UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN PIPE AND TUBE PRODUCTS FROM TURKEY

(DS523)

COMMENTS OF THE UNITED STATES ON TURKEY'S RESPONSES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL

June 29, 2018

TABLE OF CONTENTS

TABLE OF REPORTS

Short Form	Full Citation
Brazil – Aircraft (AB)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
China – Rare Earths (Panel)	Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R / WT/DS432/R / WT/DS433/R, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EU – Biodiesel (AB)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, adopted 26 October 2016
Korea – Commercial Vessels (Panel)	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Anti-Dumping and Countervailing Duties (China) (Panel)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US — Coated Paper (Indonesia) (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R and Add.1, adopted 22 January 2018
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Countervailing Measures (China) (AB)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015

US – Countervailing Measures (China) (Panel)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015
US – Countervailing Measures on Certain EC Products (AB)	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Lead and Bismuth II (Panel)	Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report WT/DS138/AB/R
US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006

I. INTRODUCTION

1. In this document, the United States comments on Turkey's responses to the Panel's written questions. To a large extent, Turkey's responses repeat arguments that the United States has addressed previously. Rather than also repeat prior U.S. arguments on these issues, the comments below contain additional points on Turkey's arguments. The absence of a U.S. comment on an aspect of Turkey's response to any particular question should not be understood as agreement with that response.

II. CLAIMS REGARDING THE PUBLIC BODY DETERMINATION

Question 72 *(To Turkey)*: Please explain the argument that, as Erdemir's prices are higher than OCTG producer Toscelik's cost of production and selling prices, this demonstrates that Erdemir's pricing decisions are market-driven.[1] Is there any record evidence to support this?

Comments:

2. As evidenced by its response to the Panel's question, Turkey continues to equate a company exhibiting commercial, profit-maximizing behavior with a company operating independently and/or autonomously from the government.[2] It is not the case, however, that either a government, or a government-controlled entity, cannot act in a commercial manner.[3] As the United States explained in its response to Question 73, while evidence concerning an entity's structure and organization in certain circumstances may be relevant to a public body analysis, evidence concerning an entity's commercial, profit-maximizing behavior is not dispositive of or necessarily relevant to whether a government exercises meaningful control over an entity and its conduct.[4] Even under the Appellate Body's approach, evidence of an entity's commercial or profit-maximizing behavior is not dispositive of whether that entity possesses, exercises, or is vested with governmental authority.

3. Indeed, nothing in Article 1.1(a)(1) suggests that acting in accordance with commercial principles would preclude an entity from being deemed a "government or any public body" within the meaning of that provision.[5] Rather, an investigating authority must take into

[1] In the OCTG investigation, for instance, Toscelik argued that "Erdemir does not sell coil at preferential prices; its prices are higher than Toscelik's cost of production and they are higher than Toscelik's selling prices". *OCTG from Turkey: Final CVD Determination*, I&D Memo, p. 35 (Exhibit TUR-85)
[2] Turkey's Response to Panel Questions Following the Second Meeting ("Turkey's Response to Second Panel Questions"), paras. 2-6.
[3] United States' Second Written Submission, para. 109.
[4] United States' Response Panel Questions Following the Second Meeting ("United States' Response to Second Panel Questions"), paras. 29-31.
[5] United States' Second Written Submission, para. 107.

consideration the totality of the evidence regarding the relationship between the government and the public body at issue, and base its determination on the specific facts of each case.[6]

4. As the United States has explained in its previous submissions, it is typically in the context of a benefit analysis that an investigating authority would consider whether the financial contribution in question is provided consistent with market principles.[7] To graft consideration of whether a financial contribution is provided consistent with market principles onto the determination of the existence of a financial contribution would make redundant the provisions of the SCM Agreement governing benefit.[8]

5. Prior panel and Appellate Body reports have likewise recognized this to be the case. The panel in *US – Antidumping and Countervailing Measures (China)* recalled that the Appellate Body in *Brazil – Aircraft* recognized financial contribution and benefit as independent concepts, both of which must be present for a measure to be a subsidy in the sense of the SCM Agreement.[9] The panel in *Korea – Commercial Vessels* likewise recognized that "it is not clear to us that an entity will cease to act in an official capacity simply because it intervenes in the market on commercial principles if that intervention is ultimately governed by that entity's obligation to pursue a public policy objective."[10]

6. In any event, in the challenged determinations, although the evidence concerning Erdemir's pricing behavior was considered by USDOC, USDOC ultimately determined that such evidence carried little weight when examining the totality of the record evidence concerning Erdemir and Isdemir. As previously detailed in the U.S. response to Question 74, the evidence

---

[6] United States' Second Written Submission, para. 107 (citing *US – Antidumping and Countervailing Measures (China) (AB)*, para. 355 (finding that USDOC "discussed extensive evidence relating to the relationship between the SOCBs and the Chinese Government, including evidence that the SOCBs are meaningfully controlled by the government in the exercise of their functions.")).

[7] For example, Article 14(d) of the SCM Agreement specifies that: "the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)." (emphasis added). *See* United States' Second Written Submission, para. 79.

[8] United States' Second Written Submission, para. 79 (further stating, "Indeed, the Appellate Body has cautioned that "[a]n interpreter may not adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." (citing *US – Gasoline (AB)*, p. 23)). Moreover, as detailed in the U.S. response to Question 74, the United States also explained that focus on an entity's specific conduct is appropriate under an entrustment and direction private body analysis, and is misplaced under a public body analysis where the question is whether the entity is engaging in conduct that is governmental. *See* United States' Response to Second Panel Questions, paras. 34-35.

[9] United States' Response to Panel Questions Following the First Meeting ("United States' Response to First Panel Questions"), para. 81 (citing *US – Antidumping and Countervailing Measures (China) (Panel)*, para. 9.29 (citing *Brazil – Aircraft* (*AB*), para. 157)).

[10] United States' Response to Second Panel Questions, para. 29 (citing *Korea – Commercial Vessels (Panel)*, para. 7.48).

taken together demonstrates that the GOT in fact exercised meaningful control over the two entities and their conduct.[11]

Question 78 *(To Turkey)*: Please comment on the United States' argument at paragraph 26 of its oral statement at the second meeting that "[a]n 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."

Comments:

7. As an initial matter, to the extent that Turkey is now attempting to raise an Article 22.5 claim,[12] the Panel must reject the claim because it was not raised in Turkey's panel request.

8. Nor do Turkey's arguments concerning alleged *post hoc* statements have merit. As the United States explained in its response to Question 75, 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 determinations.[13] Nor does the limitation on *ex post* rationalization preclude a party from identifying evidence on the record before the investigating authority.[14] In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body expressly did not apply the *ex post* limitation to evidence that was on the investigating authority's record, but not cited in the investigating authority's final determination.[15]

9. Here, contrary to Turkey's arguments, Erdemir's Annual Reports and evidence submitted by Maverick in the WLP investigation concerning OYAK's condition of purchase were explicitly discussed by USDOC in its determinations.[16] Therefore, in contrast to Turkey's attempts to ask the Panel to conduct *de novo* review by providing information that was not on the record nor considered by USDOC,[17] the United States has presented for the Panel the evidence on which USDOC relied.[18]

---

[11] United States' Response to Second Panel Questions, paras. 38-39. *See also* United States' First Written Submission, para. 114; United States' Response to First Panel Questions, paras. 83-87; United States' Second Written Submission, paras. 111-119.
[12] Turkey's Response to Second Panel Questions, para. 11.
[13] United States' Response to Second Panel Questions, para. 41.
[14] United States' Response to Second Panel Questions, para. 42.
[15] United States' Response to Second Panel Questions, para. 42 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 159-165).
[16] With respect to Turkey's arguments concerning the National Restructuring Plan, as discussed in the United States' first written submission, the applications contained information concerning the National Restructuring Plan, along with other evidence, such that USDOC determined to initiate investigations into the provision of HRS for LTAR. *See* United States' First Written Submission, para. 225.
[17] United States' Response to Second Panel Questions, paras. 12-13, 16.
[18] "The task of a panel [is] to assess whether the explanations provided by the authority are 'reasoned and adequate' by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning." *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97.

III. CLAIMS UNDER ARTICLES 1.1(B) AND 14(D) OF THE SCM AGREEMENT

Question 83 *(To Turkey)*: In footnote 437 of its first written submission, Turkey cites selected passages from three USDOC determinations involving Chinese products. The three determinations were subsequently submitted by Turkey in response to Panel Question No. 34 (as Exhibits TUR-138, TUR-139 and TUR–149). In *Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China*, other than government ownership or control the USDOC took into account that the volume of imports was small (0.63 per cent) relative to Chinese domestic production of HRS (Exhibit TUR-139, p. 5). In *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China*, the USDOC noted that import data on the record was incomplete and did not take the data into account (TUR-138, pp. 5 and 6). In light of this, how do these two examples support Turkey's argument that the USDOC systematically rejects in-country market prices based solely on a finding of majority or substantial government ownership or control of domestic suppliers?

Comments:

10. For the reasons discussed in the U.S. response to Question 86, contrary to Turkey's arguments, USDOC's consideration of import penetration is relevant to its distortion analysis, and is one factor that may be examined to determine whether a domestic market is distorted by government involvement.[19] Thus, as previously explained, USDOC engages in an evaluation of the record evidence concerning distortion, including by examining import penetration, and does not reject in-country prices "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."[20]

11. As the Panel's question recognizes, the preliminary determinations of *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China* and *Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China* demonstrate USDOC's consideration of import penetration when determining whether a market is distorted. In *Circular Welded Austenitic Stainless Pressure Pipe*, USDOC explained that the government accounted for 82 percent of the production in the domestic market, and that the government would still account for 71 percent of the production in the domestic market even after taking into account the available data on import volume.[21] Similarly, in *Circular Welded Carbon Quality Steel Line Pipe*, USDOC took into account the fact that imports only accounted for 0.63 percent of the volume available in the domestic market.[22]

[19] United States' Response to Second Panel Questions, paras. 70-71.
[20] United States' Response to Second Panel Questions, paras. 64-72.
[21] Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 73 Fed. Reg. 39,657, 39,665 (Dep't of Commerce July 10, 2008) (Exhibit TUR-138).
[22] Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 73 Fed. Reg. 52,297, 52,307 (Dep't of Commerce Sept. 9, 2008) (Exhibit TUR-139).

Question 84 *(To Turkey)*: In paragraph 88 of its second written submission, Turkey refers to the Appellate Body's statements in *EU – Biodiesel (Argentina)* that "the discretionary nature of [a] measure is no barrier to a challenge 'as such'". The Appellate Body in that dispute was referring to the examination of aspects of a Member's *laws* or *regulations*. How are these statements relevant in the context of this dispute, in which Turkey argues that a "practice", in the form of an unwritten measure, is demonstrated through *systematic* application?

Comments:

12. As an initial matter, Turkey mischaracterizes the United States' position.[23] At paragraph 51 of its second written submission, the United States explained that Turkey's argument concerning USDOC's exercise of discretion was essentially a concession that many of the determinations, including the WLP, HWRP, and CWP proceedings, as well as the *Borusan* court case, do not support its claim of an alleged "practice" that is a rule or norm of general and prospective application.[24] Because those determinations cannot support its claim, Turkey has attempted to pivot its argument and suggest that there is a discretionary nature to USDOC's alleged practice.[25]

13. Moreover, contrary to Turkey's assertion,[26] the OCTG remand and subsequent cases are not examples of USDOC exhibiting "discretion" to depart from its "practice." Rather, in *Borusan*, the court explicitly found the use of out-of-country benchmarks in the OCTG investigation based solely on a finding of the government constituting a substantial portion of the market to be insufficient under U.S. law.[27] Therefore, in light of the *Borusan* decision and since that time, USDOC does not base its determinations solely on the government constituting a substantial portion of the market and considers other facts on the record concerning market distortion.[28]

14. In addition to the WLP, HWRP, and CWP determinations wherein USDOC used in-country benchmarks, the United States has also highlighted determinations issued subsequent to the *Borusan* court case, such as *Cold-Rolled Steel from the Russian Federation*, *Supercalendered Paper from Canada*, and *Truck and Bus Tires from the People's Republic of China* that illustrate USDOC's consideration of other factors.[29] As explained below in the U.S. comments to Question 87, the five determinations cited by Turkey that post-date the *Borusan* court case also demonstrate the same. These determinations thus illustrate that USDOC in fact conducts an evaluation of the record concerning market distortion, and does not have a practice "of rejecting

[23] Turkey's Response to Second Panel Questions, para. 20.
[24] United States' Second Written Submission, para. 51.
[25] United States' Second Written Submission, para. 51.
[26] Turkey's Response to Second Panel Questions, paras. 19-20.
[27] United States' Second Written Submission, para. 59; *see also Borusan Mannesmann Boru Sanayi Ve Ticaret v. United States*, 61 F. Supp. 3d 1306, 1330 (Ct. Int'l Trade 2015) (Exhibit TUR-131).
[28] United States' Response to First Panel Questions, paras. 105-107, 113-117; United States' Second Written Submission, paras. 62-67.
[29] Turkey's Response to Panel Questions Following the First Meeting ("Turkey's Response to First Panel Questions"), paras. 107, 115-116.

in-country prices as a benchmark based solely on evidence that the government owns or controls the majority or substantial portion of the market for the good, with no consideration of whether in-country prices are distorted."[30]

Question 86 (*To both parties*): At paragraph 58 of its oral statement at the second meeting, Turkey argues that the USDOC's reference to low or insignificant import penetration in certain cases were not made in the context of a market analysis or whether government ownership or control of domestic producers results in distortion. Does this establish that the USDOC determines that a market is distorted by government involvement solely based on evidence of control of a majority or a substantial portion of the market?

Comments:

15. See U.S. comment to Turkey's response to Question 83, above.

Question 87 *(To Turkey)*: Please comment on the United States' various arguments at paragraph 16 of its oral statement at the second meeting that "Turkey has also failed to provide any explanation or argumentation as to how each of these newly added determinations supports its claims". The United States submits that Turkey "merely listed" the titles of determinations, but does not discuss how the determinations supports its claim. The United States further submits that the determinations contain "multiple subsidy programs" and Turkey does not identify which programs support its claims or which page numbers or sections are relevant.

Comments:

16. In its response, Turkey appears to assert that if a party argues that a complainant has failed to make a *prima facie* case, the Working Procedures then permit the complainant to make its *prima facie* case as a rebuttal.[31] However, this cannot be the case. As the United States previously explained, because Turkey claims that USDOC has a practice that is a rule or norm of general and prospective application, Turkey must meet a high threshold and put forward sufficient evidence of that rule or norm.[32] Indeed, 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."[33] Having failed to make its *prima facie* case in its first written submission or at the first panel meeting, Turkey cannot now be permitted to attempt to make its case at such a late juncture of the panel proceeding.[34] Therefore, for the reasons discussed in the U.S. response to Question 82, the Panel should reject Turkey's new evidence.[35]

[30] Turkey's Panel Request, pp. 3-4.
[31] Turkey's Response to Second Panel Questions, para. 25.
[32] United States' First Written Submission, para. 53 (citing *US – Zeroing (EC) (AB)*, paras. 197-198).
[33] United States' First Written Submission, para. 53 (citing *US – Zeroing (EC) (AB)*, para. 196).
[34] United States' Response to Second Panel Questions, para. 57.
[35] United States' Response to Second Panel Questions, paras. 57-63.

17. Turkey's response to Question 87 is now a third attempt by Turkey to make its *prima facie* case, wherein it has provided excerpts of the 28 determinations that it previously listed in response to Question 34. However, the Panel should decline to consider this belated attempt by Turkey. Turkey failed to make its *prima facie* case in its first written submission or even during the first panel meeting, presenting only a statement in the OCTG final determination, which was reversed, and four preliminary determinations, one of which was also reversed.[36] Turkey then submitted a list of new determinations in its response to Question 34, but failed to provide any explanation or argumentation with respect to the determinations.[37] Now, in a third attempt, Turkey submits excerpts from these determinations. Notably, Turkey has not provided an explanation for why it could not have provided this evidence at an earlier stage of the proceeding.[38]

18. Even aside from their untimeliness and inappropriateness under the Panel's Working Procedures, for completeness, the United States further notes that the excerpts of the newly added determinations do not establish a *prima facie* case that USDOC has a practice that is a rule or norm of general and prospective application at the time of the Panel's establishment.[39] As the United States previously explained, 23 of the determinations do not establish a practice as it existed at the time of the Panel's establishment because they pre-date the HWRP, CWP, WLP determinations, as well as the *Borusan* court case.[40] As explained above in the U.S. comments to Question 84, in *Borusan*, the court explicitly found the use of out-of-country benchmarks based solely on a finding of the government constituting a substantial portion of the market to be insufficient under U.S. law.[41] Subsequent to the *Borusan* decision, USDOC does not base its

[36] United States' First Written Submission, para. 56; United States' Response to Second Panel Questions, para. 57.
[37] United States' Response to Second Panel Questions, para. 60.
[38] United States' Response to Second Panel Questions, para. 61 (citing *China – Rare Earths (Panel)*, para. 7.23 ("the submission by any party of a large bundle of evidence at a very late stage in the proceedings, especially when such evidence could have been provided earlier, raises due process issues for the opposing party . . . whose opportunity to make its defense could be undermined")).
[39] United States' Second Written Submission, paras. 53-67.
[40] United States' Second Written Submission, para. 59. In addition, the 23 determinations do not demonstrate the alleged practice. For example, *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China* (Exhibit TUR-138), *Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China* (Exhibit TUR-139), *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China* (Exhibit TUR-140); *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China* (Exhibit TUR-141), *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China* (Exhibit TUR-142), *Wire Decking from the People's Republic of China* (Exhibit TUR-144); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China* (Exhibit TUR-147), and *High Pressure Steel Cylinders from the People's Republic of China* (Exhibit TUR-155) illustrate USDOC's consideration of import penetration when determining whether a market is distorted, as further discussed in the U.S. comments to Question 83. Likewise, *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China* (Exhibit TUR-140), *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China* (Exhibit TUR-142), *Wire Decking from the People's Republic of China* (Exhibit TUR-144), and *Aluminum Extrusions from the People's Republic of China* (Exhibit TUR-146) illustrate USDOC's consideration of export restraints as a factor in its distortion analysis.
[41] United States' Second Written Submission, para. 59; *see also Borusan Mannesmann Boru Sanayi Ve Ticaret v. United States*, 61 F. Supp. 3d 1306, 1330 (Ct. Int'l Trade 2015) (Exhibit TUR-131).

determinations solely on the government constituting a substantial portion of the market and considers other facts on the record concerning market distortion.[42]

19. The five remaining determinations are likewise not sufficient to demonstrate the existence of a rule or norm of general and prospective application, that necessarily led to WTO-inconsistent action, especially in light of the contrary evidence already on the record showing that USDOC does not decide to use an out-of-country benchmark based solely on evidence of the government constituting a majority or substantial portion of the market.[43]

20. In any event, as previously detailed by the United States, the five determinations in fact contain findings demonstrating that USDOC considered additional evidence concerning market distortion. Indeed, Turkey's excerpts likewise continue to demonstrate this to be the case. In *Certain Tool Chests and Cabinets from the People's Republic of China*[44] and *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China*,[45] USDOC discusses the low volume of import penetration in addition to the government's substantial involvement in the market. In *Steel Concrete Reinforcing Bar from the Republic of Turkey*,[46] *Certain Cold-Rolled Steel Flat Products from the Russian Federation*,[47] and *Certain Hot-Rolled Steel Flat Products from the Republic of Turkey*,[48] USDOC also considered other factors related to market distortion.

---

[42] United States' Response to First Panel Questions, paras. 105-107, 113-117; United States' Second Written Submission, paras. 62-67.

[43] United States' Second Written Submission, paras. 60-61.

[44] Certain Tool Chests and Cabinets from the People's Republic of China Final I&D Memo, p. 30 (finding that "state-owned producers account for 60.89 percent of domestic wide strip production and 55.28 percent of domestic thin strip production during the [period of investigation]," and "the volume of imports as a percentage of domestic production and consumption (1.20 and 1.34 percent, respectively, for wide strip and 1.37 and 1.35 percent, respectively, for thin strip), is insignificant. Based on these facts, we preliminarily determine that domestic prices in the PRC for hot-rolled coiled steel are distorted such that they cannot be used as a Tier 1 benchmark.") (emphasis added) (Exhibit TUR-164). *See also* United States' Second Written Submission, para. 65.

[45] Certain New Pneumatic Off-The-Road Tires from the People's Republic of China Final I&D Memo, p. 23 (discussing that the government accounts for a substantial portion of the market, and also that "the volume of imports as a percentage of domestic production and consumption (2.72 and 3.35 percent, respectively), is relatively insignificant. Based on these facts together, we may reasonable conclude that domestic prices in the PRC for carbon black are distorted such that they cannot be used as a Tier 1 benchmark.") (emphasis added) (Exhibit TUR-162). *See also* United States' Second Written Submission, para. 63.

[46] Steel Concrete Reinforcing Bar from the Republic of Turkey Final I&D Memo, p. 15 (finding the market distorted because: (1) the sales of natural gas account for a substantial majority of Turkey's natural gas consumption, (2) domestically produced gas accounts for only 0.79 percent of Turkey's natural gas consumption, and (3) all natural gas consumed in Turkey is transported via pipelines owned and operated by a governmental authority) (Exhibit TUR-163).

[47] Certain Cold-Rolled Steel Flat Products from the Russian Federation Final I&D Memo, p. 17 ("[F]or the reasons discussed below in the Department's Position to Comment 3, we continue to find that the natural gas market is distorted through the [Government of Russia's] predominant role in the market via Gazprom, and through other interventions in the market.") (emphasis added) (Exhibit TUR-160). In its second written submission, the United States explained the other factors that USDOC relied upon in evaluating market distortion in this case. *See* United States' Second Written Submission, para. 64 n.110.

[48] Certain Hot-Rolled Steel Flat Products from the Republic of Turkey Final I&D Memo, p. 15 (finding the market to be distorted because: (1) sales of natural gas by the government account for 82.35 percent of domestic consumption, (2) 0.98 percent accounted for by other domestic producers, and (3) the remainder accounted for by

21. Accordingly, Turkey has failed to establish 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 substantial portion of the market for the good, with no consideration of whether in-country prices are distorted," and its claim should be rejected.[49]

IV. CLAIMS UNDER ARTICLES 2.1(C) AND 2.4 OF THE SCM AGREEMENT

Question 88: At paragraph 227 of its first written submission, the United States refers to Erdemir's 2012 Annual Report, which states that Erdemir "implemented policies which promoted . . . 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." The USDOC stated in its determination that these policies are in line with the GOT's stated policy in its 2012-2014 Medium Term Programme.

a. (*To both parties*): Must an investigating authority set out its analysis of the existence of a subsidy programme in its determination of *de facto* specificity?

Comments:

22. In its response to the Panel's question, Turkey argues that in the absence of formal evidence of a "subsidy programme," an investigating authority is required to identify and substantiate in its *de facto* specificity determination a "plan," "scheme," or "systematic series of actions" to provide subsidies, because otherwise the specific language of Article 2.1(c) would be rendered meaningless.[50] However, the text of Article 2.1 does not articulate such a requirement. Nor does such an argument find support in the approach of prior reports by the Appellate Body.

23. As the United States further detailed in its response to this question, an investigating authority's analysis of the existence of a subsidy programme and the evidence relied upon need not be separately set out in one specific section of its determination.[51] Indeed, the Appellate Body in *US – Countervailing Measures (China)* recognized that "the . . . 'subsidy programme'. . . at issue . . . often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1."[52] The Appellate Body did not state that in establishing a subsidy programme an investigating authority must set out its analysis in the specificity section of its determination.[53] Indeed, an investigating authority may

direct purchases by Turkish consumers from foreign suppliers, of which the government serves as the transporter for the imports, charging a fee for its transmission services) (Exhibit TUR-160).

[49] United States' Second Written Submission, paras. 60-66.

[50] Turkey's Response to Second Panel Questions, para. 29.

[51] United States' Response to Second Panel Questions, paras. 73-74.

[52] United States' Response to Second Panel Questions, para. 73 (citing *US – Countervailing Measures (China) (AB)*, para. 4.144).

[53] *See US – Countervailing Measures (China) (AB),* para. 4.157 (explaining that it could not complete the legal analysis because the participants did not sufficiently address in their submissions "the issues of whether the USDOC sufficiently identified and substantiated the existence of a 'subsidy programme' in each of the determinations at issue.") (emphasis added).

organize evidence relating to different issues without excluding appreciation of that evidence for other issues.[54]

24. Thus, as the United States explained, USDOC's determinations with respect to the existence of a subsidy programme were based on both the transaction-specific accountings of the sale of hot-rolled steel, which were 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.[55]

Question 89 (*To both parties*): The compliance panel in *US – Countervailing Measures (Article 21.5 – China)* stated that "an investigating authority may demonstrate the existence of a subsidy programme based on evidence of: (a) the existence of a subsidy within the meaning of Article 1.1 of the SCM Agreement; and (b) the existence of a "plan or scheme" pursuant to which this subsidy has been provided to certain enterprises"[56].

a. If an investigating authority fails to establish the existence of a subsidy under Article 1.1 of the SCM Agreement, does this necessarily mean that the investigating authority would also fail to establish the existence of a "subsidy programme" that is used "by a limited number of certain enterprises"? Please explain.

Comments:

25. In its response, Turkey explains that there could be circumstances where an investigating authority failed to establish a subsidy under Article 1.1, but regardless, there may still be evidence on the record concerning the existence of a "subsidy programme" under Article 2.1, such that an investigating authority would not necessarily fail to establish a subsidy programme.[57] The United States agrees with this general observation. However, as the United States previously stated in its response to this question, were USDOC to find that a financial contribution under Article 1.1 of the SCM Agreement does not exist, USDOC would then decline to complete a specificity analysis under Article 2.1(c). [58]

26. Further, as detailed below in the U.S. comments to Turkey's response to Question 91, the United States disagrees with Turkey's assertion that "financial contributions themselves are not adequate evidence of a 'plan' or 'scheme' to provide subsidies."[59] As explained below, a "systematic series of actions" need not consist entirely of acts of subsidization; rather, the

[54] United States' Response to Second Panel Questions, para. 74.
[55] United States' Response to Second Panel Questions, para. 75.
[56] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.267.
[57] Turkey's Response to Second Panel Questions, para. 33.
[58] United States' Response to Second Panel Questions, para. 78.
[59] Turkey's Response to Second Panel Questions, para. 35.

subsidy in question must be provided "pursuant to" a series of actions that qualifies as a "program."[60]

b. If an investigating authority acted inconsistently with Article 1.1 of the SCM Agreement in its determination of the existence of a subsidy, does it necessarily mean that the investigating authority also acted inconsistently with Article 2.1 (c) in establishing the existence of a "subsidy programme" that is used "by a limited number of certain enterprises"? Please explain.

Comments:

27. The United States agrees with Turkey that a "deficient subsidy finding" under Article 1.1 of the SCM Agreement does not necessarily mean the investigating authority also acted inconsistently with Article 2.1(c) in determining the existence of a subsidy program.[61] Thus, as the United States detailed in its response to this question, if a panel were to find that an investigating authority acted inconsistently with Article 1.1 of the SCM Agreement in determining the existence of a subsidy, it does not follow that the panel must then necessarily find that the investigating authority acted inconsistently with Article 2.1(c) in establishing the existence of a "subsidy programme" that is used "by a limited number of certain enterprises."[62] Indeed, how a Member may choose to comply with an adverse ruling is not a matter at issue before this Panel.[63]

Question 91 *(To Turkey)*: Turkey argues at paragraph 106 of its second written submission that "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". Does Turkey mean that a list of transaction does not provide sufficient evidence, or even a consideration of the frequency of transactions providing subsidies does not provide sufficient evidence of the systematic nature of the transactions providing subsidies? If it is the latter, could Turkey explain why the frequency of transactions providing subsidies does not establish the systematic nature of the actions providing subsidies where the subsidy programme is unwritten?

Comments:

28. In its response to the Panel's question, Turkey argues that USDOC relied only on a list of transactions to establish a "subsidy programme."[64] Turkey also contends that "the frequency, *i.e.*, the number, of transactions conferring a benefit is not sufficient evidence of 'a systematic series of actions' to provide subsidies."[65]

---

[60] *See also* United States' Opening Statement at Second Panel Meeting, para. 33.
[61] Turkey's Response to Second Panel Questions, para. 37.
[62] United States' Response to Second Panel Questions, para. 79.
[63] United States' Response to Second Panel Questions, para. 79.
[64] Turkey's Response to Second Panel Questions, para. 38.
[65] Turkey's Response to Second Panel Questions, para. 39.

29. As the United States has previously explained, Turkey's arguments are wrong on both a factual and a legal basis.[66] As a factual matter, it was 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.[67]

30. 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.[68] In *US – Countervailing Measures (China)*, the Appellate Body explained that:

> [i]n 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.[69]

31. As the Appellate Body recognized then, 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."[70] 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;[71] rather, the subsidy in question must be provided "pursuant to" a series of actions that qualifies as a "program."[72] 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]."[73] As the Appellate Body observed, systematic activity or a series of activities may be evidence of an unwritten subsidy program.[74]

---

[66] United States' Opening Statement at Second Panel Meeting, para. 31.
[67] United States' First Written Submission, paras. 223-230; United States' Response to First Panel Questions, paras. 130-133; United States' Opening Statement at Second Panel Meeting, para. 31.
[68] United States' Opening Statement at Second Panel Meeting, para. 32.
[69] United States' Opening Statement at Second Panel Meeting, para. 32 (citing *US – Countervailing Measures (China) (AB)*, para. 4.143 (emphasis added)).
[70] United States' Opening Statement at Second Panel Meeting, para. 33 (citing *US – Countervailing Measures (China) (AB)*, para. 4.144).
[71] Turkey's Response to Second Panel Questions, para. 41 (arguing that the frequency or number of transactions conferring a benefit can depend entirely on the investigating authority's selection of a benchmark price).
[72] United States' Opening Statement at Second Panel Meeting, para. 33.
[73] United States' Opening Statement at Second Panel Meeting, para. 33 (citing *US – Countervailing Measures (China) (AB)*, para. 4.141).
[74] United States' Opening Statement at Second Panel Meeting, para. 33 (citing *US – Countervailing Measures (China) (AB)*, para. 4.149; *US – Countervailing Measures (China) (Panel)*, para. 7.239).

32. As previously explained,[75] in this dispute, the subsidy in question is the provision of hot-rolled steel for less than adequate remuneration, and the question is whether it is generally available or *de facto* limited to certain enterprises. Where a public body is providing hot-rolled steel for less than adequate remuneration, account must be taken of the features of that subsidy program in determining whether it is specific. Indeed, in the context of a subsidy provided by means of inputs for less than adequate remuneration, the provision of the inputs to the recipient by the public body is precisely the "systematic series of actions" that establishes this type of subsidy program.

33. Therefore, Turkey's claim that USDOC's finding of a "subsidy programme" is inconsistent with Article 2.1(c) of the SCM Agreement fails on both factual and legal grounds.

V. CLAIMS UNDER ARTICLE 12.7 OF THE SCM AGREEMENT IN THE OCTG, WLP AND HWRP INVESTIGATIONS

Question 93 (*To both parties*): The parties disagree as to whether the USDOC's selection of facts available in the challenged proceedings was "punitive". Please explain how a panel should assess whether the selection of facts available by an investigating authority is punitive or not.

Comments:

34. In its response to the Panel's questions, Turkey argues that USDOC selected "the worst possible information" in the OCTG investigation.[76] Turkey asserts that USDOC drew adverse inferences, and that this "can help establish the 'punitive' nature of a 'facts available' determination.[77] In making its argument, Turkey relies upon a statement by the panel in *EC – Countervailing Measures on DRAM Chips.*

35. However, Turkey fails to explain the context of the panel's discussion in *EC – Countervailing Measures on DRAM Chips*. The full context in *EC – Countervailing Measures on DRAM Chips* includes both paragraph 7.61 cited by Turkey and the prior paragraph, which state:

> In reviewing the findings of the investigating authority, the extent to which the interested parties cooperated with the authority is, of course, also a relevant element to be taken into account. In those cases where certain essential information which was clearly requested by the investigating authority is not provided, we consider that this uncooperative behaviour may be taken into account by the authority when weighing the evidence and the facts before it. The fact that certain information was withheld from the authority may be the element that tilts the balance in a certain direction. Depending on the circumstances of the cases, we

[75] United States' Opening Statement at Second Panel Meeting, para. 34.
[76] Turkey's Response to Second Panel Questions, para. 44.
[77] Turkey's Response to Second Panel Questions, para. 44.

consider that an authority may be justified in drawing certain inferences, which may be adverse, from the failure to cooperate with the investigating authority. We consider relevant, in this respect, the following statement of the Appellate Body in the *US – Hot-Rolled Steel* case concerning the facts available provision of Article 6.8 of the *AD Agreement*, which is very similar both textually and contextually to Article 12.7 of the *SCM Agreement*: "[i]n order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the "best of their abilities" – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon absolute standards or impose unreasonable burdens upon those exporters".

While we acknowledge that this statement was, at least in part, based on several paragraphs of Annex II to the *AD Agreement*, we consider that a similar significant degree of cooperation is to be expected of interested parties in a countervailing duty investigation. The fact that the *SCM Agreement* does not contain a similar Annex is not determinative as the role played by the facts available provision in an anti-dumping investigation and a countervailing duty investigation is the same. Article 12.7 of the *SCM Agreement* is an essential part of the limited investigative powers of an investigating authority in obtaining the necessary information to make proper determinations. In the absence of any subpoena or other evidence gathering powers, the possibility of resorting to the facts available and, thus, also the possibility of drawing certain inferences from the failure to cooperate play a crucial role in inducing interested parties to provide the necessary information to the authority. If we were to refuse an authority to take such cases of non-cooperation from interested parties into account when assessing and evaluating the facts before it, we would effectively render Article 12.7 of the *SCM Agreement* meaningless and inutile. We wish to add that we do not suggest that non-cooperation provides a blank cheque for simply basing a determination on speculative assumptions or on the worst information available. Ultimately, the determination has to be made on the basis of the available *facts*, and not on mere speculation. Therefore, and in the absence of such supporting facts, mere non-cooperation by itself does not suffice to justify a conclusion which is negative to the interested party that failed to cooperate with the investigating authority.[78]

[78] *EC – Countervailing Measures on DRAM Chips*, paras. 7.60-7.61 (emphasis added).

36. Therefore, the panel in *EC – Countervailing Measures on DRAM Chips* was explaining the crucial role of Article 12.7. The panel explained that in cases of non-cooperation, the "possibility of drawing certain inferences from the failure to cooperate play[s] a crucial role in inducing interested parties to provide the necessary information to the authority."[79] However, the panel then clarified that a facts available determination should not be "a blank cheque for simply basing a determination on speculative assumptions or on the worst information available. Ultimately, the determination has to be made on the basis of the available *facts*, and not on mere speculation."[80] Thus, in the context of its discussion of Article 12.7, the panel in *EC – Countervailing Measures on DRAM Chips* explained that an investigating authority's determination should not be based on speculation, but rather, must be based on the available facts.

37. In the OCTG investigation, USDOC calculated a subsidy rate from the actual information that was provided by Borusan; the rate was based on the actual behavior of Borusan.[81] Likewise, in the WLP and HWRP investigations, USDOC used subsidy rates that reflected the actual subsidy practices of the Turkish government as reflected in the actual experiences of companies in Turkey.[82] Therefore, in the challenged proceedings, the rates used by USDOC were not speculative. A speculative subsidy rate would have been one that did not reflect the actual subsidy practices of the Turkish government and the experiences of Turkish companies. Therefore, the information that USDOC used was not "punitive," as Turkey suggests.

38. Moreover, as the United States explained in its response to this question, an interested party or Member's lack of cooperation is relevant to the investigating authority's selection of particular "facts available" under Article 12.7.[83] The Appellate Body has acknowledged that 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.[84] That a particular fact may result in an outcome less favorable than had the responding party cooperated with the investigation does not mean that the selected fact is not reasonable, or punitive, however.[85]

39. Simply because USDOC used a subsidy rate that is higher than what Turkey would prefer does not mean that USDOC's determination was speculative or not based on the available facts. Therefore, the Panel should find that an objective and unbiased investigating authority could have selected the facts available in each of the challenged proceedings, as USDOC did, consistent with Article 12.7 of the SCM Agreement.[86]

---

[79] *EC – Countervailing Measures on DRAM Chips*, para. 7.61.
[80] *EC – Countervailing Measures on DRAM Chips*, para. 7.61 (emphasis added).
[81] United States' Second Written Submission, para. 134.
[82] United States' Second Written Submission, para. 153; United States' Opening Statement at Second Panel Meeting, para. 40; United States' Response to Second Panel Questions, para. 110.
[83] United States' Response to Second Panel Questions, paras. 86-90.
[84] United States' Response to Second Panel Questions, para. 87.
[85] United States' Response to Second Panel Questions, paras. 88-89.
[86] *US – Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

Question 94 (*To both parties*): Turkey argues that, in the WLP investigation, Borusan decided not to participate in the verification, and instead requested the USDOC to use the verification report and exhibits from the CWP review proceeding, which covered *the same programs* and *the same time period* as the WLP investigation. The USDOC rejected this request.

a. Please explain the USDOC procedures through which facts are introduced to the written records. Does it suffice if an interested party introduce or refer to certain facts, such as the verification report and exhibits from the CWP review proceeding, or must such facts be physically placed on the record? What about public information such as the subsidy rates determined in previous investigations?

b. As a matter of fact, were the CWP verification report and exhibits on the written record of the WLP investigation? Please explain.

Comments (subparts a & b):

40. The United States refers the Panel to the United States' response to this question.[87]

Question 96 *(To Turkey)*: At paragraph 84 of Turkey's response to panel question No. 45, Turkey stated 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. Does Turkey's argument concerning "punitive facts available" hinge on the USDOC having to take into account the difficulties when selecting facts available? If so, how did the difficulties experienced by Borusan affect the USDOC's selection of facts? Please explain.

Comments:

41. As the United States has previously explained, Turkey's claim that USDOC failed to take into account the difficulties Borusan experienced is not supported by the text of Article 12.7, or the OCTG final determination.[88] Contrary to Turkey's arguments, USDOC took into account the difficulties Borusan experienced, including by granting the extension requested by Borusan to respond to the initial questionnaire, and later issuing a supplemental questionnaire to remedy Borusan's initial deficient reporting.[89] In total, Borusan had over 100 days to report the requested information concerning the Halkali and Izmit mills.[90] Importantly, Borusan never claimed that it could not provide the information; rather, it claimed that it needed more time – time that USDOC extended to Borusan.[91] Notwithstanding USDOC's accommodation of

[87] United States' Response to Second Panel Questions, paras. 91-100.
[88] United States' Second Written Submission, para. 121.
[89] United States' Second Written Submission, para. 122.
[90] United States' First Written Submission, para. 153.
[91] United States' Second Written Submission, para. 126.

Borusan's request for additional time, Borusan ultimately failed to cooperate and failed to provide the requested information.[92]

42. Therefore, USDOC took into account all relevant, substantiated facts on the record, including the fact that Borusan did not cooperate. Turkey's claim that USDOC did not take into account all substantiated facts, that is, all of Borusan's purchases of hot-rolled steel for the Gemlik mill, is essentially an argument that USDOC should have used all of Borusan's purchases of hot-rolled steel for the Gemlik mill in its selection of the facts available.[93] However, such a request by Turkey would appear to suggest that USDOC should have ignored a relevant fact on the record – that is, the fact that Borusan did not cooperate with USDOC. To ignore Borusan's non-cooperation would contradict the text of Article 12.7, which permits an investigating authority to make determinations based on "facts available" in cases where an interested party "does not provide, necessary information within a reasonable period or significantly impedes the investigation."[94] Moreover, as the Appellate Body has recognized, "non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact."[95]

43. And, as previously explained, Turkey has not demonstrated that the facts selected by USDOC were not a reasonable replacement for the missing purchase data.[96] The quantity of hot-rolled steel identified for the Halkali and Izmit mills does not exceed their yearly production capacity, and the purchase price selected by USDOC was a price actually paid by Borusan for the Gemlik facility.[97] Because Borusan failed to provide information concerning the Halkali and Izmit mills, it is entirely possible that the actual prices paid by Borusan for hot-rolled steel for the Halkali and Izmit mills were less than the lowest price it paid for the Gemlik mill.[98] This being the case, a price based on the lowest prices paid for another mill may in fact reflect a better outcome than had Borusan fully cooperated with the investigation.[99] Certainly, no evidence on the record contradicted or raised questions about the price and quantity selected and their reasonableness as a replacement for the missing data.[100]

---

[92] And, as previously explained, 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 in the OCTG investigation. *See* United States' Second Written Submission, para. 124.
[93] Turkey's Response to Second Panel Questions, para. 49.
[94] United States' Second Written Submission, para. 123.
[95] United States' Second Written Submission, para. 123.
[96] United States' Second Written Submission, para. 125.
[97] United States' Second Written Submission, para. 125.
[98] United States' Second Written Submission, para. 131.
[99] United States' Second Written Submission, para. 131.
[100] United States' Second Written Submission, para. 125.

44. Lastly, the facts selected by USDOC were also not the "worst possible information as facts available" as Turkey suggests.[101] Indeed, the OCTG final determination demonstrates USDOC's rejection of such a request by petitioners. Specifically, the OCTG final determination explains that petitioners requested for USDOC to "infer that Borusan's Izmit and Halkali mills purchased the same quantity of HRS as the Gemlik mill, but that 100 percent of these purchases was from Erdemir and Isdemir."[102] USDOC, however, rejected this request, explaining that petitioners' proposal would contradict record information.[103] Ultimately, USDOC calculated a subsidy rate from actual information that was provided by Borusan; the rate was thus based on the actual behavior of Borusan.[104]

45. That a particular fact may result in an outcome less favorable than had the responding party cooperated with the investigation does not mean that the selected fact is not reasonable.[105] Rather, in reviewing an investigating authority's application of facts available, a panel must assess whether an "objective and unbiased" investigating authority could have found the chosen information to be a reasonable replacement for the missing information in the particular circumstances of the case, including by taking into account the non-cooperation of the party at issue.[106]

Question 98 (*To both parties*): In the OCTG investigation, was information concerning the production and capacity utilisation rate of the Gemlik facility on the record? Please explain. If so, what was the capacity utilization rate of the Gemlik facility? Were the capacity figures that were used for the non-responding facilities nominal or effective?

Comments:

46. The United States refers the Panel to the United States' response to this question.[107]

VI. CLAIMS UNDER ARTICLE 15.3 OF THE SCM AGREEMENT

Question 101 (*To both parties*): At paragraph 103 of its oral statement at the second meeting, Turkey argues that "the cumulative assessment of subsidized and dumped, *non-subsidized* imports for purposes of determining injury is fundamentally inconsistent with Article 15.3 and the SCM Agreement as a whole". In light of Turkey's panel request, how is the Panel to take into account the argument that cross-cumulation in sunset reviews is inconsistent with "the SCM Agreement as a whole"?

[101] Turkey's Response to Second Panel Questions, para. 50.
[102] OCTG Final I&D Memo, p. 52 (Exhibit TUR-85).
[103] OCTG Final I&D Memo, p. 53 (Exhibit TUR-85).
[104] United States' Second Written Submission, para. 134.
[105] United States' First Written Submission, paras. 131-132, 154; United States' Response to First Panel Questions, para. 152.
[106] *US –Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.
[107] United States' Response to Second Panel Questions, paras. 104-107.

Comments:

47. The Panel asked how it should take into account Turkey's argument at the second meeting that cross-cumulation in sunset reviews is inconsistent with "the SCM Agreement as a whole". In response to this question, the United States explained that the Panel should reject any claim that cross-cumulation is inconsistent with "the SCM Agreement as a whole" because such a claim is not within the Panel's terms of reference.[108] Turkey, in its response, clarified that, in making this statement, it was referring to the context of Article 15.3 and the object and purpose of the SCM Agreement. Turkey then repeats its various assertions concerning the interpretation of Article 15.3, which the United States has already addressed in prior written submissions and demonstrated to be flawed.

48. In particular, Turkey repeats its assertion that, in light of the context of Article 15.3 and the object and purpose of the SCM Agreement, Article 15.3 should be interpreted to prohibit cross-cumulation.[109] However, as the United States has noted throughout this dispute, Turkey fails to engage in any textual analysis of Article 15.3 consistent with the customary rules of interpretation.[110] Turkey again ignores that WTO adjudicators must apply those customary rules of interpretation to the text of the covered agreements.[111] In contrast to Turkey's approach, the United States has explained that the text of Article 15.3 is silent on the issue of whether cross-cumulation is permissible. Thus, Turkey's assertions regarding context, including its attempt to graft Article 15 obligations onto Article 21, therefore fail as they are belied by the actual texts of the respective provisions.[112]

49. Turkey's response also repeats its assertion that the object and purpose of the SCM Agreement supports Turkey's interpretation. However, as the United States has already explained, the text of the SCM Agreement makes clear that the requirements of Article 15 do not apply with respect to sunset reviews under Article 21, and the object and purpose of an agreement cannot have the effect of changing the text of that agreement.[113] Moreover, the United States has explained that the purpose of the cumulation provisions and the context provided by the AD Agreement and Article VI of the GATT 1994 support an interpretation that the cumulation of subsidized and dumped imports is permitted by the SCM Agreement.[114] In this regard, the United States noted in prior written submissions that the Appellate Body has 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.[115] This reasoning is similarly applicable to a situation where dumped and subsidized imports are having

[108] United States Response to Second Panel Questions, paras. 122-123.
[109] Turkey's Response to Second Panel Questions, para. 52.
[110] *See, e.g.*, United States' First Written Submission, paras. 251-253.
[111] *See* DSU, Articles 3.2, 7.1, 11.
[112] United States' First Written Submission, paras. 258-263.
[113] *See, e.g.*, United States' Second Written Submission, para. 215.
[114] United States' First Written Submission, paras. 264-277.
[115] United States' First Written Submission, para. 267 (citing *EC – Tube or Pipe Fittings (AB)*, para. 117).

a simultaneous injurious impact on industry.[116] Turkey has failed to respond meaningfully to this argument.

50. Finally, Turkey's response also repeats the assertion that Turkey's interpretation is confirmed by the negotiating history of the SCM Agreement.[117] The United States has previously explained why recourse to supplementary means of interpretation is not warranted here, as the meaning of Articles 15 and 21 are clear. Further, Turkey's entire discussion of negotiating history is inapposite because it has pointed to no mention in the negotiating history of the issue of cumulation in sunset reviews.[118]

VII. CLAIMS UNDER ARTICLE 19.4 OF THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994

Question 103 (*To both parties*): At paragraphs 329 and 441 of its first written submission, Turkey cites the Appellate Body statement from *US - Countervailing Measures on Certain EC Products* that, under Article 19.4, "investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation".[119] Beyond this statement, the Appellate Body also stated in the same paragraph of that report that "Article 19.4 of the SCM Agreement, consistent with the language of Article VI:3 of the GATT 1994, requires that '*[n]o countervailing duty* shall be levied on any imported product in excess of the amount of the subsidy *found to exist*'".[120] Reading these statements together, what is the obligation in Article 19.3 and Article VI:3? Must an investigating authority simply ensure that it does not collect countervailing duties in excess of the amount of the subsidy that the investigating authority *had actually determined to exist* in the investigation?

Comments:

51. See U.S. comments to Questions 104 and 105, below.

Question 104 (*To both parties*): In respect of the *chapeau* of Article 9.3 of the Anti-Dumping Agreement, the Appellate Body stated in *EU – Biodiesel (Argentina)* that the burden is on a complainant to "show that anti-dumping duties are imposed at a rate that is higher than the dumping margin that would have been established had the authority acted consistently with Article 2"?[121] What is the relevance of this reasoning for purposes of addressing Turkey's Article 19.4 and Article VI:3 claims? Does this mean that any error made in calculating the subsidy amount arising from violations of other SCM provisions would not necessarily lead to a violation of Article 19.4 or Article VI:3? Please explain.

[116] United States' First Written Submission, para. 268.
[117] Turkey's Response to Second Panel Questions, para. 52.
[118] United States' Second Written Submission, para. 216.
[119] *US - Countervailing Measures on Certain EC Products (AB)*, para. 139.
[120] *US - Countervailing Measures on Certain EC Products (AB)*, para. 139 (emphasis original).
[121] *EU – Biodiesel (AB)*, para. 6.104.

Comments:

52. In its response, Turkey argues that "errors or inconsistencies under other provisions of the SCM Agreement which will also result in an inconsistency with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 are not strictly limited to those that result in higher calculated subsidy rates."[122] However, Turkey's interpretation is inconsistent with the text of Article 19.4. As the United States has previously explained, consistent with the language of Article VI:3 of the GATT 1994, SCM 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."[123] In other words, no countervailing duty may be imposed on an imported product if no countervailable subsidy is found to exist with respect to that imported product, and the countervailing duty imposed may not exceed the subsidy amount that the investigating authority calculated.[124] Article 19.4 thus "establishes a clear nexus between the imposition of a countervailing duty, and the existence of a (countervailable) subsidy."[125] Notably, Article 19.4 does not prevent Members from levying a countervailing duty on an imported product up to the amount of the subsidy found to exist — it only prevents the imposition of duties "in excess of" that amount.[126]

53. Turkey also argues that "errors that result in the imposition of countervailing duties where no subsidization exists would also give rise to a violation of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, even if there is no error in the investigating authority's calculations, per se."[127] Turkey's arguments thus appear to suggest that if the Panel finds an error, for instance, in the application of facts available, then this means that the duty applied must necessarily have been in excess of the actual rate of subsidization under the program.[128] This is not what Articles VI:3 and 19.4 address. Rather, as the United States previously explained, Article 19.4 and Article VI:3 provide that no countervailing duty may be levied on an imported product if no countervailable subsidy is found by the investigating authority to exist with respect to that imported product; and the countervailing duty levied may not exceed the subsidy amount calculated by the investigating authority.[129] Therefore, that a Member's application of facts available, for instance, may be found by the Panel to be inconsistent with Article 12.7 does not mean that the Member has levied a countervailing duty "in excess of the amount of subsidy found to exist."[130] If the duty rate was applied consistent with the investigating authority's calculation of subsidization, no breach of Articles VI:3 or 19.4

[122] Turkey's Response to Second Panel Questions, para. 58.
[123] United States' First Written Submission, paras. 185, 206.
[124] United States' First Written Submission, paras. 185, 206 (citing *US – Lead and Bismuth II (Panel)*, para. 6.52).
[125] United States' First Written Submission, paras. 185, 206 (citing *US – Lead and Bismuth II (Panel)*, para. 6.52).
[126] United States' First Written Submission, paras. 185, 206.
[127] Turkey's Response to Second Panel Questions, para. 58.
[128] United States' Response to First Panel Questions, para. 23.
[129] United States' Response to Second Panel Questions, para. 128.
[130] United States' Response to First Panel Questions, para. 22.

may be found.[131] That there may have been errors in the method of calculation does not lead to the conclusion that the duty was applied "in excess of the amount of subsidy found to exist."[132]

Question 105 (*To both parties*): Is it self-evident that a breach of Articles 1.1(a)(1), 1.1(b), 2.1(c), 12,7, 14(d) and 15.3 of the SCM Agreement would necessarily lead an investigating authority to calculate and impose a higher subsidy rate? Please explain in respect of each provision concerned, e.g. Article 1.1(a)(1), 1.1(b), 2.1(c), 12.7, 14(d) and 15.3 of the SCM Agreement.

Comments:

54. The United States refers the Panel to the United States' response to this question.[133]

[131] United States' Response to First Panel Questions, para. 22.
[132] United States' Response to First Panel Questions, para. 22.
[133] United States' Response to Second Panel Questions, paras. 127-130.