establishment of a panel" or "for an extension of time so as to have sufficient time to prepare its responses" to Turkey's first written submission. However, Turkey's arguments in this respect are not relevant to the Panel's analysis under DSU Article 6.2. Article 6.2 requires two elements; if either of these two elements is not properly identified, the matter would not be

within the panel's terms of reference. Moreover, compliance with the requirements of Article 6.2 "must be objectively determined on the basis of the panel request as it existed at the time of filing" and be "demonstrated on the face" of the panel request. Thus, the Panel need not make a finding of whether the United States was "sufficiently notified" or the extent to which its "due process rights" were affected in order to find the additional claims under Article 12.7 to be outside its terms of reference.

7. In addition, it is simply incorrect that the United States was "sufficiently notified" of Turkey's claims. In fact, the US had no notice or opportunity to begin preparing a defense with respect to the 29 additional subsidy programs, because Turkey failed to raise any legal claims in its panel request with respect to those programs. Nor would the United States have had any reason to ask for "clarification" regarding the scope of Turkey's panel request. The panel request was clear on its face; the United States had no reason to suspect that Turkey would subsequently challenge 29 additional subsidy programs in its first written submission.

8. Turkey argues that "USDOC's determination to apply adverse facts available with regard to Borusan in the WLP proceeding was not a program-specific determination," but was based on Borusan's decision to not participate in verification. However, USDOC engaged in separate fact-finding and legal determinations with respect to each of the 30 subsidy programs at issue in that proceeding. Turkey's decision to identify only one subsidy program in its panel request, and then raise claims regarding the remaining 29 programs in its written submission, has placed the United States at a distinct disadvantage in this proceeding.

C. The Benchmark Measure Challenged by Turkey Ceased to Have Legal Effect Prior to The Date of The Panel's Establishment

9. Turkey's challenge under Articles 1.1(b) and 14(d) of the SCM Agreement falls outside the Panel's terms of reference because the out-of-country benchmark and benefit determination in the OCTG final determination ceased to exist and have legal effect at least 15 months prior to the date of the Panel's establishment.

10. In its response to the United States' preliminary ruling request, Turkey argues that the Appellate Body in *EC − Selected Customs Matters* "has also recognized two exceptions to the general requirement that measures must be in force at the time of establishment of the panel: where a measure is enacted subsequently or expires prior to establishment of the panel." Turkey explains that the latter "exception" was recognized by the Appellate Body in *US − Upland Cotton.*

11. The Appellate Body's findings in *US − Upland Cotton*, however, are not applicable to this dispute. In *US − Upland Cotton*, the issue was whether two subsidy measures (i.e., contract payments) could be within the panel's terms of reference if the legislative basis for those measures had expired prior to the panel's establishment. The situation before this Panel is very different. The OCTG final determination in which USDOC used an out-of-country benchmark was successfully challenged by Turkish respondents at the U.S. Court of International Trade (USCIT), was remanded to USDOC, and was subsequently reversed by USDOC with regard to benefit in the OCTG remand determination. USDOC issued an amended final determination on March 10, 2016, which effectuated USDOC's remand determination to use in-country benchmarks. On that date, the OCTG final determination ceased to exist and have any legal effect with respect to the use of out-of-country benchmarks.

12. Therefore, Turkey cannot demonstrate that the benchmark and benefit determination in the OCTG final determination had effects that were "impairing the benefits accruing to it" at the time of the Panel's establishment. Once the amended OCTG final determination was issued on March 10, 2016, it changed the subsidy rates and served as the legal basis for the collection of cash deposits on entries.

13. Turkey disputes that the original OCTG benefit determination ceased to have legal effect by claiming that "there was a possibility that USDOC's remand determination would be reversed, and that the original benefit determined reinstated." However, that legal action in U.S. courts might have caused USDOC to further amend the duty rates, or to alter the legal basis of those rates, at a later date, does not mean that the superseded determination continued to have legal effect. Moreover, if a challenge were permitted based on Turkey's arguments, it would mean that a

complainant could equally challenge a countervailing duty order in which no inconsistency was identified or claimed, based on the possibility that a domestic legal challenge to that order might result in an inconsistency at some time in the future. This would lead to absurd results, and is not consistent with a proper interpretation of the DSU.

14. Turkey argues that "although the benefit determination in the OCTG proceeding which resulted in the imposition of countervailing duties may have been superseded by the remand determination, the basic legislative framework and implementing regulations that gives rise to the United States' practice of rejecting in-country benchmarks in benefit determinations based on evidence of government ownership or control remains in place." To the extent Turkey now attempts to challenge the "basic legislative framework and implementing regulations that gives rise to the United States' practice," such a claim is outside the Panel's terms of reference.

II. TURKEY'S "AS SUCH" CHALLENGE UNDER ARTICLES 1.1(B) AND 14(D)

15. Turkey, in its responses to the Panel's questions, presents new evidence relating to 28 USDOC determinations purportedly demonstrating the existence of a "practice" that is a rule or norm, which necessarily led to WTO-inconsistent action on the part of USDOC. The Panel should reject Turkey's new evidence because it is untimely and contrary to the Panel's Working Procedures. Having failed to make its affirmative case in its first written submission, or even during the first Panel meeting, that such a "practice" exists, Turkey should not be permitted to make such a case at this late stage of the panel proceedings when the parties are to present rebuttal evidence, or evidence necessary for purposes of answering clarifying questions.

16. In addition to being untimely, Turkey also fails to attempt to explain how the newly added 28 determinations establish that USDOC had a practice at the time of the Panel's establishment that constitutes a rule or norm of general and prospective application. In its response to Panel Question 34, Turkey merely lists the titles of these 28 determinations, without more. Turkey does not identify which of the subsidy program analyses included in each of the determinations is alleged to support its claims, or even include a page number or section heading in its footnotes.

17. Turkey apparently considers that it is sufficient for it to submit these determinations as exhibits, and leave it to the Panel to review and analyze them on its own. A panel is not to make an affirmative case for a party through its own review of evidence, not based on the party's own claims and arguments. The Appellate Body similarly found in *Canada − Wheat* and *US-Gambling* that a complainant cannot succeed in making a *prima facie* case by submitting evidence without explaining how its content is relevant to the claims before the panel. The Panel should thus not examine this evidence further.

18. The United States also notes that the determinations fail to support Turkey's claim regarding the existence of the alleged practice at the time of the Panel's establishment, which necessarily led to WTO-inconsistent action on the part of USDOC. First, of the 28 determinations listed, 23 of the determinations could not assist in establishing a practice existing at the time of the Panel's establishment. Turkey cannot succeed in its challenge by demonstrating that USDOC had, *prior to* the date of the Panel's establishment, a practice regarding the use of out-of-country benchmarks. And, to the extent that Turkey could show that such a practice previously existed − which it has not − the United States has demonstrated no such practice existed at the time of the Panel's establishment, as evidenced by the HWRP, CWP, and WLP determinations at issue in this dispute, by other determinations that post-date these determinations, as well as the decision of the USCIT in the *Borusan* case.

19. Second, the five remaining determinations are not sufficient to demonstrate the existence of a rule or norm, and in any event, in fact contain findings by USDOC demonstrating that no such rule or norm exists. For example, some of the listed determinations are actually examples of where USDOC did *not* use out-of-country benchmarks. Other determinations listed by Turkey demonstrate that when USDOC uses an out-of-country benchmark, such findings are not based solely on evidence concerning the government constituting a majority or substantial portion of the market. Therefore, the new evidence provided by Turkey fails to support its claim.

III. TURKEY'S ARTICLE 1.1(A)(1) CLAIMS

20. As the United States has explained, Turkey's claim with respect to OYAK must fail because the requirements of Article 1.1(a)(1) of the SCM Agreement do not apply to USDOC's analysis of OYAK. Turkey argues that, although USDOC "did not explicitly refer to OYAK as a public body," "it is clear from the overall analysis that the USDOC analyzed OYAK under its standard for 'public body,' and not as a 'government organ' or part of the [GOT] in some other way." Turkey misses the point in suggesting that the use of particular terminology in a domestic determination can convert a factual finding into a legal finding for purposes of WTO dispute settlement. USDOC did not need to make a finding regarding whether OYAK was a public body under Article 1.1(a)(1), and none of Turkey's arguments change that fact.

21. Moreover, because Turkey's arguments concerning OYAK are raised separately from its challenge against USDOC's determinations concerning Erdemir and Isdemir, the Panel should decline to review Turkey's OYAK arguments because they are made on an independent basis.

22. However, for completeness, to the extent that the Panel considers Turkey's arguments concerning OYAK to be understood as a basis of its challenge against USDOC's determinations concerning Erdemir and Isdemir, the Panel could examine whether USDOC's factual findings regarding the relationship between the GOT and OYAK, and the relationship between OYAK and Erdemir and Isdemir, support USDOC's legal determination that Erdemir and Isdemir are public bodies for purposes of Article 1.1(a)(1) of the SCM Agreement.

23. In its previous submissions, the United States explained that USDOC determined Erdemir and Isdemir to be public bodies based on numerous considerations. Throughout this dispute, however, Turkey has attempted to draw the Panel away from its standard of review and from considering the totality of the record evidence, as USDOC did. Rather, Turkey isolates specific facts and assertions on the record of the proceedings, and continues to make assertions that rely on secondary non-objective material on the record, that is, a law firm position paper and case briefs from interested parties. Thus, in arguing that USDOC's determinations are inconsistent with the SCM Agreement, Turkey merely offers its own interpretation of the record, and seeks for the Panel to conduct a *de novo* review. However, a panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action." Accordingly, "in order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the agency from the evidence, and then by considering whether the evidence could sustain that inference." Thus, the inquiry for the Panel is whether an unbiased and objective investigating authority could have determined Erdemir and Isdemir to be public bodies based on the totality of the record evidence before it.

24. A close examination of the arguments that Turkey has continued to make since its first written submission demonstrates that Turkey fails to engage with or undermine USDOC's examination of the totality of the record evidence. Many of the arguments are either premised on secondary non-objective material from the record, or are simply unsupported. Other arguments are premised on the isolation of a sentence pulled from the record, where Turkey thereby attempts to shield that sentence from the remainder of the record, which USDOC considered in totality.

25. Indeed, in contrast to Turkey's presentation of isolated record facts, USDOC weighed the totality of the record evidence. Turkey has therefore failed to demonstrate that an unbiased and objective investigating authority, when faced with the totality of the record evidence, could not have examined OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir, such that Erdemir and Isdemir could be found to be public bodies within the meaning of Article 1.1(a)(1).

26. Turkey claims that USDOC's public body determinations concerning Erdemir and Isdemir are inconsistent with Article 1.1(a)(1) because USDOC "refused to consider evidence regarding their commercial conduct." Turkey errs in suggesting that evidence of commercial, profit-maximizing behavior precludes a finding that an entity is controlled by the government. To the contrary, while such evidence may be relevant to an investigating authority's determination, nothing in Article 1.1 suggests that, where meaningful control by the government is otherwise demonstrated, a public body cannot also exhibit commercial behavior.

27. Turkey argues that "evidence of an entity's corporate governance framework, policies and procedures that make it accountable to shareholders or members and require it to pursue commercial, profit-maximizing strategies, and external audit requirements are highly relevant to whether that entity is a public body." The United States agrees that such evidence may be relevant to an investigating authority's analysis. However, Turkey appears to equate a company exhibiting commercial, profit-maximizing behavior with a company operating independently and/or autonomously from the government. It is not the case, however, that either a government, or a government-controlled entity, cannot act in a commercial manner. Moreover, when viewed in light of the totality of the evidence, as USDOC did, the information cited by Turkey purporting to show "commercial conduct" does not undermine USDOC's finding that GOT meaningfully controlled Erdemir and Isdemir.

28. Therefore, Turkey has failed to demonstrate that an objective and unbiased investigating authority, after examining the totality of the record evidence, could not have determined that the GOT exercised meaningful control over Erdemir and Isdemir, such that the two entities are public bodies within the meaning of Article 1.1(a)(1).

IV. TURKEY'S CLAIMS UNDER ARTICLE 12.7 OF THE SCM AGREEMENT

A. USDOC's Application of Facts Available in the OCTG Investigation

29. Turkey has clarified that its claims relate only to USDOC's "selection" of facts available, and do not include either USDOC's decision to resort to the use of facts available or whether the information requested by USDOC was "necessary" within the meaning of Article 12.7. In short, Turkey does not challenge USDOC's determination that Borusan failed to provide "necessary information," that this failure significantly impeded USDOC's investigation, and that the use of facts available was therefore warranted. Thus, it is undisputed that by failing to provide the requested information, Borusan hindered USDOC's ability to calculate the subsidy from the Provision of HRS for LTAR program.

30. Turkey's argument that "USDOC should have considered whether Borusan's failure to provide requested information was attributable to resource constraints, ... and therefore whether it would have been reasonable to use the data which Borusan provided on its hot rolled steel purchases for the Gemlik mill to approximate the missing information or to ask Borusan to provide the missing information in a different form" is perplexing. USDOC did consider Borusan's "resource constraints," including when it granted Borusan's extension of time to respond to the initial questionnaire. In addition, USDOC did use the data Borusan provided on its HRS purchases for the Gemlik mill to approximate the missing information for the Halkali and Izmit mills. Finally, Turkey's suggestion that USDOC could have asked Borusan to provide the missing information in a different form is pure speculation. Turkey has cited to no evidence that USDOC requested the data in a "form" that was problematic, or that a "different form" would have resolved Borusan's claimed difficulties.

31. Turkey claims that USDOC acted inconsistently with Article 12.7 because it "relied on only a part of the evidence provided by Borusan – *e.g.*, only the lowest price on the record for the Gemlik mill's hot rolled steel purchases from Erdemir and Isdemir." However, Turkey has failed to explain, much less provide evidence, that its suggested approaches would provide a more accurate determination of the missing purchase data than the method used by USDOC.

32. In this case, USDOC selected a reasonable replacement for the missing information by relying on the HRS purchase data that Borusan had provided for its Gemlik facility, as well as data provided by Borusan regarding the respective production capacities of the Halkali and Izmit mills. Moreover, Turkey has pointed to no evidence on the record that contradicted or raised questions about this data or its reasonableness as a replacement for the missing information. Since an "unbiased and objective" investigating authority could have found the chosen HRS price and quantity data to be a reasonable replacement for the missing information, there is no basis for the Panel to overturn that assessment.

B. USDOC's Application of Facts Available in the WLP Investigation

33. In response to the Panel's written questions after the first Panel meeting, Turkey has dramatically expanded the scope of its arguments under Article 12.7 with respect to the WLP investigation. In response to Question 49, Turkey sets forth a bullet-point list individually challenging USDOC's application of facts available with respect to 27 of the subsidy programs at issue in the WLP investigation: the original 13 programs that it challenged in its first written submission, as well as 14 additional programs that have never previously been addressed by Turkey under Article 12.7. The Panel should reject Turkey's attempt to challenge these 14 subsidy programs.

34. Turkey's belated introduction of new arguments and evidence is contrary to the Panel's Working Procedures and basic procedural fairness as it impairs the United States' ability to defend its interests. Turkey was well aware of these 14 programs at the time it filed its first written submission, and (assuming it had properly raised these claims in its panel request) it could have included a substantive challenge of USDOC's application of facts available with respect to those programs in that submission. The Panel should reject Turkey's attempt to bring such claims now.

35. Finally, the United States notes that for three of the subsidy programs at issue − including the Provision of HRS for LTAR program − Turkey still has provided *no* substantive argumentation or analysis. Turkey has clarified that its claims under Article 12.7 "relate[] specifically to the USDOC's *selection* of facts available" − namely, USDOC's selection of facts available to calculate subsidy rates for each of the programs at issue. Since Turkey's claims relate specifically to USDOC's selection of facts available − a necessarily program-specific determination − Turkey has failed to meet its burden of proof with respect to the three programs for which it has provided *no* substantive arguments regarding how USDOC's determination of a subsidy rate for those programs based on facts available is allegedly inconsistent with Article 12.7.

36. Moreover, as detailed in the United States' Preliminary Ruling Request, Turkey's panel request limited its claims under Article 12.7 with respect to the WLP investigation to the Provision of HRS for LTAR program only. Since Turkey has opted not to raise *any* substantive arguments in any of its submissions with respect to the Provision of HRS for LTAR program, Turkey has not properly raised any claims under Article 12.7, and thus the Panel should not make any findings in relation to these claims.

37. In the interest of completeness, the United States briefly comments on Turkey's newly-raised arguments and demonstrates that they lack any substantive merit. Although Turkey appears to challenge USDOC's use of the "highest" possible rates, it has provided no argumentation or evidence that these rates are not a reasonable replacement for necessary information missing from the record.

38. Second, with respect to 27 programs, Turkey asserts that "while Borusan declined to participate in verification, the USDOC did verify the Government of Turkey's responses, which confirmed Borusan's own responses regarding its use or non-use of the investigated subsidy programs." However, because Borusan refused to participate in verification, USDOC did not verify the Government of Turkey's responses with respect to Borusan.

39. Third, Turkey's response to Panel Question 49 includes new, program-specific argumentation regarding USDOC's application of facts available with respect to 27 of the individual subsidy programs at issue in the WLP proceeding. However, Turkey's references mischaracterize the Government of Turkey's questionnaire response regarding certain subsidy programs or fail to mention key pieces of information with respect to USDOC's selection of facts available to replace missing necessary information.

40. Fourth, Turkey claims that USDOC's resulting subsidy determination "cannot be described as 'accurate' because there is no connection between the allegedly missing 'necessary information' and the rates selected by the USDOC as 'facts available.'" However, Turkey has pointed to no evidence on the record to suggest that the rates chosen by USDOC were not accurate, or that other information on the record would have been more appropriate for use because it was more accurate. And in fact, for each subsidy program, USDOC's calculation of the subsidy rates was based on information provided by cooperating companies in the same or other Turkish

countervailing duty investigations. The chosen rates reflect the actual subsidy practices of the Turkish government as reflected in the actual experiences of companies in Turkey, including Borusan's fellow respondent in the WLP investigation, and thus serve as a "reasonable replacement" for information that was missing from the record. Turkey has therefore failed to demonstrate that USDOC's application of facts available is inconsistent with Article 12.7.

C. USDOC's Application of Facts Available in the HWRP Investigation

41. Turkey's claims with respect to USDOC's application of facts available in the HWRP investigation are without merit. Because the subsidy rate calculated for each of the three HWRP programs challenged by Turkey was on a par with identical or similar subsidy programs, these rates were not punitive, but instead provided a reasonable estimate of the level of subsidization provided by the government, that an objective and unbiased investigative authority could have determined to use, as USDOC did.

V. TURKEY'S CLAIMS UNDER ARTICLES 2.1(C) AND 2.4

42. Turkey has confused the inquiry by claiming that "the United States argues that a 'series of transactions for the provision of [hot rolled steel] for [less than adequate remuneration]' is sufficient to demonstrate a subsidy 'plan' or scheme.'" USDOC's determinations were based on *both* the transaction-specific accountings of the provision of HRS for LTAR provided by the respondent parties *and* statements in Erdemir's 2012 and 2013 Annual Reports indicating that its actions furthered the promotion of export-oriented production consistent with GOT policy as set out in Turkey's 2012-2014 Medium Term Programme. Thus, Turkey's arguments that USDOC relied only on a list of transactions to demonstrate the existence of a subsidy program are misplaced.

43. Next, in the determinations at issue, USDOC took account of the extent of diversification of economic activities within Turkey and the length of time during which the HRS subsidy program had been in operation. With respect to the length of time factor, USDOC examined Erdemir's 2012 and 2013 Annual Reports, and in each proceeding requested and received from the GOT information regarding the production and provision of HRS for not only the period of investigation, but also the preceding two years, which demonstrated that the program usage data for the period of investigation was not anomalous in comparison to data for past years. With respect to the extent of diversification factor, USDOC took into account this factor when it considered and discussed the Medium Term Programme and Erdemir's 2012 and 2013 Annual Reports, which reflected the publicly known fact of Turkey's highly diversified economy.

44. The lack of any explicit findings with respect to the two factors is both reasonable and appropriate where, as here, none of the parties to the countervailing duty proceedings ever argued or suggested that the factors had any bearing on the facts at issue. This is also relevant to the Panel's assessment, as it reaffirms the United States' position that there were no facts on the record that call into question the soundness of USDOC's specificity findings.

VI. TURKEY'S CLAIMS UNDER ARTICLE 15.3 OF THE SCM AGREEMENT

45. Turkey's claims regarding cumulation in the context of original investigations under Article 15.3 of the SCM Agreement must fail. Not only has Turkey failed to demonstrate that a "practice" regarding cumulation exists, but Turkey is wrong that Article 15.3 prohibits the cumulation of dumped and subsidized imports.

46. Turkey has challenged USITC's alleged practice of cumulating dumped and subsidized imports in original investigations as a rule or norm of general and prospective application. In such a case, there is a "high [evidentiary] threshold" that must be reached by the complaining party. Turkey must not only show that the alleged "rule or norm" is attributable to the United States, but must establish its precise content, and that it has general and prospective application.

47. Turkey's showing with respect to USITC's alleged "practice" in original investigations has fallen far short of its burden. In support of its claim, Turkey's first written submission pointed to the three original injury determinations at issue in this dispute. However, as the United States explained in its previous submissions, the fact that USITC cumulated the effects of subsidized and

non-subsidized imports in the investigations at issue does not demonstrate that the alleged practice has been "systemic[ally] appli[ed]" or that it has general and prospective application. Moreover, the fact that an investigating authority may have employed a practice in the past "would not be sufficient to accord such a practice an independent operational existence."

48. In light of the United States' arguments, Turkey in its responses to Panel questions presents additional injury determinations which it argues provide further evidence of the existence of a practice. The Panel should reject Turkey's evidence because it is both untimely and unpersuasive. Permitting Turkey to introduce new evidence at this late stage is contrary to the Working Procedures adopted by the Panel and to procedural fairness and the orderly resolution of this dispute.

49. Further, Turkey bears the burden of proving that USITC's cumulation of imports in the OCTG, WLP, and HWRP investigations is inconsistent with Article 15.3. Yet Turkey has failed to engage in any analysis of Article 15.3 that would allow that burden to be met. It has provided no interpretation of the text, in context, of Article 15.3, or of the object and purpose of the SCM Agreement. Turkey has simply quoted statements made by the Appellate Body in a previous dispute, but this is not a sufficient basis upon which to make a legal showing. Under DSU Article 11, a panel must make an "objective assessment" of the matter before it, and that a breach has been made out by application of a covered agreement, properly interpreted, to the facts before it. Turkey has failed to provide the Panel with any argumentation that would allow the Panel to engage in such an interpretation, and its claims thus must fail.

50. Moreover, a proper interpretation of Article 15.3 reveals that nothing in the text of that provision prohibits the cumulation of subsidized imports with imports that are dumped. Article 15.3 addresses the conditions under which an authority may cumulatively assess the effects of imports from multiple countries that are found to be subsidized. Article 15.3 does not address − or set any prohibition against − an investigating authority conducting a cumulative assessment of the effects on the domestic industry of subsidized imports and dumped, non-subsidized imports. Article 15.3 is silent on this issue, and silence cannot be read as a prohibition. Both the purpose of the cumulation provisions of the AD and SCM Agreements and relevant context support the proposition that cumulation of dumped and subsidized imports is consistent with the WTO Agreements.

51. Turkey's "as such" challenge to USITC's alleged practice of cross-cumulation in sunset reviews also must fail because Turkey has not established the existence of a rule or norm of general and prospective application. To succeed in an "as such" challenge to any measure, a complainant must also show that the application of the measure necessarily leads to WTO-inconsistent action. Turkey has made no such showing. First, Turkey itself acknowledges that USITC has discretion in electing whether or not to cumulate in five-year reviews and does not argue that USITC is required to cumulate in the context of sunset reviews. Second, it cited to no evidence in its first written submission, other than the sunset determination in the CWP proceeding. Evidence that USITC has exercised its discretion to cumulate on one occasion does not demonstrate the existence of a measure, much less that the alleged practice necessarily leads to WTO-inconsistent action.

52. In its responses to Panel questions, Turkey erroneously asserts that the ITC always cross-cumulates subsidized and non-subsidized imports in reviews, despite its discretion not to do so, if the other conditions for cumulation are satisfied. In actuality, in sunset reviews, USITC decides on a case-by-case basis whether to cumulate subject imports, largely on the basis of whether or not subject imports compete under similar conditions of competition. This examination of the conditions of competition is a separate, distinct, and additional analytic step from the question of whether imports are likely to compete with each other or with the domestic like product in the U.S. market. Turkey's listing of cases in its response to the Panel's questions does not cure Turkey's failure to provide sufficient evidence to demonstrate the content or existence of the alleged "practice" it challenges, or that the "practice" constitutes a rule or norm of general and prospective application.

53. Turkey has also failed to show that Article 15.3 prohibits the cumulation of dumped and subsidized imports in the context of sunset reviews. Sunset review proceedings are governed by Article 21, and not by Article 15.3, of the SCM Agreement. In fact, the Appellate Body has expressly rejected claims that the SCM and AD Agreements' specific requirements relating to cumulation in original investigations can be applied directly in sunset reviews.

54. Turkey offers no textual support for its position that Article 15.3 prohibits cross-cumulation in sunset reviews. Turkey's reliance on the object and purpose of the SCM Agreement, and its contention that cross-cumulation, whether in investigations or reviews, is inconsistent with this object and purpose, fails. The object and purpose of an agreement cannot have the effect of changing the text of that agreement.

55. Turkey also relies on the negotiating history of the SCM Agreement to support its argument that cross-cumulation is prohibited in reviews. Recourse to supplementary means of interpretation is not warranted, since the meaning of Articles 15 and 21 is clear. However, even if the use of supplementary means of interpretation were warranted, the negotiating history of the SCM Agreement does not support Turkey's position. In particular, Turkey has not pointed to any mention at all in the negotiating history of the issue here − cumulation in the context of sunset reviews − and therefore Turkey's entire discussion is inapposite.

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

I. TURKEY'S CHALLENGE TO USDOC'S PUBLIC BODY DETERMINATIONS

56. We note Turkey's argument that the United States has engaged in a "*post hoc*" defense. In making this argument, Turkey appears to suggest that where, for example, USDOC referred to specific language in a record document, its review of that document must be understood as having been limited to that language only, such that the Panel should find that USDOC otherwise did not examine or rely on that document in making its determination. Turkey's position is untenable and without any basis in the SCM Agreement or the DSU. An investigating authority is not required to cite or discuss, down to the word, every piece of supporting record evidence for each factual finding in its determination.

II. TURKEY'S CHALLENGE TO USDOC'S SPECIFICITY DETERMINATIONS

57. Turkey continues to suggest that the finding of a subsidy program was based on "a list of transactions, some of which are above and some of which are below a benchmark price." Turkey argues that such a series of transactions is not positive evidence of a systematic series of actions, let alone a plan or scheme because "the frequency or number of transactions that provide a subsidy may be relevant evidence of an underlying 'plan or scheme,' but is not, in and of itself, sufficient evidence."

58. Turkey's arguments are wrong on both a factual and a legal basis. Factually, it is the two findings *in conjunction* − the repeated provision of hot-rolled steel for less than adequate remuneration, and its provision in accordance with stated GOT policy − that formed the basis of USDOC's finding that a "subsidy programme" existed.

59. Legally, Turkey's arguments also reflect a misunderstanding of the text of Article 2.1, as well as the findings of the Appellate Body on which it relies. In *US − Countervailing Measures (China)*, the Appellate Body recognized, the inquiry under "Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*." Thus, the only remaining question is whether the contribution and benefit were provided "pursuant to" "a systematic series of actions." Contrary to Turkey's claim then, a "systematic series of actions" need not consist entirely of acts of subsidization; rather, the subsidy in question must be provided "pursuant to" a series of actions that qualifies as a "program." The identification of a plan or scheme *pursuant to which* the subsidies in question are provided serves a particular purpose in this context because, in an analysis of *de facto* specificity, it is not the financial contribution or benefit that is in question, but rather "whether there are reasons to believe that a subsidy is, in fact, specific, even though there is no explicit limitation of access to the subsidy set out in [law]." As the Appellate Body observed, systematic activity or a series of activities may be evidence of an unwritten subsidy program.

60. Turkey's arguments that USDOC did not consider the two factors in Article 2.1(c) are equally unavailing. Turkey claims that the evidence presented by the United States is *post hoc*. However, where the path of an investigating authority's determination is reasonably discernable, an adjudicator should meet with that reasoning rather than avoid it on the basis of form. This

principle is apparent in past cases. For example, the panels in *US − Softwood Lumber IV* and *EC − Countervailing Measures on DRAM Chips* both upheld the investigating authority's consideration of the factors provided in the final sentence of Article 2.1(c) where such consideration was implicit. Likewise, in *US − DRAMS*, the Appellate Body found that an investigating authority need not cite or discuss every piece of record evidence supporting its conclusion.

61. Here, USDOC explicitly discussed the evidence demonstrating the two factors in its determination. Having done so, and without these issues having been raised by any interested party in the investigation in the context of specificity, the Panel should find that USDOC took the two factors identified in Article 2.1(c) into account in making its specificity determination.

EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING

U.S. RESPONSE TO PANEL QUESTION 64

62. The Appellate Body in *US − Carbon Steel (India)* further stated that "a government's exercise of 'meaningful control' over an entity and its conduct, includ[es] control such that the government can use the entity's resources as its own." Thus, the Appellate Body has recognized that a government's exercise of meaningful control includes evidence that "the government can use the entity's resources," and has not stated that evidence that the government is in fact actually using an entity's resources is necessary.

63. In the United States' view, requiring evidence that the government is "in fact actually" exercising control over the entity and its conduct would conflate the public body analysis with the examination of a private body under Article 1.1(a)(1)(iv) of the SCM Agreement, where a demonstration of entrustment or direction is required. The Appellate Body in *US − Anti-Dumping and Countervailing Duties (China)* similarly found that there need not be "an affirmative demonstration of the link between the government and the specific conduct" as part of a public body analysis. Rather, "all conduct of a governmental entity [including an entity determined to be a public body] constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv)."

64. Turkey appears to suggest that an entity may be deemed a public body only when the entity is "exercising" governmental authority. This is incorrect, however, even under the public body approach of the Appellate Body. The Appellate Body has "explained that the term public body in Article 1.1(a)(1) of the SCM Agreement means 'an entity that possesses, exercises or is vested with governmental authority'." Under the framework elaborated by the Appellate Body, an entity might be deemed a public body when there is evidence that the entity possesses or is vested with governmental authority, even if there is no evidence that the entity is exercising governmental authority at the time of the particular transaction at issue. Likewise, in the United States' view, an entity's ability or authority to transfer government resources is sufficient to find an entity as a public body.

65. Therefore, a determination that an entity exercises meaningful control, such that the government can use an entity's resources as its own, is sufficient. An investigating authority need not demonstrate that the government has "in fact actually" used an entity's resources, that is, that the government "in fact actually" exercised meaningful control.

U.S. RESPONSE TO QUESTION 74

66. The Appellate Body has stated that "[w]hether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates." Thus, the question is not whether the conduct under Article 1.1(a)(1) is governmental. Rather, the question is whether the entity engaging in the conduct is governmental.

67. Regardless, to the extent the Panel finds certain statements in *US – Carbon Steel (India*) persuasive concerning this issue, the United States observes that the evidence before USDOC in this case substantially differs both in substance and volume from that before USDOC in *US – Carbon Steel (India)*.

U.S. RESPONSE TO QUESTION 86

68. In its oral statement at the second panel meeting, for the first time in this dispute, Turkey raised a new argument concerning certain USDOC determinations it cited in response to Question 34. Turkey appears to suggest that import penetration does not demonstrate an evaluation of whether in-country prices are distorted. However, past panels have recognized that import penetration is relevant to an investigating authority's distortion analysis. The panel in *US – Carbon Steel (India)* stated that "import transactions necessarily relate to prevailing market conditions in India because they are made by entities in India operating subject to Indian market conditions." The panel in *US – Coated Paper (Indonesia)* also recognized the relevance of import penetration to the distortion analysis. Therefore, contrary to Turkey's claim, USDOC's evaluation of import penetration is one factor that may be examined to determine whether a domestic market is distorted by government involvement

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ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil would like to comment on the interpretation of Article 12.7 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Brazil understands that a proper reading of that provision would lead to the conclusion that recourse to facts available is possible only with the purpose of identifying replacements for the "necessary information" that is missing from the record. This understanding is corroborated by the Appellate Body findings in *US –Carbon Steel* that "Article 12.7 is not directed at mitigating the absence of 'any' or 'unnecessary' information, but is rather concerned with overcoming the absence of information required to complete a determination."[1]

2. Brazil notes that nothing in the wording or context of Article 12.7 suggests it could be used in a punitive manner. On the contrary, as found by the Panel of *EC - Countervailing Measures on DRAM Chips*[2], that provision allows an authority to make determinations on the basis of the facts available, but not on the basis of mere assumptions or inferences. In fact, when the provisions of the Covered Agreements open the possibility to draw adverse inferences they are explicitly determined in the text, as in paragraph 7 of Annex V of the SCM Agreement.

3. In addition, Brazil points out that Article 12.7 allows for the use of "the facts available"[3] and not merely "facts available". This reinforces Brazil's interpretation that all facts available to the authority would have to be considered in order to fill in the gap of the missing information. Consequently, the investigating authority is not allowed to "cherry-pick" those facts that would lead to a biased determination of subsidy, while disregarding other facts that may point in a different direction.

4. The importance of preventing a Member's investigating authority to pick and choose which facts to consider cannot be overstated. It is the investigating authorities' duty to perform a process of reasoning and evaluation that takes into account all the facts available on the record. Brazil notes that the United States acknowledges that, when faced with a lack of information regarding the purchase price of Hot Rolled Steel (HRS) as an input by some plants of one of the interested parties, it invoked facts available to select "the lowest price on the record for the Gemlik Facility's HRS purchases"[4].

5. This is not a proper application of Article 12.7 of the SCM Agreement. The admission by the United States that it selected the lowest price available on record as the basis for its inferences regarding the price paid by other facilities indicates that the record also contained other prices paid for the same product over the investigated period. Brazil believes that recourse to facts available does not allow a Member to select the lowest price and disregard the other data.

6. Brazil is cognizant of the fact that, as mentioned by the United States in its First Written Submission, "a non-cooperating party's knowledge of the consequences of failing to provide information can be taken into account by an investigating authority, along with other procedural circumstances in which information is missing"[5]. That, however, does not allow the departure from the facts actually available on the record nor does it exempt the investigating authority from the duty to "evaluate and reason which of the 'facts available' reasonably replace the missing 'necessary information', with a view to arriving at an accurate determination."[6] The authority must, therefore, weigh all the information and evidence available in order to reach a reasonable conclusion.

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[1] Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products*, para. 4.416.

[2] Panel Report, *EC - Countervailing Measures on DRAM Chips,* para. 7.245.

[3] Emphasis added.

[4] United States FWS, para. 146.

[5] United States FWS, para. 133.

[6] Appellate Body Report, *US — Carbon Steel (India),* para. 4.426.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. PUBLIC BODY RELATED CLAIMS UNDER ARTICLE 1.1 ASCM

1. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* found that a public body is properly understood as one that is governmental in nature. The performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body.[1] Whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member may be a relevant consideration. The classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies.[2] State ownership is a relevant but not decisive criterion.[3]

2. The Appellate Body concluded that a public body is an entity that possesses, exercises or is vested with governmental authority, which is to be determined on a case-by-case basis having regard to all the relevant facts. Evidence that an entity is in fact exercising governmental functions, particularly if there is a sustained and systematic practice, may serve as evidence that it possesses or has been vested with governmental authority. Evidence that government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. However, the existence of mere formal links is unlikely to suffice to establish the necessary possession of governmental authority. The mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, or that the government has bestowed it with governmental authority. On the other hand, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.[4] The Panel would therefore have to assess whether the USDOC's determinations reveal sufficient evidence of the existence of government control and of the exercise of such control by the GOT over Erdemir and Isdemir.

3. The EU considers that the question whether OYAK constitutes a "government" entity would be a particularly relevant factor to be considered for the qualification of Erdemir and Isdemir as public bodies, notably for the question of government ownership and hence the existence of government control. In this context, the EU considers that the conditions of Article 1.1(a)(1) ASCM apply and are relevant for an assessment of OYAK even if it provided no financial contribution. The USDOC did not qualify OYAK as a "public body" but as a GOT "organ".[5] The EU considers that the relationship of an organ with the government would appear to be more closely linked than that of a public body with the government. The term "government organ" connotes a closer relationship with the government than the more generic term "public body". The Appellate Body distinguished in Article 1.1(a)(1) ASCM between the term "government" in the narrow sense and the term "government" in a parenthetical phrase which means, collectively, government in the narrow sense and any public body.[6] Hence if OYAK is not a public body, it must necessarily form part of the government in the narrow sense in order to be qualified as "government". The Appellate Body has not provided a definition of the term government in the narrow sense and whether an entity falls into this category will therefore have to be determined on a case-by-case basis in view also of the internal laws and organisation of the Member in question. Possible examples could include the police, ministries or the judiciary. The Panel may therefore have to assess whether the pension fund OYAK falls into that category.

[1] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.
[2] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 295-297.
[3] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 309-316.
[4] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 317-322.
[5] United States' First Written Submission, paras. 75, 84, 97.
[6] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 286, 288.

II. BENEFIT RELATED CLAIMS UNDER ARTICLES 1.1(B) AND 14(D)

4. The EU recalls that the Appellate Body found that the primary benchmark under Article 14(d) is the prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision.[7] The use of out-of-country benchmarks is rather the exception.[8] But the Appellate Body has found, for example, that prices of private suppliers in a country could not be used as benchmarks because of the government's predominant role in the market.[9] The Appellate Body also held that the question whether a relevant entity is to be qualified as "government" (including as a "public body") does not automatically answer the question of whether the prices of goods provided by private or government-related entities in the country of provision are to be considered as market determined for the purpose of selecting a benefit benchmark.[10] Hence, even assuming that Erdemir and Isdemir are public bodies (and control a substantial part of the market), this fact alone may not evidence market distortion. Assuming Erdemir and Isdemir are public bodies, the government could be considered as a predominant or significant supplier of the market through these entities which would be relevant considerations for a demonstration of market distortion. The Appellate Body found previously that the more "predominant" a government is as a supplier in the market in question, the less relevant other evidence will become for a finding of price distortion.[11] However, if the government is only a "significant" supplier, evidence from other sources will always be required.[12] There is no clear dividing line between the concepts of "predominant" and "significant" supplier. In previous cases, predominance was found where the government had above 90% market share.[13] Therefore, an important element in the assessment of market distortion – even if not the only element - is the level of the market share held by the government as supplier regarding the product in question.

5. Having said that, given that the USDOC's original out-of-country benchmark was replaced by an in-country benchmark, the EU recalls that "as a general rule, the measures included in a panel's term of reference must be measures that are in existence at the time of the establishment of the panel" pursuant to Article 6.2 of the DSU.[14] [emphasis added]. This means that, in a case of expiry of the measure prior to panel establishment, a panel should normally exercise its discretion to the effect of not making findings regarding the expired measure. In addition, in the present case the measure not only expired but was replaced by a different measure which addressed and resolved the concern of the complaining Member. Previous panels in similar circumstances declined to make findings.[15] The EU therefore considers that the Panel should not make findings in this respect.

III. SPECIFICITY UNDER ARTICLE 2.1(C)

6. A subsidy programme in the form of a "plan or scheme of some kind" under Article 2.1(c) may be manifested in written instruments or it may take less explicit forms such as a systematic series of actions.[16] With respect to subsidies in the form of a provision of goods for less than adequate remuneration as in the present case, the Appellate Body found that a subsidy programme cannot be evidenced by the mere fact that financial contributions have been granted to certain enterprises. Rather, an investigating authority must have adequate evidence of the existence of a systematic series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises,[17] possibly over a period of time.[18] The EU agrees. The fact that some of the transaction prices are higher than the benchmark price whereas other prices are lower than the benchmark price may be one of the elements relevant for the assessment of the existence of a subsidy programme. If the list of transactions alone does not demonstrate a series of systematic actions, the investigating authority must otherwise demonstrate the existence

[7] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.
[8] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.
[9] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.
[10] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.43.
[11] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.
[12] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 443.
[13] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 455; Panel Report, US –Coated Paper (Indonesia), para. 7.80.
[14] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[15] Panel Report, US – Gasoline, para. 6.19, Panel Report, Argentina – Textiles and Apparel, para. 6.15.
[16] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.
[17] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.
[18] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.142.

of a policy of providing goods at less than adequate remuneration (e.g., through policy documents or statements).

IV. ARTICLE 12.7 ASCM (ADVERSE FACTS AVAILABLE)

7. The purpose of Article 12.7 is to "overcome a lack of information" and to enable investigating authorities to continue with the investigation and make determinations.[19] The Appellate Body found that Article 12.7 ASCM "permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination."[20] The Appellate Body also found that in view of this objective of Article 12.7 ASCM, an investigating authority may not use any information in whatever way it chooses but that there are limitations. The first limitation is that an investigating authority must take into account all the substantiated facts provided by an interested party and the second limitation is that the "facts available" to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide.[21] The EU considers that the legal requirement that facts available must "reasonably replace" missing information should be interpreted in light of the overall objective of Article 12.7 ASCM of arriving at an "accurate determination." [22]

8. A key decision in the present case is which (adverse) inferences may be drawn from non-cooperation and which facts may be available to support a determination. The authority is not permitted to identify two different equally possible inferences, and then select the inference that is more adverse to the interests of a particular interested party, solely because it is more adverse (for example, in order to "punish" non-cooperation).[23] Rather, the authority must draw the inference that best fits the facts that have been evidenced. However, the facts that may be taken into account for this purpose include such things as the precise question that has been put; the procedural circumstances; the availability of the evidence being sought; and all the circumstances surrounding the absence of the requested information from the record. Thus, the behaviour of an interested party as "procedural circumstance" can colour the inferences that can be reasonably drawn in any particular instance. The more uncooperative a party is in fact, the more attenuated and extensive the inferences that it may be reasonable to draw.

9. Whether or not a WTO Member has acted inconsistently with Article 12.7 ASCM might therefore depend less upon the particular label that has been used (e.g., "adverse inference"), and more upon a specific examination of all the surrounding facts and procedural context. The EU considers that one element that an investigating authority may consider when weighing the evidence is whether and to what extent the available information on the record is reliable. There may be situations where all or part of the information provided by an interested party that could – in principle - be used as facts available may be "tainted" by non-cooperation which may justify the authority to use information e.g. from a different producer or from a different subsidy programme. Depending on the circumstances, an authority may in such scenario decide to discard the entire data set of the particular producer and instead rely on information provided by a different producer or on information from a different subsidy programme. However, an investigating authority must properly reason and evaluate why it selected the facts that it did, consider all the evidence on record and may not select exclusively certain "adverse" evidence in order to punish non-cooperation.

V. CROSS-CUMULATION UNDER ARTICLE 15.3 ASCM

10. The EU recalls that the Appellate Body in *US – Carbon Steel (India)* addressed the legality of cross-cumulating subsidized and dumped imports under Article 15.3 ASCM. The Appellate Body agreed with the panel's findings that "the consistent use of the term "subsidized imports" in Article 15 ASCM limits the scope of the investigating authority's injury assessment to subsidized

[19] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.245.

[20] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, para. 293. In a similar vein, the Appellate Body has also stated that the use of inferences in order to select adverse facts that punish non-cooperation would lead to an inaccurate determination and thus not accord with Article 12.7 ASCM, Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468.

[21] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, para. 294.

[22] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.416 and 4.419.

[23] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419.

imports only." The Appellate Body further found that the consistent references to "subsidies" and "subsidised imports" require investigating authorities to ensure that their examinations are directed at the effects of subsidized imports and exclude non-subsidized imports."[24] It concluded that "we see no basis in the text of Article 15.3 ASCM for cumulatively assessing the effects of subsidized imports with those of non-subsidized imports."[25] In the EU's view, the Appellate Body's case law on cross-cumulation is relevant also for Turkey's claim under Article 15.3 ASCM.

[24] Appellate Body Report, *US – Carbon Streel (India)*, para. 4.591.
[25] Appellate Body Report, *US – Carbon Streel (India)*, para. 4.593.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. THE DEFINITION OF "PUBLIC BODY" UNDER ARTICLE 1.1 OF THE SCM AGREEMENT

1. In this dispute, Turkey challenges the determination of the U.S. Department of Commerce ("USDOC") that Eregli Demir ve Celik Fabrikalari T.A.S. ("Erdemir") and its affiliate Iskenderun Iron & Steel Works Co. ("Isdemir") are "public bodies" as defined under Article 1.1 of the SCM Agreement.[1]

2. The Appellate Body has explained that a "public body" is "an entity that possesses, exercises or is vested with governmental authority."[2] The Appellate Body has further found that "evidence that a government exercises meaningful control over an entity and its conduct" may serve as evidence that the relevant entity "possesses governmental authority and exercises such authority in the performance of governmental functions,"[3] and is thus a public body.

3. In determining whether a government exercises "meaningful control" over an entity, the Appellate Body has explained that "formal indicia of control," such as the government's ownership interest in the entity and the government's power to appoint and nominate directors, are "certainly relevant."[4] However, without further evidence and analysis of several other factors, those indicia "do not provide a sufficient basis" for a public body determination.[5] Factors other than formal indicia that the Appellate Body has found relevant include whether board directors appointed by the government are independent,[6] and the extent to which the government in fact exercised meaningful control over the relevant entity and over its conduct.[7]

4. Taking this into account, Japan considers that the relevant factors in determining whether the Government of Turkey ("GOT") exercises meaningful control over Erdemir and Isdemir include not only formal indicia of control, such as share ownership and the government's power to appoint directors, but also whether, and to what extent, the GOT influences the management of these entities (*i.e.*, whether the business decisions of the entities are independent from the GOT), the legal status and structure of the entities, and the legal status of their property, as compared with those of other private steel producers in Turkey. Thus, Japan considers that a key question before the Panel is whether Erdemir and Isdemir are independent from the GOT, and whether these entities are structured in a manner that ensures that management decisions are made independently and without government interference.

5. Japan notes the United States' explanation that, as part of its public body determination, the USDOC examined the involvement of Ordu Yardimlasma Kurumu ("OYAK"), which the United States contends is an "organ of the GOT," in Erdemir, including OYAK's majority interest in Erdemir.[8] The term "government organ" is not contained in the SCM Agreement, and no WTO precedent has exactly defined this term. Moreover, the United States itself does not provide a definition of the term in this proceeding. Japan considers that the relationship between the GOT and OYAK is relevant only to the extent that it is part of the factual analysis of whether the involvement of OYAK in Erdemir, and by extension, in Isdemir, contributes to establishing "meaningful control" by the GOT over these entities.

[1] For example, First Written Submission of Turkey, paras. 94-95.
[2] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[3] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[4] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.43 and 4.54; *See also* Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[5] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.43.
[6] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.45.
[7] Appellate Body Report, *US– Carbon Steel (India)*, paras. 4.52-4.54.
[8] *See* First Written Submission of the United States, paras. 97, 100.

II. MEASURE OF BENEFITS UNDER ARTICLES 1.1(B) AND 14(D) OF THE SCM AGREEMENT

6. Turkey alleges that the USDOC improperly determined that Erdemir and Isdemir provided hot rolled steel to the respondents for less than adequate remuneration under Article 14(d), thereby conferring a benefit under Article 1.1(b), because the USDOC erroneously rejected in-country prices as potential benchmarks based solely on evidence of government ownership or control of domestic producers.[9] Turkey's claim raises the question of the weight that should be placed on the role of the government in the market in determining whether market prices are distorted, thus permitting an investigating authority to reject in-country prices.

7. Article 14(d) establishes that the adequacy of remuneration is to be determined "in relation to prevailing market conditions for the good or service in question in the country of provision or purchase." What an investigating authority must do in assessing the proper benchmark "will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents."[10] In-country prices are the primary benchmark for the calculation of benefit under Article 14(d),[11] but "an investigating authority may use a benchmark other than private prices of the goods in the country of provision, when it has been established that private prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods."[12]

8. The weight that should be placed on the government's role in the market may differ depending on whether the government's role is "predominant" or "significant". When the government is a predominant supplier, the Appellate Body has found that the government would likely have the market power to affect the pricing by private providers through its own pricing, inducing them to align with government prices.[13] In these circumstances, "evidence of factors other than government market share will have less weight in the determination of price distortion than in a situation where the government has only a 'significant' presence in the market."[14] Price distortion may also be established where the government is a significant supplier, but there must be evidence pertaining to factors other than government market share,[15] such as the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers.[16]

9. Whether the government is a "predominant" or "significant" supplier, Japan considers that the investigating authority must consider all of the evidence that is put on the record.[17] Thus, the determination of an appropriate benchmark requires an assessment of the specific facts of the case, taking into consideration the characteristics, structures, and participants of the market, as well as the role of the government in the relevant market. The weight that the investigating authority places on each of these facts may depend on the predominance or significance of the government in the supplier market.

10. Having said that, as the Panel pointed out in its question to the third parties, the USDOC issued an amended determination which relied on in-country prices prior to panel establishment.[18] Japan recalls that "as a general rule, the measures included in a panel's term of reference must be measures that are in existence at the time of the establishment of the panel" pursuant to Article 6.2 of the DSU,[19] and that "panels are allowed to examine a measure 'whose legislative basis has expired, but whose effects are alleged to be impairing the benefits accruing to the

[9] First Written Submission of Turkey, paras. 181-183.
[10] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.153.
[11] Appellate Body Report, *US – Softwood Lumber IV*, para. 97.
[12] Appellate Body Report, *US – Softwood Lumber IV*, para. 119.
[13] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 455.
[14] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 455.
[15] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 443.
[16] Appellate Body Report, *US— Carbon Steel (India)*, para. 4.157, fn. 754.
[17] First Written Submission of Turkey, para. 185, fn. 446 (citing Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 453).
[18] Panel's Questions to Third Parties, question 4.
[19] Appellate Body Report, *EC — Chicken Cuts*, para. 156.

requesting Member under a covered agreement' at the time of the establishment of the panel."[20] Therefore, Japan considers that if the original determination had already been superseded by an amended determination and had ceased to have legal effect when the Panel was established, the original determination would fall outside the Panel's terms of reference and should not be examined.

III. DETERMINATION OF SPECIFICITY UNDER ARTICLE 2.1 OF THE SCM AGREEMENT

11. Turkey challenges the USDOC's determination that the provision of hot rolled steel for less than adequate remuneration was *de facto* specific within the meaning of Article 2.1 of the SCM Agreement because the number of industries or enterprises using the program was limited to eight industries identified by the GOT.[21]

12. Assuming that the use of the subsidy program was strictly limited to the specific industries identified by the GOT, Japan believes that the USDOC could properly find the provision of hot rolled steel to be "limited" under Article 2.1(c). However, Japan notes that there may be instances where an entity outside of the enumerated industries may also benefit from the provision of hot rolled steel for less than adequate remuneration. Thus, it is Japan's view that the investigating authority cannot rest its finding of specificity only on the identification of a limited number of industries or entities, if it is found that the provision of the good or service in question for less than adequate remuneration can benefit an entity that is outside of the enumerated industries or enterprises.

13. Japan also notes the Panel's questions to third parties on what must be shown to demonstrate a "series of systematic actions" that constitute a subsidy programme under Article 2.1(c) when the subsidy programme consists of a list of transactions.[22] Japan notes the Appellate Body's guidance in *US – Countervailing Measures (China)* that "[t]he mere fact that financial contributions have been provided to certain enterprises is not sufficient … to demonstrate … a plan or scheme for purposes of Article 2.1(c)."[23] Rather, "an investigating authority must have adequate evidence of the existence of a *systematic* series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises."[24] Japan considers that this determination must be made on a case-by-case basis, and that there is not a bright-line rule to determine how much, or what kind of, evidence is "adequate" to determine the existence of a "systematic series of actions." Japan does not consider that the requirement to have "adequate evidence" means that each individual transaction must be lower than the benchmark to demonstrate the existence of a subsidy programme. Such rigid construct could potentially permit circumvention of countervailing duties, and would go against the objective of Article 2.1(c), which is to cover *de facto* specific subsidies, including through the use of a subsidy programme, which may appear non-specific on its face.

IV. APPLICATION OF FACTS AVAILABLE UNDER ARTICLE 12.7 OF THE SCM AGREEMENT

14. Turkey challenges the USDOC's application of adverse inferences with respect to the respondents' reported data in several countervailing duty investigations.[25] In particular, Turkey challenges the USDOC's use of facts available under Article 12.7 of the SCM Agreement, in part because the USDOC drew adverse inferences in selecting among facts available, in order to punish the respondent for its alleged non-cooperation.[26]

15. Japan agrees that Article 12.7 does not permit the application of "facts available" in a punitive manner. Article 12.7 states that, "[i]n cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available." The Appellate Body has explained

[20] Appellate Body Report, *EC – Selected Customs Matters*, para. 184, referring to Appellate Body Report, *US – Upland Cotton*, para. 263.
[21] First Written Submission of Turkey, paras. 213-220.
[22] Panel's Questions to Third Parties, question 5.
[23] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.
[24] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.
[25] First Written Submission of Turkey, paras. 195-196, 323-325, and 434-436.
[26] First Written Submission of Turkey, paras. 196, 326, 437.

that "Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. Thus, the provision permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination."[27]

16. The Appellate Body has also explained that "Article 12.7 requires an investigating authority to use 'facts available' that reasonably replace the missing 'necessary information,' with a view to arriving at an accurate determination," and that this "calls for a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case."[28] Thus, the determination of what information constitutes a "reasonable replacement" must be made on a case-by-case basis, in light of the available evidence. The circumstances of a case that may be taken into consideration may include procedural circumstances relating to the missing information, such as any difficulties experienced by interested parties that have not provided the "necessary information,"[29] and the knowledge of a non-cooperating party of the consequences of failing to provide information.[30]

17. Japan recognizes that the Appellate Body has found in *US – Carbon Steel (India)* that the grant of authorization to use adverse inferences under the SCM Agreement was not in itself "as such" inconsistent with Article 12.7, insofar as it was possible to apply the U.S. statute in a manner that comports with Article 12.7.[31] However, Japan does not understand the Appellate Body's ruling as allowing Members to apply adverse inferences in a manner intended to punish a non-cooperating respondent. In fact, while recognizing that an investigating authority may use inferences and may consider the procedural circumstances of the missing information in determining which "facts available" constitute reasonable replacements, the Appellate Body noted that "the use of inferences in order to select adverse facts that punish non-cooperation would lead to an inaccurate determination and thus not accord with Article 12.7."[32]

18. That Article 12.7 does not permit Members to apply adverse inferences in a punitive manner is further supported by Article 6.8 and Annex II of the Anti-Dumping Agreement, which sets out several conditions that the investigating authority must meet in order to apply "facts available." While the SCM Agreement does not include a reference to Article 6.8 or Annex II, the Appellate Body has confirmed that these provisions of the Anti-Dumping Agreement provides guidance in interpreting the SCM Agreement. According to the Appellate Body, "it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."[33]

19. Annex II is titled "Best Information Available in Terms of Paragraph 8 of Article 6." By the very terms of its title, the Annex makes clear that the purpose of using "facts available" is to use the "*best* information available." A WTO panel has further stated that Article 6.8 and Annex II are meant to ensure that "even where the investigating authority is unable to obtain the 'first-best' information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps 'second-best' facts."[34]

20. Paragraph 3 of Annex II states that "[a]ll information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion … should be taken into account when determinations are made." Paragraph 5 also states that "[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability." Pursuant to paragraphs 3 and 5, even if an investigating authority uses "facts available," it is nonetheless required to take into account all substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of the party.

[27] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293.
[28] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.435.
[29] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.422.
[30] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426.
[31] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483.
[32] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468.
[33] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.
[34] Panel Report, *US – Hot-Rolled Steel*, para. 7.55.

21. Finally, neither Article 12.7 of the SCM Agreement nor Article 6.8 (incorporating Annex II) of the Anti-Dumping Agreement refers to the use of "adverse facts available" or "adverse inferences." Rather, paragraph 7 of Annex II states that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate." In Japan's view, this language acknowledges that the "best information available" may be less favorable than the interested parties' own data, but does not grant permission for the investigating authority to bring about an outcome that is punitive and that does not reasonably reflect an accurate margin calculation based on the available facts.

22. In sum, the authority to use "facts available" under Article 12.7 of the SCM Agreement does not permit the investigating authority to apply adverse inferences in a manner that runs counter to the authority's overarching obligation to make an accurate determination. Thus, it is Japan's view that an investigating authority must select among "facts available" a "reasonable replacement" for missing information that seeks to achieve an "accurate determination." Article 12.7 does not permit Members to apply adverse inferences in a manner that would punish non-cooperating respondents.

V. CROSS-CUMULATION UNDER ARTICLE 15.3 OF THE SCM AGREEMENT

23. Turkey challenges the U.S. International Trade Commission's ("ITC") "cross-cumulation" of imports from countries that were subject to both anti-dumping and countervailing duty investigations with imports from countries that were subject only to anti-dumping investigations.[35] As Turkey notes, the Appellate Body in *US – Carbon Steel (India)* found that "the effects of imports other than such subsidized imports must not be incorporated in a cumulative assessment pursuant to Article 15.3."[36] Thus, the ITC's practice of cross-cumulating imports that are subject to only anti-dumping investigations with those that are subject to countervailing duty investigations would appear to be inconsistent with the Appellate Body's guidance.

24. That said, Japan notes that the Appellate Body's ruling, if taken at face value, would appear to leave a logical gap with regards to the principal objective of Article 15.3 of the SCM Agreement, as well as the parallel provisions under Article 3.3 of the Anti-Dumping Agreement. In Japan's view, the purpose of Article 15.3 is to capture circumstances where the causal relationship between the injury and subsidized imports may escape scrutiny simply because it would be difficult to identify, individually, the injurious effects of subsidized imports that originate from multiple countries. In other words, just as the effects of subsidized (or dumped) imports originating from several countries may not be adequately taken into account in a country-specific analysis, Japan considers that the combined effects of subsidized and dumped imports from several countries may not be adequately taken into account if cross-cumulation is prohibited.

[35] For example, First Written Submission of Turkey, paras. 221-232.

[36] First Written Submission of Turkey, para. 227 (citing Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.579, 4.593).

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO

1. Mexico is grateful for this opportunity to present its views on this dispute, and notes that its oral statement will be confined to the complaints regarding cross-cumulation raised by Turkey in its first written submission.

2. With respect to this issue, Turkey maintains that the United States' practice of cross-cumulating, which consists in cumulating the harmful effects of the subsidized imports with those caused by non-subsidized imports, is inconsistent "as such" with Article 15.3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Turkey also affirms that cross-cumulation is inconsistent with that same article as applied to the proceedings regarding Oil Country Tubular Goods (OCTG), Welded Line Pipe (WLP), Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes (HWRP), and Circular Welded Carbon Steel Pipes and Tubes (CWP).

3. As can be seen from Turkey's first written submission, the Appellate Body's findings in *US – Carbon Steel (India)* on cross-cumulation are the key to resolving this issue because, as Turkey rightly points out, in that dispute the Appellate Body expressly ruled that cumulatively assessing the effects of subsidized imports with the effects of non-subsidized imports was inconsistent with Article 15.3 of the SCM Agreement.

4. Mexico notes in this connection that the facts examined in *US – Carbon Steel (India)*, in particular those pertaining to cross-cumulation, are unquestionably similar to the facts pertaining to the practice in dispute in this case. In both cases: (i) simultaneous applications were submitted for the initiation of anti-subsidy and anti-dumping proceedings, and the United States investigating authority performed a cumulative assessment of the effects of the subsidized imports with the effects of the dumped imports; and (ii) the authority that applied the cross-cumulation was the International Trade Commission (ITC).

5. Similarly, Mexico notes that the practice of cross-cumulation was grounded on Section 1677(7)(G)(i) of the United States Tariff Act. While Mexico is aware that the Appellate Body Report in *US – Carbon Steel (India)* states that it is unclear whether this Section requires the USITC to carry out the cross-cumulation, paragraphs 223, 224, 343 and 456 of Turkey's first written submission apparently provide verbatim quotes of the relevant ITC rulings in which the ITC itself expressly states that Section 1677(7)(G)(i) of the US Tariff Act requires the Commission to cumulate. Mexico has no reason to suppose that the ITC is not required to cumulate when the ITC itself expressly states that it is required to do so.

6. It is clear to Mexico that the text of Article 15.3 of the SCM Agreement permits the cumulation of imports from several countries only where they are simultaneously subject to countervailing duty investigations, and points (a) and (b) of the said Article are complied with.

7. At the same time Mexico notes that, contrary to what the United States claims, the text of Article 15.3 of the SCM Agreement is not silent with respect to the possibility of cumulating imports subject to countervailing duty investigations with imports that are not subject to countervailing duty investigations. On the contrary, Mexico believes that Article 15.3 expressly conditions the cumulation of imports on their being subject to countervailing duty investigations. It is clear that if that condition is not met, cumulative assessment is plainly and simply not permitted.

8. This interpretation is perfectly consistent with the rulings of the Panel and the Appellate Body in *US – Carbon Steel (India)*. In that dispute, the Appellate Body ruled that to assess cumulatively the effects of imports, Article 15.3 of the SCM Agreement requires, in principle, that those imports be "*subject to countervailing duty investigations*". In the words of the Appellate Body, "*[t]he provision that investigating authorities may, if the conditions set out in the*

last clause of Article 15.3 are fulfilled, cumulatively assess the effects of 'such' imports thus requires that the imports be 'subject to countervailing duty investigations[1]'".

9. Moreover, the Appellate Body undertook a contextual interpretation of Article 15.3 of the SCM Agreement and reached the conclusion that paragraphs 1, 2, 4 and 5 of Article 15 as well as other provisions throughout Part V of the Agreement required that the injury analysis in the context of a countervailing duty procedure be limited to consideration of the effects of subsidized imports.[2] It is therefore clear that where there is cumulation of imports in the assessment of injury, that cumulation must be limited to subsidized imports.

10. Both the Panel and the Appellate Body in *US − Carbon Steel (India)* reached similar conclusions with respect to the causation analysis. In that dispute, they ruled that under Article 15.5 of the SCM Agreement, non-subsidized imports come within the scope of "any known factors other than the subsidized imports which at the same time are injuring the domestic industry", so that the injuries caused by non-subsidized imports must not be attributed to the subsidized imports, because they are "other factors".

11. Mexico notes that in its first written submission, the United States puts forward a number of arguments in defence of cross-cumulation that are identical to the arguments it presented in *US − Carbon Steel (India)* that were ruled by the Appellate Body to be without foundation. For example, it repeats the argument that Article 15.3 is silent on whether the cumulation of the effects of subsidized imports with the effects of dumped imports is permitted, in spite of the fact that the Appellate Body expressly states, in paragraph 4.589, that "*Article 15 is not silent on the question of cumulation of the effects of subsidized imports with the effects of non-subsidized imports*" since, as the Appellate Body also mentions in the same paragraph, from the requirement that the imports must simultaneously be subject to countervailing duty investigations, "*it follows that a cumulative assessment pursuant to Article 15.3 must not encompass the effects of non-subsidized imports*."

12. In another example of this reiteration of the same arguments, the United States repeats, in this dispute, that an analysis that focuses solely on subsidized imports or dumped imports would prevent the investigating authority from taking account of the injurious effects of all unfairly traded imports. However, this issue was clearly settled by the Panel in paragraph 7.343 of its report and confirmed by the Appellate Body in paragraph 4.596 of its report with the statement that the object of the analysis to be made under Article 15 is injury caused by subsidized imports, and not injury caused by unfairly traded imports.

13. The United States also reiterates that Article VI:6(a) of the General Agreement on Tariffs and Trade (GATT) 1994 supports its interpretation of cross-cumulation as being consistent with the provisions of Article 15 of the SCM Agreement, since the expression "as the case may be" suggests that there are situations in which the determination of injury may involve dumping, subsidization, or both. However, in paragraphs 4.598 and 4.599 of its report, the Appellate Body ruled that Article VI.6(a) of the GATT referred to two separate elements, dumping and subsidization, so that the expression "as the case may be" clarifies that injury may be caused by either the effect of the subsidy or, in another case, the effect of dumping. Accordingly, the Appellate Body ruled that the United States' interpretation simply did not apply to Article VI:6(a) of the GATT.

14. At the same time, since the cross-cumulation used by the ITC has already been subject to dispute settlement and the Appellate Body upheld the Panel's findings of inconsistency with paragraphs 1, 2, 3, 4 and 5 of Article 15 of the SCM Agreement, it is a source of concern to Mexico that the United States should continue to apply this injury analysis methodology which, in addition to infringing Members' rights, prevents the dispute settlement system from meeting its objectives of providing the multilateral trading system with security and predictability. Thus, regardless of whether cross-cumulation constitutes a practice, we are struck by the fact that this is the second dispute against the same Member in which we are assessing the same methodology that was already found to be inconsistent with that Member's WTO obligations.

15. In other words, the fact that the United States persists in applying a measure in the full knowledge that it is inconsistent with its multilateral obligations, and that it has not provided a

[1] Appellate Body Report, *US − Carbon Steel (India)*, para 4.579.
[2] Appellate Body Report, *US − Carbon Steel (India)*, para 4.586.

defence that is any different from the defence it presented in the case in which cross-cumulation was found to be inconsistent with Article 15 of the SCM Agreement, means that although the United States is aware of the Appellate Body's legal interpretation and ultimately of its multilateral obligations, it has decided to continue to act in a manner inconsistent with those obligations.

16. However, leaving aside the concern that this attitude inspires, we believe that the Panel should bear in mind, as the Appellate Body has stressed, that "ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[3] Consequently, the Panel must "[follow] the Appellate Body's conclusions in earlier disputes", since doing so " is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[4]

17. Finally, Mexico thanks you for your attention and the interpreters for their work. We look forward to any questions you may have.

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[3] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.
[4] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.