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

(DS523)

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL

March 15, 2018

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US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
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US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006

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I. THE UNITED STATES' PRELIMINARY RULING REQUEST

Question 1 *(To both parties)*: The United States argues that Turkey's panel request adds new "practice" measures and new "as such" claims related to these practices. The subsection of Turkey's request for consultations entitled "Specific Measures at Issue" states that the measures at issue include, *inter alia*, "related practices". The subsection of Turkey's request for consultations entitled "Legal Basis of the Complaint" states that Turkey's concerns relate, *inter alia*, to "ongoing practices applied in administrative proceedings more generally".

a. Does the referenced language establish that Turkey's challenge extends beyond the preliminary and final countervailing duty measures in the OCTG, WLP, HWRP and CWP proceedings?

b. Do Turkey's "as such" claims in its panel request relating to "ITC's practice of 'cross-cumulating'", and "a practice, in assessing whether a good is provided for less than adequate remuneration", evolve from this language?

Response (Subpart a):

1. Turkey's request for consultations did not identify any measures at issue in this dispute other than the preliminary and final countervailing duty measures in the OCTG, WLP, HWRP and CWP proceedings. In particular, its references to "related practices" and "ongoing practices applied in administrative proceedings more generally" fail to actually identify any practices as measures at issue, and thus fail to extend Turkey's challenge beyond the identified OCTG, WLP, HWRP, and CWP countervailing duty measures.

2. Under Article 4.4 of the DSU, any request for consultations must include an "identification of the measures at issue and an indication of the legal basis for the complaint." Under DSU Article 6.2, the complaining party must identify the "specific measures at issue" and provide a "short summary of the legal basis of the complaint" sufficient to present the problem clearly. Thus, the measures in the panel request are those of the consultations request identified more specifically, while "the short summary" of the legal basis in the panel request may provide greater precision through additional legal provisions as compared to "the indication" of the consultation request.[1] The Appellate Body has noted that the panel request may neither "expand the scope"[2] nor change the essence of a consultations request,[3] which would occur if new

[1] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 138.
[2] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (emphasis omitted) (quoting *US – Upland Cotton (AB)*, para. 293).
[3] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (quoting *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 137 (other citations omitted)).

instruments not identified as part of the measure in the consultation request were introduced for the first time in the panel request.[4]

3. In the first paragraph of Section A ("Specific Measures at Issue") of its consultation request, Turkey indicates the measures at issue in this dispute 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]."[5] In the second paragraph of that section, Turkey states that these measures include, *inter alia*, "related practices."[6] Later, in Section B ("Legal Basis of the Complaint"), Turkey indicates that its concerns relate to both the "the aspects of the measures and underlying administrative proceedings cited above as well as ongoing practices applied in administrative proceedings more generally."[7]

4. While Turkey's consultation request refers to "related practices" and "ongoing practices," it does not identify what those alleged practices are, or connect these general references to specific issues or claims discussed elsewhere in the request. The alleged practices themselves, as identified for the first time in Turkey's panel request[8] — USDOC's rejection of in-country benchmarks based on evidence of government control in determining benefit and USITC's cumulation of subsidized imports and dumped, non-subsidized imports in determining injury — are not identified anywhere in Turkey's consultation request. By comparing the "respective parameters" of the consultations request and the panel request, it is thus clear that Turkey's consultation request does not identify the alleged U.S. injury and benefit practices subsequently identified in its panel request.[9]

5. By introducing new measures in its panel request that were not identified in its consultation request, Turkey has not identified with greater precision the "specific measures at issue" but has both "expanded the scope" and "changed the essence" of the dispute, contrary to DSU Articles 4.4 and 6.2.[10] Thus, Turkey's newly added measures regarding alleged U.S. practices, as well as the corresponding legal claims, are not within the Panel's terms of reference.

Response (Subpart b):

6. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body observed that information learned during consultations could warrant revising the list of provisions with which

[4] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 294 (in determining the matter before it, 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").
[5] Consultations Request, section A.
[6] Consultations Request, section A.
[7] Consultations Request, section B.
[8] *Compare* Consultations Request, sections A-B, *with* Panel Request, paras. 8.(A).2, 8.(A).5, 8.(B).4, 8.(C).4, 8.(D).3.
[9] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 294.
[10] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (emphasis omitted).

an identified measure is alleged to be inconsistent.[11] "The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process."[12] In that dispute, for example, the Appellate Body found there to be a "natural evolution" where the panel request included claims based on Article 11.2 of the AD Agreement, while the consultations request had included claims based on Article 11 of the AD Agreement.[13]

7. The situation before the Panel is not comparable to that in *Mexico – Anti-Dumping Measures on Rice*. In the present dispute, as explained in response to Subpart a above, Turkey's request for consultations failed to identify the alleged U.S. injury and benefit practices – the *measures* – that it subsequently challenged in its panel request. Turkey's general reference to "related practices" and "ongoing practices" — with no indication of what those practices might be, much less how they might be WTO-inconsistent — is insufficient to give an indication of the measures at issue, as required by DSU Article 4.4, such that those measures would form part of the matter on which consultations were held and could be identified in the panel request, pursuant to DSU Articles 4.7 and 6.2.

8. 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*. The present dispute is thus distinguishable from *Mexico – Anti-Dumping Measures on Rice*, because the consultations request in that dispute did identify specific measures, as well as claims based on those measures.[14]

9. Turkey suggested at the Panel meeting that Turkey raised these issues during the consultations themselves, and that the United States thus was aware that these measures also were subject to the Turkish challenge. However, anything that may have occurred during the course of consultations is irrelevant to the Panel's analysis of this issue. Consultations are confidential under the DSU,[15] and the Panel must base its assessment on the respective texts of Turkey's consultation request and panel request[16]. As the panel in *China – Broiler Products* explained, analysis of the relationship between consultation requests and panel requests is based on "the text of these documents without inquiring into the actual consultations that took place between the parties."[17]

10. Therefore, Turkey's introduction of new measures in its panel request cannot retroactively fix its fundamentally deficient consultation request. To the contrary, these new measures impermissibly expand the scope and change the essence of the dispute, contrary to

[11] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 138.
[12] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 138.
[13] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 141.
[14] *See Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 141, 144; Turkey's Consultations Request, sections A-B.
[15] DSU, Art. 4.6 ("Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.").
[16] *See China – Broiler Products (Panel)*, para.7.225; *Brazil – Aircraft (AB)*, para. 131; *US – Upland Cotton (AB)*, para. 285.
[17] *China – Broiler Products (Panel)*, para 7.225.

DSU Article 4.4.[18] Turkey's challenges to alleged U.S. injury and benefit practices, as well as its "as such" claims with respect to those practices, are thus outside the Panel's terms of reference.

Question 2 *(To both parties)*: The Appellate Body has explained that, in order to present the problem clearly, a panel request must plainly connect the challenged measures with the provisions of the covered agreements that are alleged to have been infringed so that the responding party is aware of the basis for the alleged violation or impairment of benefits. Regarding the WLP investigation, Turkey's panel request lists its claim concerning Article 12.7 of the SCM Agreement directly under the subheading "In connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration". Turkey's panel request does not refer to any other subsidy programme in connection with the WLP proceeding. In light of this, how can Turkey's panel request be said to plainly connect its Article 12.7 claim in respect of the WLP investigation with other programmes at issue?

Response:

11. With respect to the WLP investigation, Turkey's request for establishment of a panel limited its claims under Article 12.7 to a single subsidy program through the structure of that request. It is Turkey's panel request – as Turkey drafted it – that delineates the measures and the claims that the DSB has charged the Panel with examining. As a result, any claims under Article 12.7 with respect to other programs at issue in the WLP proceeding fall outside the Panel's terms of reference.

12. Under Article 6.2 of the DSU, a request for establishment of a panel must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint," or claims. These two elements — (a) identification of the specific measures at issue and (b) a brief summary of the legal basis of the complaint — comprise the "matter referred to the DSB," which is the basis for a panel's terms of reference under DSU Article 7.1. "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."[19]

13. The Appellate Body has explained that "the terms of reference of a panel define the scope of the dispute" and "the claims identified in the request for the establishment of a panel establish the panel's terms of reference under Article 7 of the DSU."[20] The Appellate Body further stated in *US – Oil Country Tubular Goods Sunset Reviews* that, "[i]n order for a panel request to 'present the problem clearly', it must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged violation or impairment of the complaining party's benefits."[21]

14. Here, Turkey's panel request specifically identified the relevant claim as: "In connection with the alleged Provision of Hot Rolled Steel [HRS] for Less than Adequate Remuneration

[18] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (emphasis omitted).
[19] *Australia – Apples (AB)*, para. 416.
[20] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 152 (citing *EC – Bananas III (AB)*, para. 141).
[21] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 162.

[LTAR] . . . The USDOC's alleged drawing of adverse inferences in selecting among the facts available for the purpose of punishing Borusan for its alleged failure to cooperate" is inconsistent with "Article 12.7 of the SCM Agreement."[22]

In other words, Turkey directly connected its claims under Article 12.7 with USDOC's application of facts available in connection with the Provision of Hot-Rolled Steel for Less Than Adequate Remuneration program. Turkey did not include a reference to any other subsidy programs in this section of its panel request, much less "plainly connect" Article 12.7 with any of the other 29 subsidy programs at issue in the WLP proceeding.[23]

15. Therefore, because Turkey limited its claims under Article 12.7 with respect to the WLP proceeding to a single program, any claims with respect to programs other than the Provision of HRS for LTAR fall outside the Panel's terms of reference and are beyond the scope of this dispute.

Question 3 (*To both parties*): Regarding HWRP from Turkey, Turkey's panel request lists a claim concerning Article 12.7 of the SCM Agreement under the subheading "In connection with 'other subsidies' not previously reported to the USDOC". Does Turkey's decision to identify this claim in this manner inform in any way the scope of Turkey's Article 12.7 claim regarding the WLP investigation?

Response:

16. As discussed above in response to Question 2, with respect to the WLP investigation, Turkey's panel request expressly limited its claims under Article 12.7 to a single subsidy program: the Provision of HRS for LTAR. Turkey's decision, with respect to the HWRP investigation, to assert certain claims under the SCM Agreement against the Provision of HRS for LTAR program, while asserting a different claim under the SCM Agreement against "other subsidies," provides additional confirmation that Turkey explicitly limited the claims in its panel request to specific subsidy programs.

17. In particular, in identifying its claims with respect to the HWRP proceeding, Turkey identified two claims under the SCM Agreement "[i]n connection with the alleged Provision of Hot Rolled Steel for Less than Adequate Remuneration": a claim under Article 1.1(a)(1) and a claim under Articles 2.1(c) and 2.4.[24] Turkey did not include any claims under Article 12.7 with respect to this subsidy program. Turkey's panel request then goes on to identify a separate claim under Article 12.7 of the SCM Agreement regarding USDOC's application of facts available "[i]n connection with 'other subsidies' not previously reported to the USDOC."[25] USDOC's final determination identifies three subsidies – the Deduction from Taxable Income for Export Revenue ("Deduction from Taxable Income"), Provision of Electricity for LTAR, and

[22] Turkey's Panel Request, para. 8.(B).2.
[23] Turkey's Panel Request, para. 8.(B).2.
[24] Turkey's Panel Request, para. 8.(C).1 (emphasis added).
[25] Turkey's Panel Request, para. 8.(C).2 (emphasis added).

Exemption from Property Tax programs – as "other subsidies" for which respondents had failed to provide information in their questionnaire responses.[26]

18. In short, for the HWRP investigation — much like the WLP investigation — Turkey expressly limited its claims to specific subsidy programs. This further confirms that if Turkey had intended to raise legal claims regarding the application of facts available in the WLP proceeding with respect to programs other than the Provision of HRS for LTAR, it should have identified those programs in its panel request.

Question 4 (*To both parties*): Turkey's panel request states, *inter alia*, that the United States is in violation of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement "[t]o the extent that the United States' practices … 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". Would any violation of Articles 1.1(a)(1), 1.1.(b), 2.1(c), 12.7, 14(d) and 15.3 of the SCM Agreement *ipso facto* result in a violation of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement? Please explain.

Response:

19. As an initial matter, the United States notes that Turkey has only argued in its written submission that the United States has acted contrary to Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 with respect to USDOC's application of facts available under Article 12.7 of the SCM Agreement in the WLP and HWRP proceedings. Thus, the question of whether a breach of Articles 1.1(a)(1), 1.1.(b), 2.1(c), 14(d), and 15.3 of the SCM Agreement *ipso facto* results in a breach of Article 19.4 and Article VI:3 does not arise in this dispute.

20. As for Article 12.7 of the SCM Agreement, a breach of that provision would not *ipso facto* result in a violation of Article 19.4 of the SCM Agreement or Article VI:3 of the GATT 1994. Article 12.7 of the SCM Agreement provides a Member's authority to make determinations on the basis of the facts available. Under Article 12.7, determinations may be made on the basis of facts available where an "interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." A breach of Article 12.7 would thus occur where a Member applies facts available contrary to the requirements of that provision.

21. Article VI:3 of the GATT 1994 and SCM Article 19.4 require that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist."[27] In other words, no countervailing duty may be levied on an imported product if no countervailable subsidy is found to exist with respect to that imported product, and the

[26] HWRP Final I&D Memo, p. 5 (Exhibit TUR-46).
[27] *See also* GATT 1994, Article VI:3 ("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, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product."); *US – Countervailing Measures on Certain EC Products (AB)*, para. 139.

countervailing duty levied may not exceed the subsidy amount that the investigating authority calculated.[28]

22. That a Member's application of facts available may be found 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." If the duty rate was applied consistent with the calculation of subsidization, no breach of Articles VI:3 or 19.4 may be found. 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."

23. Turkey's claims in this respect appear to suggest that if the Panel finds an error 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. This is not what Articles VI:3 and 19.4 address, and nor could such a determination be made by the Panel. An authority relies on the application of facts available when the actual information needed to calculate a duty rate is not available on the record. That is, neither the investigating authority, nor a WTO panel, has access to the actual information such that the actual rate of subsidization could be determined. And while an investigating authority's implementation of an adverse finding under Article 12.7 could lead to a change in the amount of subsidization found, given the lack of actual information on the record, a panel could not determine that an authority must find a lower rate of subsidization to comply with such a finding. In any event, how a Member may choose to comply with an adverse ruling is not a matter at issue before this Panel.

24. Therefore, each of these provisions is directed to a different subject matter — the circumstances in which facts available may be applied, for Article 12.7, versus the amount of countervailing duty that may be levied, for Articles VI:3 and 19.4 — and a breach of the former does not *ipso facto* mean that the latter have also been breached.

Question 5 (*To both parties*): At paragraph 39 of its first written submission, the United States cites the Appellate Body's statement in *EC – Chicken Cuts* that "[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 a panel"[29]. This statement was made in relation to two measures, both of which entered into force subsequent to the panel requests and certain of which entered into force subsequent to the establishment of the panel.[30] Should this statement be understood to apply as a general rule in respect of all types of measures that are found to have expired, been replaced or ceased to have legal effect prior to the request for establishment of a panel, or prior to the establishment of a panel?

[28] *US – Lead and Bismuth II (Panel)*, para. 6.52.
[29] Appellate Body Reports, *EC – Chicken Cuts*, para. 156.
[30] One of those measures, EC Regulation 1871/2003, was published on 23 October 2003 and entered into force on the twentieth day following its publication. The other measure EC Regulation 2344/2003 was published on 30 December 2003 and entered into force on 1 January 2004. The DS269 panel was established on 7 November 2003. The DS286 panel was established on 21 November 2003.

Response:

25. As explained in the U.S. preliminary ruling request,[31] a panel's terms of reference are set out in Articles 7.1 and 6.2 of the DSU. Under Article 6.2 of the DSU, a request for establishment of a panel must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint," or claims. These two elements — (a) identification of the specific measures at issue and (b) a brief summary of the legal basis of the complaint — comprise the "matter referred to the DSB," which is the basis for a panel's terms of reference under DSU Article 7.1.

26. Thus, the measures that the DSB places within a panel's term of reference for its examination are defined by the complaining Member's panel request. Consequently, the relevant time for defining the measures within the panel's terms of reference is the time of the DSB's establishment of the panel. As panels and the Appellate Body have repeatedly recognized, as in *EC – Chicken Cuts (AB)*, "the measures included in a panel's terms of reference," and thus the measures on which the panel makes findings, "must be measures that are in existence at the time of the establishment of the panel."[32] Turkey does not appear to disagree.[33]

27. Therefore, the Panel should review the measure as it existed at the time of the Panel's establishment. As the United States explained in its preliminary ruling request,[34] the OCTG final determination in which USDOC used an out-of-country benchmark was successfully challenged by Turkish respondents in U.S. domestic court, was remanded to USDOC, and was subsequently reversed by USDOC with regard to benefit in the OCTG remand determination and amended final determination.[35] The amended final determination went into effect on March 10, 2016, *prior to* both Turkey's request for consultations and its request for the establishment of a panel in this dispute.[36] In the remand determination, which provided the legal basis for the cash deposits being applied at the time of the Panel's establishment, USDOC used an *in*-country benchmark.[37] Therefore, at the time of the Panel's establishment, the OCTG countervailing duty order challenged by Turkey was no longer supported by the use of out-of-country benchmarks, and thus the benchmark measure challenged in Turkey's panel request – the original OCTG final determination – had already ceased to have any legal effect.[38] Because the OCTG final determination ceased to exist and have legal effect at least 15 months prior to the Panel's

[31] United States' First Written Submission, paras. 39-40.
[32] *EC – Chicken Cuts (AB)*, para. 156; *EC – Selected Customs Matters (AB)*, para. 184 (agreeing with *EC – Chicken Cuts (AB)* statement and explaining a possible limited exception for a subsequent measure continuing the substance of a measure in force at the time of the establishment of the panel); *EC – IT Products (Panel)*, para. 7.140 (same); *China – Raw Materials (Panel)*, para. 7.15 (same); *Japan – Film (Panel)*, para. 10.58 & n.1221-1222 (noting GATT practice that measure should continue to be in existence as of panel establishment to be examined by a panel).
[33] Turkey's Response to the Preliminary Ruling Request, para. 12.
[34] United States' First Written Submission, paras. 42-47.
[35] United States' First Written Submission, para. 43.
[36] United States' First Written Submission, paras. 46-47.
[37] United States' First Written Submission, paras. 43-46.
[38] United States' First Written Submission, paras. 46-47.

establishment, the Panel should find Turkey's claims with respect to USDOC's use of out-of-country benchmarks in the OCTG investigation to be outside of its terms of reference.[39]

II. CLAIMS REGARDING THE PUBLIC BODY DETERMINATION

Question 7 (*To the United States*): Please comment on Turkey's statement at paragraph 24 of its oral statement at the first substantive meeting that the legal standard for determining a "government organ" is a stricter one than the standard for public body as articulated by the Appellate Body. Can OYAK be a government organ if it does not "regulate", "restrain", "supervise", or "control" the conduct of citizens, as argued at paragraph 23 of Turkey's statement?

28. In its determination, 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.[40] 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).[41]

29. 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).

30. 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.[42] 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

[39] United States' First Written Submission, paras. 37-49.
[40] *See* United States' First Written Submission, para. 97.
[41] United States' First Written Submission, paras. 77-80.
[42] U.S. Opening Statement at the First Panel Meeting, para. 39 (citing to U.S. Opening Oral Statement, *US – Carbon Steel (India)*, paras. 11-12 (available at https://ustr.gov/sites/default/files/US.Oral_.Stmt%20as%20delivered.Public.pdf)); U.S. Other Appellant Submission, *US – Carbon Steel (India)*, paras. 5-8, 23-91 (available at https://ustr.gov/sites/default/files/US.Other_.Appellant.Sub_.Fin_.Public.pdf).

in the performance of governmental functions" such that the entity could be deemed a "public body" under Article 1.1(a)(1).[43]

31. 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. Thus, 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.[44]

32. As discussed below in response to Question 9, 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.

Question 8 (*To both parties*): If the Panel were to accept the United States' assertion that USDOC did not determine that OYAK is a public body, what implication, if any, would this have for Turkey's overall claim with respect to Erdemir and Isdemir?

33. As discussed in the United States' first written submission, because a financial contribution was not attributed to OYAK, and because USDOC did not make a finding that OYAK is a public body, Turkey's claim with respect to OYAK as a public body must fail because the requirements of Article 1.1(a)(1) of the SCM Agreement do not apply to USDOC's examination of OYAK.[45] This position does not prevent the Panel from examining Turkey's claim under Article 1.1(a)(1) with respect to Erdemir and Isdemir, as discussed above.

Question 9 (*To the United States*): Did USDOC explicitly or implicitly determine that OYAK has "status as an organ of GOT"[46] through its finding that GOT meaningfully controls OYAK in any of the proceedings at issue? If so, what was the evidentiary basis for this?

[43] *US – Carbon Steel (India) (AB)*, para. 4.10 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318).
[44] *Canada – Dairy (AB)*, para. 97; *US – Gambling (Panel)*, para. 6.514; *US – Carbon Steel (India) (AB)*, para. 4.37.
[45] United States' First Written Submission, paras. 77-80.
[46] United States' First Written Submission, para. 108.

34. As discussed in detail in response to Question 7, USDOC examined OYAK and its relationship to the GOT, and found that the GOT exercised meaningful control over Erdemir and Isdemir, including through OYAK (as well as through the TPA).[47] Specifically, USDOC detailed OYAK's statutory authority derived from Law No. 205, as well as the extensive overlap between OYAK's leadership structure and other organs of the GOT.

35. 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. As USDOC observed, OYAK was created, by virtue of its authorizing statute,[48] Law No. 205 (1961), "as an institution related to the Ministry of National Defense."[49] Law No. 205 articulates that OYAK is "established to provide members of [the] Turkish Armed Forces with mutual assistance" and is to be headquartered in Ankara, the seat of the GOT.[50] OYAK was thus expressly established to provide retirement and social security benefits to members of the country's armed forces. Article 20 of Law No. 205 stipulates the benefits provided to members, including retirement, disability, death and housing acquisition benefits. Article 39 further states that in the case of a war in which the Turkish Armed Forces may physically take part in, retirement, disability and death benefits shall be suspended as of the beginning of such war. The provision of retirement and social security benefits to public employees, that is then suspended during a time of war in which the Turkish Armed Forces participates in, is indicative of "government" in the broader sense.

36. 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"[51] 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.[52] USDOC likewise observed that "members of the armed forces must by law contribute part of their salaries to OYAK."[53] Specifically, Article 17 of Law No. 205 calls for mandatory membership in OYAK for members of the Turkish Armed Forces, and Article 18 provides for a mandatory levy on their salaries.[54]

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[47] United States' First Written Submission, paras. 97-100, 105-106.
[48] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, pp. 11-12 (Exhibit TUR-46).
[49] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, pp. 11-12 (Exhibit TUR-46).
[50] HWRP Law No. 205, Article 1 (Exhibit TUR-30); OCTG Law No. 205, Article 1 (Exhibit TUR-58); CWP Law No. 205, Article 1 (Exhibit TUR-11); WLP Law No. 205, Article 1 (Exhibit TUR-107).
[51] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Article 37 (Exhibit TUR-30); OCTG Law No. 205, Article 37 (Exhibit TUR-58); CWP Law No. 205, Article 37 (Exhibit TUR-11); WLP Law No. 205, Article 37 (Exhibit TUR-107).
[52] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Article 35 (Exhibit TUR-30); OCTG Law No. 205, Article 35 (Exhibit TUR-58); CWP Law No. 205, Article 35 (Exhibit TUR-11); WLP Law No. 205, Article 35 (Exhibit TUR-107).
[53] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[54] HWRP Law No. 205, Articles 17, 18 (Exhibit TUR-30); OCTG Law No. 205, Articles 17, 18 (Exhibit TUR-58); CWP Law No. 205, Articles 17, 18 (Exhibit TUR-11); WLP Law No. 205, Articles 17, 18 (Exhibit TUR-107).

Article 31 provides that "[d]ues shall be levied on the wages and salaries of members at the time of payment and shall be indicated on their payrolls by the payroll officer." Article 31 further states that "[a]nyone who fails to levy, deduct, or transfer such dues to the Fund . . . shall be liable for such dues together with a 10% penalty for delay, which amount shall be collected by the local offices of the Ministry of Finance pursuant to the Law on Collection of Public Debts and shall be transferred to the Fund."[55] Therefore, the text of Law No. 205 explicitly provides that unpaid dues are collected pursuant to a law concerning "public debt," with a 10% penalty levied and collected by another government agency, the Ministry of Finance.[56]

37. Moreover, as detailed in response to Questions 18, 19, and 20, USDOC also analyzed the composition of OYAK's leadership, describing the extensive overlap between OYAK's leadership structure and the Turkish Armed Forces, as well as other organs of the GOT.[57] 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."[58]

38. The Panel should thus find that an objective and unbiased investigating authority, in reviewing the totality of evidence, could have considered OYAK to be an entity through which the GOT could have exercised meaningful control over Erdemir and Isdemir, as USDOC did.[59] Moreover, as described in detail in response to Question 26, USDOC's determinations also demonstrate that the GOT exercised meaningful control over Erdemir and Isdemir, such that the two entities could be found to be public bodies within the meaning of Article 1.1(a)(1).

Question 10: (*To the United States*) The Issues and Decision Memorandum for the OCTG investigation (Exhibit TUR-85) states at page 22: "The Department has determined that enterprises with little or no formal government ownership can still be considered public bodies if the government exercises meaningful control over them". Doesn't this suggest that, in finding "meaningful control" by GOT over OYAK, USDOC determined OYAK to be a public body, since USDOC applied the same "meaningful control" standard in determining that Erdemir and Isdemir are public bodies?

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[55] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Article 31 (Exhibit TUR-30); OCTG Law No. 205, Article 31 (Exhibit TUR-58); CWP Law No. 205, Article 31 (Exhibit TUR-11); WLP Law No. 205, Article 31 (Exhibit TUR-107).

[56] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Article 31 (Exhibit TUR-30); OCTG Law No. 205, Article 31 (Exhibit TUR-58); CWP Law No. 205, Article 31 (Exhibit TUR-11); WLP Law No. 205, Article 31 (Exhibit TUR-107).

[57] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Articles 3-5 (Exhibit TUR-30); OCTG Law No. 205, Articles 3-5 (Exhibit TUR-58); CWP Law No. 205, Articles 3-5 (Exhibit TUR-11); WLP Law No. 205, Articles 3-5 (Exhibit TUR-107).

[58] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85) (citing TESEV Publications, "Military-Economic Structure in Turkey: Present Situation, Problems, and Solutions." (Exhibit USA-4)).

[59] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186; *US – Lamb (AB)*, para. 103; *see also US – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia* (*Panel)*, para. 7.61.

39. As discussed above, USDOC did not determine that OYAK made a financial contribution, and did not make a legal finding that OYAK was a public body. Rather, as the determination goes on to state in the sentence that follows the statement referenced in the question, "[t]he record evidence cited above show that the GOT exercises meaningful control over Erdemir and Isdemir through its control of OYAK."[60] Therefore, the Panel's inquiry with respect to OYAK would be a factual one performed in the context of reviewing USDOC's finding that Erdemir and Isdemir are public bodies. The United States discusses the manner in which such an assessment may be performed in its response to Question 7, above.[61]

Question 11 (*To the United States*): In determining whether a government exercises meaningful control over an entity for purposes of 19 USC 1677(5)(B), is USDOC required to specifically assess whether the entity in question possesses, exercises or is vested with government authority?

40. The United States recalls that Turkey has not raised a claim with respect to 19 U.S.C. 1677(5)(B). Therefore, the precise contours of the relevant U.S. municipal law are not relevant to the Panel's inquiry into USDOC's public body determinations. Moreover, a Member is not required to impose through its municipal law the legal interpretations expressed in particular WTO reports. Rather, the question before the Panel is whether USDOC's *application* of U.S. law in the determinations at issue is consistent with U.S. WTO obligations, in this case, Article 1.1(a)(1) of the SCM Agreement.

41. In each of the determinations, USDOC determined that Erdemir and Isdemir are "authorities" within the ambit of 19 U.S.C. 1677(5)(B).[62] As described in the U.S. First Written Submission and in response to Questions 9 and 26, USDOC's findings were consistent with Article 1.1(a)(1) of the SCM Agreement.

Question 12 *(To both parties*): Under US law, does majority ownership *per se* establish a rebuttable presumption of government control over that entity? If not, what other factors must USDOC evaluate in establishing meaningful control under US law?

42. As explained in the response to Question 11, above, Turkey has challenged the application of U.S. law in the determinations at issue, such that the relevant inquiry for the Panel is whether these instances of application are consistent with U.S. obligations under Article 1.1(a)(1) of the SCM Agreement. As explained in the U.S. first written submission,[63] and in response to Questions 9 and 26, in the underlying investigations USDOC examined multiple

[60] OCTG Final I&D Memo, p. 22 (Exhibit TUR-85).
[61] As discussed in response to Question 9, the record evidence concerning OYAK supports USDOC's examination of OYAK as an entity through which the GOT meaningfully controlled Erdemir and Isdemir.
[62] OCTG Final I&D Memo, p. 35 (Exhibit TUR-85); WLP Final I&D Memo, p. 36 (Exhibit TUR-122); CWP Final I&D Memo, p. 30 (Exhibit TUR-22); HWRP Final I&D Memo, p. 23 (Exhibit TUR-46). 19 U.S.C. 1677(5)(B) specifies that, "{a} subsidy is described in this paragraph in the case in which an authority… provides a financial contribution," and that the term "authority" means "a government of a country or any public entity within the territory of the country."
[63] United States' First Written Submission, paras. 97-107.

factors regarding the relationship between the GOT and Erdemir and Isdemir, not limited to majority ownership. These factors included the TPA's veto power over decisions related to closure, sale, merger, and liquidation, and the presence of OYAK and TPA officials on Erdemir's Board of Directors.[64] The GOT's meaningful control was further evidenced through the alignment of Erdemir's stated corporate objectives in its 2012 and 2013 Annual Reports with the GOT's macroeconomic policies.[65] Although not within Turkey's claims, and therefore not relevant to the Panel's evaluation in this dispute, for completeness, the United States notes that USDOC does not treat majority ownership as a rebuttable presumption of government control in a countervailing duty investigation.

Question 13 (*To both parties*): How did USDOC consider 1961 Law No. 205 relevant to OYAK's status? In particular, is it the fact that OYAK was established pursuant to Law No. 205, or the fact that Law No. 205 describes OYAK as "an institution related to the Ministry of National Defense"? Does either necessarily indicate that OYAK is a governmental organ or agency?

43. As explained in response to question 7, the Panel's inquiry concerning OYAK is a factual one, and requires the Panel to determine whether the evidence supports USDOC's examination of OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir, such that those entities could be considered public bodies with the meaning of Article 1.1(a)(1) of the SCM agreement. Therefore, the Panel need not determine whether USDOC's findings support a conclusion that OYAK is a "governmental organ or agency" as a legal matter.

44. As explained above, the record evidence supported USDOC's examination of OYAK through which the GOT meaningfully controlled Erdemir and Isdemir for purposes of Article 1.1(a)(1). In particular, USDOC examined the text of Law No. 205 and found multiple provisions of the statute that permitted USDOC to examine OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir. USDOC considered both the fact that OYAK was established by Law No. 205, and also the fact that the text of the statute explicitly stated that OYAK is "an institution related to the Ministry of National Defense."[66] Both of these facts were relevant to USDOC's examination of OYAK. USDOC did not examine these provisions in isolation. Rather, USDOC examined these two facts, along with other provisions of Law No. 205 that required OYAK's leadership to be composed of members of the Turkish Armed Forces and other government agencies, conferred the same rights and privileges of state property upon OYAK's property, exempted OYAK from corporate and other taxes, and imposed mandatory contributions on members of the Turkish armed forces.[67]

45. The Appellate Body has found that "[w]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the

[64] United States' First Written Submission, paras. 104-106.
[65] United States' First Written Submission, paras. 102-103.
[66] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 8 (Exhibit TUR-22); HWRP Final I&D Memo, p. 11 (Exhibit TUR-46).
[67] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, pp. 11-12 (Exhibit TUR-46).

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."[68]

46. Therefore, here, where USDOC reviewed Law No. 205 in its totality, it is important for the Panel to do the same when evaluating whether USDOC, as an objective and unbiased investigating authority, could have considered OYAK to be an entity through which the GOT exercised meaningful control over Erdemir and Isdemir.

Question 14 (*To both parties*): Is OYAK acting in a capacity as a government organ or agency by managing the military's pension fund and providing retirement benefits to Turkish military members? Please explain.

47. As explained in response to question 7, the Panel's inquiry concerning OYAK is a factual one, and requires the Panel to determine whether the evidence supports USDOC's examination of OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir, such that those entities could be considered public bodies with the meaning of Article 1.1(a)(1) of the SCM agreement. Certainly, ensuring that military members receive pensions and other benefits as a result of their service is indicative of a governmental function.

48. In conducting its analysis of OYAK, one of the facts that USDOC considered was that OYAK was the Turkish military pension fund, "established to provide members of the Turkish Armed Forces with mutual assistance set out" in Law No. 205.[69] Article 20 of Law No. 205 stipulates the benefits provided to members, including retirement, disability, death and housing acquisition benefits.[70] USDOC examined these provisions of Law No. 205, along with other provisions of Law No. 205 that required OYAK's leadership to be composed of members of the Turkish Armed Forces and other government agencies, conferred the same rights and privileges of state property upon OYAK's property, provided exemption from corporate and other taxes, and imposed mandatory salary contributions from members of the Turkish armed forces.[71] Therefore, USDOC found, based on the totality of this evidence, that the GOT exercised meaningful control over Erdemir and Isdemir through OYAK.

Question 15 (*To the United States*): At paragraph 133 of its first written submission, Turkey argues that OYAK receives no funding from the GOT budget and is not subject to GOT administrative oversight or audit requirements. Is this correct? If so, does this contradict the view that OYAK is a governmental organ or agency?

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[68] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted).
[69] OCTG Final I&D Memo, pp. 20-21 (Exhibit TUR-85); WLP Final I&D Memo, pp. 13-14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, pp. 11-12 (Exhibit TUR-46).
[70] HWRP Law No. 205, Article 20 (Exhibit TUR-30); OCTG Law No. 205, Article 20 (Exhibit TUR-58); CWP Law No. 205, Article 20 (Exhibit TUR-11); WLP Law No. 205, Article 20 (Exhibit TUR-107).
[71] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, pp. 11-12 (Exhibit TUR-46).

49. Turkey's statement in this respect refers to a general statement in OYAK's 2012 Annual Report, and does not indicate, for example, to which administrative oversight or audit requirements it refers. Therefore, this general statement does not contradict USDOC's examination of other evidence demonstrating OYAK to be an entity through which the GOT exercised meaningful control over Erdemir and Isdemir. USDOC examined the fact that Article 18 of Law No. 205, entitled, "Revenues of the Fund" stipulates that members of the armed forces must by law contribute part of their salaries to OYAK.[72] Likewise, Article 31 provides that "[d]ues shall be levied on the wages and salaries of members at the time of payment and shall be indicated on their payrolls by the payroll officer."[73] Article 31 further states that "[a]nyone who fails to levy, deduct, or transfer such dues to the Fund . . . shall be liable for such dues together with a 10% penalty for delay, which amount shall be collected by the local offices of the Ministry of Finance pursuant to the Law on Collection of Public Debts and shall be transferred to the Fund."[74]

50. Therefore, notwithstanding that OYAK does not receive direct funding from the GOT budget, the text of Law No. 205 explicitly states that funds are received from mandatory salary contribution requirements from members of the Armed Forces.[75] Should dues not be received on time, a 10% penalty is levied and collected by the Ministry of Finance pursuant to the Law on Collection of *Public Debts*.[76] Unpaid dues are thus collected pursuant to a law concerning "public debt," with a 10% penalty levied and collected by another government agency, the Ministry of Finance.[77] Therefore, the fact that OYAK does not receive direct funding from the GOT budget does not preclude USDOC from examining it as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir.

51. Moreover, the general statement that OYAK is not subject to GOT administrative oversight or audit requirements does not contradict or undermine USDOC's examination of OYAK in light of the text of Law No. 205, which imposed specific requirements on members of OYAK and structured OYAK in such a manner that the GOT exercised meaningful control of Erdemir and Isdemir. Therefore, the Panel should consider the totality of the evidence, as USDOC did, in reviewing USDOC's examination of OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir.

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[72] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[73] *See also* HWRP Law No. 205, Article 31 (Exhibit TUR-30); OCTG Law No. 205, Article 31 (Exhibit TUR-58); CWP Law No. 205, Article 31 (Exhibit TUR-11); WLP Law No. 205, Article 31 (Exhibit TUR-107).
[74] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Article 31 (Exhibit TUR-30); OCTG Law No. 205, Article 31 (Exhibit TUR-58); CWP Law No. 205, Article 31 (Exhibit TUR-11); WLP Law No. 205, Article 31 (Exhibit TUR-107).
[75] HWRP Law No. 205, Article 31 (Exhibit TUR-30); OCTG Law No. 205, Article 31 (Exhibit TUR-58); CWP Law No. 205, Article 31 (Exhibit TUR-11); WLP Law No. 205, Article 31 (Exhibit TUR-107).
[76] HWRP Law No. 205, Article 31 (Exhibit TUR-30); OCTG Law No. 205, Article 31 (Exhibit TUR-58); CWP Law No. 205, Article 31 (Exhibit TUR-11); WLP Law No. 205, Article 31 (Exhibit TUR-107).
[77] HWRP Law No. 205, Article 31 (Exhibit TUR-30); OCTG Law No. 205, Article 31 (Exhibit TUR-58); CWP Law No. 205, Article 31 (Exhibit TUR-11); WLP Law No. 205, Article 31 (Exhibit TUR-107).

Question 16 (*To both parties*): In the Issues and Decision Memorandum for the WLP Final Determination (Exhibit TUR-122), petitioner Maverick Tube Corporation (Maverick) asserted that OYAK was explicitly directed to implement Turkish industrial policy directives in the process of Erdemir's privatization. Therefore, Maverick argued that record evidence shows that OYAK made decisions under the direction or suggestion of GOT. Is there evidence on record that GOT previously explicitly directed OYAK to implement Turkish industrial policy directives or objectives in the process of Erdemir's privatization? Was this evidence relied upon by USDOC when determining that the GOT meaningfully controls OYAK, or that Erdemir and Isdemir are public bodies?

52. USDOC examined evidence that the GOT directed OYAK to implement Turkish industrial policy directives or objectives in the process of Erdemir's privatization in finding that the GOT meaningfully controlled Erdemir and Isdemir through OYAK, including evidence submitted by Maverick in support of the statements to which the Panel refers in its question.[78] In particular, as a condition of purchase, OYAK was "required to add 3.5 million tonnes of flat steel capacity…by the end of 2008."[79] As a guarantee of the fulfilment of this condition, OYAK fronted a $500 million bond and was expected to construct an additional plant, estimated to cost some $2 billion.[80] OYAK also agreed not to reduce Erdemir's workforce to less than 95% within two years.[81] This information was among the evidence that USDOC relied upon in finding that the GOT exercised meaningful control over Erdemir and Isdemir through OYAK, and that those two entities were therefore public bodies.

Question 17 (*To both parties*): Does the Turkish Privatization Authority (TPA) have any direct say in how Erdemir or Isdemir set prices of hot rolled steel? Is there evidence on record that TPA exercised its authority over any capacity or sales decisions? Is there evidence that alterations to Erdemir capacity and output affected the price of hot rolled steel in the Turkish market? Please explain.

53. In the challenged determinations, USDOC considered the involvement of the TPA, a governmental entity, in Erdemir and Isdemir, in determining that Erdemir and Isdemir are public bodies. USDOC found that the TPA's involvement in Erdemir and Isdemir supported its finding that the GOT exercised meaningful control over Erdemir and Isdemir.

54. Specifically, USDOC considered evidence demonstrating that TPA has veto power over Erdemir's decisions related to closure, sale, merger or liquidation of its assets.[82] In the OCTG final determination, the USDOC examined Erdemir's 2012 Annual Report, which indicates that the TPA must approve "decisions regarding the closure, limitation upon restriction, or capacity

[78] WLP Final I&D Memo, pp. 33-34 (Exhibit TUR-122).
[79] Letter from Maverick Tube Corporation to USDOC, "Welded Line Pipe from the Republic of Turkey: Comments on the Government of Turkey's Third Supplemental Questionnaire Response" (March 10, 2015), Ex. 4 ("Maverick's March 10, 2015 Comments") (Exhibit USA-35).
[80] Maverick's March 10, 2015 Comments, Ex. 4 (Exhibit USA-35).
[81] Maverick's March 10, 2015 Comments, Ex. 4 (Exhibit USA-35).
[82] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).

curtailing of any of the integrated steel production plants or the mining plants owned by the Company and/or affiliates."[83] In the CWP, HWRP, and WLP final determinations, USDOC examined Articles 21, 22, and 37 of Erdemir's Articles of Association and similarly found that the TPA holds veto power over any decisions related to closedown, sale, merger, or liquidation, as well as capacity adjustments, for both Erdemir and Isdemir.[84] Moreover, USDOC noted the presence of the TPA and OYAK on Erdemir's Board of Directors.[85] Erdemir's "business and management is in turn governed by the Board of Directors."[86]

55. Thus, Erdemir and Isdemir are structured in a manner that affords the GOT, through the TPA, an ability to interfere with critical aspects of Erdemir's and Isdemir's operations, and thus exercise meaningful control over Erdemir and Isdemir. Indeed, by the very provisions in their Articles of Association, Erdemir and Isdemir could not transfer their own resources without the GOT's approval.[87] Therefore, the TPA's veto power and presence on Erdemir's Board of Directors demonstrated that Erdemir and Isdemir did not and could not operate autonomously, as Turkey suggests.

56. We also note that it was not necessary for USDOC to also determine that the TPA directed the pricing of hot-rolled steel or exercised its authority over specific capacity or sales decisions. Focus on the specific conduct of an entity would be relevant when examining a *private body* under Article 1.1(a)(1)(iv) of the SCM Agreement, where 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.[88] 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)."[89]

Question 18 (*To both parties*): According to the TESEV study (Exhibit USA-4), the OYAK Board of Representatives comprises only military officers and the 40-seat General Assembly has only nine civilian members. In addition, the TESEV study states that in practice the military has occupied four seats and the presidency on the OYAK board of directors since 1976. Does the mere presence of military officers, both current and retired, on its own

[83] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); Erdemir 2012 Annual Report (complete), pp. 62-63 (Exhibit USA-5).
[84] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[85] OCTG Final I&D Memo, p. 22 n. 163 (Exhibit TUR-85); Erdemir 2012 Annual Report (complete), pp. 54-55 (Exhibit USA-5); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); Erdemir 2013 Annual Report (complete), pp. 65-66 (Exhibit USA-7). *See also* GOT Questionnaire Response, Ex. 4-M, "Senior Management Staff for Erdemir and Isdemir" (Exhibit TUR-68).
[86] Erdemir's Articles of Association, Article 10 (Exhibit USA-8).
[87] OCTG Final I&D Memo, p.21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[88] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[89] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.

support the conclusion that OYAK acts under the meaningful control of the Turkish government or exercises a government function? Please explain.

57. See U.S. response to Question 20, below.

Question 19 (*To both parties*): How are the seventeen government officials that are designated by statute to serve on OYAK's General Assembly chosen or appointed? From which government agencies are these officials taken? Are they always chosen from the same government agencies? What are the qualifications of these designated government officials?

58. See U.S. response to Question 20, below.

Question 20 (*To both parties*): Is there evidence that Turkish military members that serve on OYAK's Representative Assembly, General Assembly or the board of directors have acted in supporting government interests beyond those of a beneficiary of OYAK?

59. As the United States explained in its first written submission, in its determinations, USDOC described the extensive overlap between OYAK's leadership structure and the Turkish Armed Forces.[90] Specifically, USDOC examined Law No. 205 in the four proceedings and observed:[91]

> 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.

60. Thus, by law, the Representative Assembly is composed entirely of (50-100) officials from the Turkish Armed Forces.[92] This body elects half (20) of the General Assembly, with 17 spots of the other half being filled with designated members of the GOT and three spots filled at the discretion of the Minister of National Defense.[93] The General Assembly then elects three

[90] United States' First Written Submission, para. 99.
[91] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Articles 3-5 (Exhibit TUR-30); OCTG Law No. 205, Articles 3-5 (Exhibit TUR-58); CWP Law No. 205, Articles 3-5 (Exhibit TUR-11); WLP Law No. 205, Articles 3-5 (Exhibit TUR-107).
[92] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Article 3 (Exhibit TUR-30); OCTG Law No. 205, Article 3 (Exhibit TUR-58); CWP Law No. 205, Article 3 (Exhibit TUR-11); WLP Law No. 205, Article 3 (Exhibit TUR-107).
[93] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law

members – nominated by the Minister of National Defense and Chief of the General Staff – of OYAK's Board of Directors.[94] The other four members on the Board of Directors are selected by an Election Committee composed of, among other individuals, the Minister of National Defense, the Minister of Finance, the President of the Court of Accounts of the Republic of Turkey, and the President of the Board of General Audit of the Prime Ministry of the Republic of Turkey.[95]

61. Article 4 of Law No. 205 details which government officials shall have a seat on OYAK's General Assembly and from which government agencies the officials are from. Specifically, Article 4 states that the General Assembly shall be composed of the following members: the Minister of National Defense; 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 Defense or General Staff.[96] Article 4 further 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 Defense for three-year terms of office."[97]

62. The text of Article 4 is unequivocally clear – the General Assembly "shall be composed" of the aforementioned seventeen government officials, and does not provide for the General Assembly to be composed of any other officials from other government agencies.[98] Moreover, in contrast to the qualification requirements for the three individuals from the private sector who must be "distinguished in financial and economic fields," Article 4 does not provide qualification requirements for the seventeen government officials.[99] Nor does Article 4 provide for a term of office for these government officials, which is also in contrast to the three individuals from the

No. 205, Article 4 (Exhibit TUR-30); OCTG Law No. 205, Article 4 (Exhibit TUR-58); CWP Law No. 205, Article 4 (Exhibit TUR-11); WLP Law No. 205, Article 4 (Exhibit TUR-107).

[94] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Article 8 (Exhibit TUR-30); OCTG Law No. 205, Article 8 (Exhibit TUR-58); CWP Law No. 205, Article 8 (Exhibit TUR-11); WLP Law No. 205, Article 8 (Exhibit TUR-107).

[95] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Article 8 (Exhibit TUR-30); OCTG Law No. 205, Article 8 (Exhibit TUR-58); CWP Law No. 205, Article 8 (Exhibit TUR-11); WLP Law No. 205, Article 8 (Exhibit TUR-107).

[96] *See* HWRP Law No. 205, Article 4 (Exhibit TUR-30); OCTG Law No. 205, Article 4 (Exhibit TUR-58); CWP Law No. 205, Article 4 (Exhibit TUR-11); WLP Law No. 205, Article 4 (Exhibit TUR-107).

[97] *See* HWRP Law No. 205, Article 4 (Exhibit TUR-30); OCTG Law No. 205, Article 4 (Exhibit TUR-58); CWP Law No. 205, Article 4 (Exhibit TUR-11); WLP Law No. 205, Article 4 (Exhibit TUR-107).

[98] *See* HWRP Law No. 205, Article 4 (Exhibit TUR-30); OCTG Law No. 205, Article 4 (Exhibit TUR-58); CWP Law No. 205, Article 4 (Exhibit TUR-11); WLP Law No. 205, Article 4 (Exhibit TUR-107).

[99] *See* HWRP Law No. 205, Article 4 (Exhibit TUR-30); OCTG Law No. 205, Article 4 (Exhibit TUR-58); CWP Law No. 205, Article 4 (Exhibit TUR-11); WLP Law No. 205, Article 4 (Exhibit TUR-107).

private sector that are limited to three-year terms of office.[100] The record evidence thus demonstrates that – across OYAK's governing bodies – individuals serve either *because* of their status as GOT officials or *because* they were selected by GOT officials.

63. Moreover, Turkey's proposition that members of OYAK's governing bodies act "in their capacity as individual contributors and beneficiaries of the fund," not in their capacity as government officials is unsupported by objective record evidence.[101] As the United States explained in its first written submission[102] and in response to Question 22, Turkey relied upon a law firm position paper, which contains a law firm's opinion on the same facts that USDOC examined, but is not objective fact.

64. Likewise, as Question 18 recognizes, in the OCTG Final Determination, the USDOC also examined a study by the Turkish Economic and Social Studies Foundation and concluded that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control."[103] Therefore, the presence of military officers in OYAK's leadership, when viewed in light of the totality of evidence relied on by USDOC, supports USDOC's examination of OYAK as an entity through which the GOT could exercise meaningful control over Erdemir and Isdemir.

65. Therefore, in determining that Erdemir and Isdemir are public bodies, USDOC examined the involvement of the GOT, including through OYAK. USDOC examined OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir, in part, based on the fact that OYAK's leadership was statutorily required to be composed of officials from the Turkish Armed Forces and other government agencies. USDOC also examined the fact that OYAK was statutorily established by Law No. 205, that its property status has the same rights and privileges of state property, and that is requires salary contributions from members of the military.[104] Indeed, it is important to recall that OYAK was expressly established to provide retirement and social security benefits to members of the country's armed forces.[105] Article 20 of Law No. 205 stipulates the benefits provided to members of the Turkish Armed Forces, including retirement, disability, death and housing acquisition benefits.[106] The provision of retirement and social security benefits to public employees is indicative of the GOT's interests with respect to OYAK that are divergent from those of an individual contributor and beneficiary.

[100] *See* HWRP Law No. 205, Article 4 (Exhibit TUR-30); OCTG Law No. 205, Article 4 (Exhibit TUR-58); CWP Law No. 205, Article 4 (Exhibit TUR-11); WLP Law No. 205, Article 4 (Exhibit TUR-107).
[101] Turkey's First Written Submission, paras. 126, 276, 389, 499.
[102] United States' First Written Submission, para. 110.
[103] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85) (citing TESEV Publications, "Military-Economic Structure in Turkey: Present Situation, Problems, and Solutions" (Exhibit USA-4)).
[104] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, pp. 11-12 (Exhibit TUR-46).
[105] HWRP Law No. 205, Article 1 (Exhibit TUR-30); OCTG Law No. 205, Article 1 (Exhibit TUR-58); CWP Law No. 205, Article 1 (Exhibit TUR-11); WLP Law No. 205, Article 1 (Exhibit TUR-107).
[106] HWRP Law No. 205, Article 20 (Exhibit TUR-30); OCTG Law No. 205, Article 20 (Exhibit TUR-58); CWP Law No. 205, Article 20 (Exhibit TUR-11); WLP Law No. 205, Article 20 (Exhibit TUR-107).

66. After reviewing further evidence concerning Erdemir and Isdemir, USDOC determined that GOT exercised meaningful control over Erdemir and Isdemir. USDOC's examination of OYAK as one of the means through which the GOT exercised meaningful control over Erdemir and Isdemir is therefore based on the totality of the evidence on the record.[107] In evaluating USDOC's determinations, the Panel should find that an unbiased and objective investigating authority could have examined OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir, as USDOC did, upon review of the totality of evidence concerning OYAK.

67. The Appellate Body has found previously 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."[108] 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."[109]

Question 21 (*To the United States*): Please comment on the statement reflected in Comment 7 of the CWP Administrative Review Decision Memorandum (Exhibit TUR-22, at page 26), as drawn from Borusan's case brief: "The Department failed to consider that four of OYAK's board members are not GOT or military members but are instead university graduates with finance and investment experience. Further, there is nothing in Law No. 205 … that OYAK's board decisions are or can be subject to GOT approval or consent".

68. The statement referenced by the Panel refers to unsubstantiated arguments made by Borusan in the underlying administrative case proceeding before USDOC.[110] Contrary to Borusan's argument, USDOC considered the entire composition of OYAK's leadership, explaining that Law No. 205 provides that, "OYAK's Representative Assembly shall be composed of not less than 50 and not more than 100 members of the Turkish Armed Forces."[111] USDOC further found that "[t]he Representative Assembly, in turn, elects 20 of the 40 members

[107] WLP Final I&D Memo, p. 36 (Exhibit TUR-122) ("Therefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); HWRP Final I&D Memo, p. 23 (Exhibit TUR-46) ("Therefore, 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 . . . ."); CWP Final I&D Memo, p. 30 (Exhibit TUR-22) ("Therefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); OCTG Final I&D Memo, p. 35 (Exhibit TUR-85) ("Based 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 . . . .").
[108] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted).
[109] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted).
[110] CWP Final I&D Memo, pp. 25-28 (Exhibit TUR-22); Borusan's CWP Case Brief (Exhibit TUR-5).
[111] CWP Final I&D Memo, p. 8 (Exhibit TUR-22).

of OYAK's General Assembly," and that "[m]embers of the General Assembly elect the eight-person Board of Directors."[112]

69. In arguing that USDOC failed to consider that four of OYAK's board members are not GOT or military members, Borusan cited in its case brief to Article 8 of Law No. 205.[113] Article 8 of Law No. 205 provides that four members of the Board of Directors "shall be university graduates specialized and experienced in fields of finance, law, banking or insurance selected by an Election Committee established solely for this purpose."[114] Nothing in Article 8 provides that those four members could not also be GOT or military members. Indeed, OYAK's 2013 Annual Report shows that *five* of the individuals on the Board of Directors are members of the Turkish Armed Forces, with the Annual Report listing each individual's title in the military: Lieutenant General Hasan Memisoglu, Major General Hasan Huesyin Demirarslan, Major General Ishak Ceylan, Rear Admiral Macit Arslan, and Geospatial Technician Master Sergeant Hakan Serdar Copoglu.[115]

70. Therefore, contrary to Borusan's argument in the underlying proceeding, USDOC considered not only the presence of the Turkish Armed Forces on the Board of Directors, but also examined how the Board of Directors's members were selected and the role of the Turkish military in the selection of OYAK's leadership.[116]

71. Moreover, although Borusan argued that nothing in Law No. 205 indicated that OYAK's board decisions are or can be subject to GOT approval or consent, Law No. 205 does not indicate that the GOT cannot influence or control OYAK's board decisions. Thus, the lack of evidence concerning approval from the GOT does not contradict or undermine USDOC's examination of OYAK and the text of Law No. 205, which imposed specific requirements on members of OYAK and structured OYAK in such a manner that the GOT exercised meaningful control over Erdemir and Isdemir. Thus, after examining the totality of the evidence, USDOC determined that OYAK was an entity through the GOT could exercise meaningful control over Erdemir and Isdemir.[117]

Question 22 (*To the United States*): At paragraph 116 of its first written submission, Turkey submits that all private mandatory pension funds are subject to the same Turkish laws as OYAK in respect of tax exemptions and state property rights. Does the United States agree? If true, how would the fact that OYAK received such exemptions and rights be relevant to a finding that OYAK is a government organ or a public body?

72. In making this assertion, Turkey has not pointed to any record evidence that supports its position. Instead, Turkey cites the assertions in the GOT's case brief in the underlying OCTG

[112] CWP Final I&D Memo, p. 9 (Exhibit TUR-22).
[113] Borusan's CWP Case Brief, p. 13 n. 22 (Exhibit TUR-5).
[114] CWP Law No. 205, Article 8 (Exhibit TUR-11).
[115] OYAK's 2013 Annual Report, pp. 14-15 (Exhibit TUR-10); CWP Final &D Memo, p.26 n. 130-131 (Exhibit TUR-22).
[116] CWP Final I&D Memo, p. 8 (Exhibit TUR-22).
[107] CWP Final I&D Memo, pp. 8-9, 28 (Exhibit TUR-22).

administrative proceeding, as well as a law firm position paper.[118] An examination of both of these documents reveals that Turkey's claim is entirely unsupported.

73. First, Turkey cites page 5 of the GOT's case brief, which was submitted to USDOC in the underlying OCTG administrative proceeding. A review of this document reveals the following two sentences: "Additionally, OYAK's exemption from corporate and other taxes are not exclusive to OYAK, but in parallel with the privileges granted to all actors operating within the social security system in Turkey. Other pension funds are also exempted from the relevant taxes under Turkish Tax legislation."[119] Neither of these sentences contain any reference to record evidence. Therefore, these statements do not reflect evidence upon which USDOC could have relied in making its findings with respect to OYAK.

74. Second, Turkey cites a law firm position paper submitted by the GOT in the OCTG, WLP, and HWRP investigations. As explained in the United States' first written submission,[120] this position paper was commissioned by OYAK in response to a report entitled, "Advanced assessment of Turkish State aids to the steel industry" by WYG, a consulting firm for the European Commission ("WYG Report").[121] Both the law firm position paper and the WYG Report were created "in the overall context of negotiations on the accession of Turkey to the European Union," where "specific discussions and exchanges of reports between the Turkish authorities and the European Commission on alleged aid measures granted by the Turkish authorities to their steel sector" took place.[122] The WYG Report apparently concluded that OYAK qualified as a public undertaking and therefore that "the acquisition by OYAK of a controlling stake of Erdemir in 2005 could not be a privatization."[123] The position paper defines "public undertaking" as "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it."[124] The WYG Report also apparently concluded that State aid rules are applicable to OYAK's investment decisions.[125] The position paper further states that its "legal analysis . . . should result in rectifying any erroneous statements, especially as to

[118] Turkey's First Written Submission, p. 43 n. 287.
[119] GOT OCTG Case Brief, p. 5 (Exhibit TUR-59).
[120] United States' First Written Submission, para. 110.
[121] The law firm was also asked to provide assessments of the Turkish authorities' observations on the WYG report; however, the position paper does not indicate what those observations were, and that information was also not provided to USDOC in any of the investigations. OCTG Position Paper by Hogan Lovells, p. 1 (Exhibit TUR-66); WLP Position Paper by Hogan Lovells, p. 1 (Exhibit TUR-99); HWRP Position Paper by Hogan Lovells, p. 1 (Exhibit TUR-39).
[122] OCTG Position Paper by Hogan Lovells, p. 1 (Exhibit TUR-66); WLP Position Paper by Hogan Lovells, p. 1 (Exhibit TUR-99); HWRP Position Paper by Hogan Lovells, p. 1 (Exhibit TUR-39).
[123] OCTG Position Paper by Hogan Lovells, p. 3 (Exhibit TUR-66); WLP Position Paper by Hogan Lovells, p. 3 (Exhibit TUR-99); HWRP Position Paper by Hogan Lovells, p. 3 (Exhibit TUR-39).
[124] OCTG Position Paper by Hogan Lovells, p. 3 (Exhibit TUR-66); WLP Position Paper by Hogan Lovells, p. 3 (Exhibit TUR-99); HWRP Position Paper by Hogan Lovells, p. 3 (Exhibit TUR-39).
[125] OCTG Position Paper by Hogan Lovells, pp. 1-2 (Exhibit TUR-66); WLP Position Paper by Hogan Lovells, pp. 1-2 (Exhibit TUR-99); HWRP Position Paper by Hogan Lovells, pp. 1-2 (Exhibit TUR-39).

any misrepresentations contained in the WYG report that could potentially be very damaging to OYAK if further relied upon by the Commission."[126]

75. Although the GOT submitted the law firm position paper, the underlying WYG report was not submitted by the GOT in the determinations at issue. In response to repeated requests by USDOC for that document, the GOT indicated that it was confidential and could not be provided, even in summary form, due to a confidentiality agreement with the European Union.[127]

76. The position paper itself does not refer to any record evidence to substantiate its assertions, and on which the USDOC could have relied in making its findings. Therefore, the position paper reflects the unsupported positions of a law firm. Given the circumstances of the document's creation, and the fact that USDOC was not given access to the underlying analysis the paper sought to rebut, the paper was of very little probative value for USDOC's analysis.

Question 24 (*To the United States*): Please identify evidence on record that Erdemir's prices were *not* or are *not* market determined.

77. See the U.S. response to Question 25, below.

Question 25 (*To the United States*): Does the fact that Erdemir's prices may have been higher than Toscelik's cost of production and selling prices[128] support the conclusion that Erdemir does not sell hot rolled steel at preferential prices? Does this in turn support the conclusion that the GOT does not exercise control over Erdemir and that Erdemir does not implement Turkish industrial policy directives?

78. The United States responds to Questions 24 and 25 together. The Panel's questions pertain to whether Erdemir and Isdemir exhibited commercial behavior, *i.e.* whether Erdemir's prices were market determined, and the relevance of this information to USDOC's determination that Erdemir and Isdemir are public bodies.

79. As the United States explained in its first written submission, the basis for determining the existence of a financial contribution are laid out clearly in Article 1.1(a)(1), and do not include consideration of whether the financial contribution in question is provided consistent with market principles.[129] Instead, such considerations are incorporated into the determination of benefit, which is covered by other provisions of the SCM Agreement.[130] To graft consideration

[126] OCTG Position Paper by Hogan Lovells, p. 2 (Exhibit TUR-66); WLP Position Paper by Hogan Lovells, p. 2 (Exhibit TUR-99); HWRP Position Paper by Hogan Lovells, p. 2 (Exhibit TUR-39).
[127] OCTG Borusan Post-Preliminary Memo, p.5 (Exhibit TUR-75); WLP Final I&D Memo, p. 13 (Exhibit TUR-122); HWRP Final I&D Memo, p. 11 (Exhibit TUR-46).
[128] OCTG Final I&D Memo, p. 35 (Exhibit TUR-85).
[129] U.S. First Written Submission, paras 115-117.
[130] 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

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.[131]

80. This reasoning is consistent with the approach taken by dispute settlement panels in prior proceedings. For example, in *Korea – Commercial Vessels (Panel)*, the panel stated that:[132]

> {T}he concept of "financial contribution" is writ 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."

81. The panel in *US – Antidumping and Countervailing Measures (China)* similarly 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.[133]

82. We also note that where an entity may exhibit commercial behavior in some respects, nothing in Article 1.1(a)(1) suggests that the existence of such commercial behavior would preclude an entity from being deemed a "government or any public body" within the meaning of that provision. Rather, an investigating authority must take into 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.[134] As previously explained, USDOC's examination of the relevant record evidence led to the conclusion that Erdemir and Isdemir are public bodies within the meaning of Article 1.1(a)(1).

Question 26 (*To the United States*): Does the manner in which Erdemir makes production and pricing decisions in consultations with the Erdemir Group Finance Directorate and Production Planning Coordinator (see paragraphs 160-162 of Turkey's first written submission) support the conclusion that Erdemir acts independently and that Erdemir's prices are market determined?

83. In its first written submission, Turkey asserts that "{t}he evidence on the record…demonstrates that there is no government involvement in Erdemir's decision-making

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the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)" (emphasis added).

[131] 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." *See US – Gasoline (AB)*, p. 23.

[132] *See Korea – Commercial Vessels (Panel)*, para. 7.28.

[133] *US – Antidumping and Countervailing Measures (China) (Panel)*, para. 9.29 (citing *Brazil – Aircraft* (*AB*), para. 157)).

[134] *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.").

process with regard to pricing of hot rolled steel."[135] In support of this assertion, Turkey relies on a narrative description and related one-page diagram regarding Erdemir's pricing and production decision-making processes, submitted by the GOT as part of a questionnaire response.[136] As discussed below, this evidence does not demonstrate that Erdemir acts independently and/or autonomously from the government.

84. As an initial matter, Turkey appears to conflate the concepts of a company operating independently and/or autonomously from the government, with a company exhibiting commercial, profit-maximizing behavior.[137] These two concepts are distinct, and while at most Turkey has proffered evidence with respect to commercial behavior, that in and of itself does not demonstrate that Erdemir and Isdemir operate autonomously from, and are not meaningfully controlled by the GOT.

85. As explained in response to Questions 24 and 25, an entity's commercial behavior is not dispositive of whether a government exercises meaningful control over an entity and its conduct. Rather, commercial behavior, or lack thereof, is germane to the question of benefit, and is thus explored elsewhere in an investigating authority's countervailability analysis.

86. Moreover, the information cited by Turkey is outweighed by the evidence relied on by USDOC. Turkey relies heavily on the GOT's proffered narrative and an unsubstantiated diagram regarding Erdemir's pricing and production decision-making processes, but offers nothing further.[138] In fact, there is no record evidence demonstrating the enactment of such corporate processes or that Erdemir employees are required to adhere to such processes.

87. In contrast, as detailed in the United States' first written submission, USDOC cited ample record evidence demonstrating that the GOT can impact Erdemir's operations and that Erdemir has acted pursuant to the GOT's policies.[139] First, USDOC discussed that "OYAK effectively decides the composition of the majority of Erdemir's board through its majority shareholder voting rights in Erdemir."[140] Specifically, USDOC explained that Erdemir's Annual Report states, "[e]ach shareholder or the representative of the shareholder attending an Ordinary or an Extraordinary General Assembly Meetings shall have one voting right for each share."[141] USDOC also pointed to Erdemir's Articles of Association, which states, "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."[142] As a result, USDOC determined that OYAK controls the selection of Erdemir's

[135] Turkey's First Written Submission, para. 163.
[136] Turkey's First Written Submission, paras. 160-162.
[137] *See, e.g.,* Turkey's First Written Submission, paras. 153-165.
[138] Turkey's First Written Submission, paras. 160-162; GOT Questionnaire Response, Ex. 4, "Input Producer Appendix" (Exhibit TUR-61); GOT Questionnaire Response, Ex. 4-K, "Target Base Price Determination Diagram (Exhibit TUR-67).
[139] United States' First Written Submission, paras. 100-106.
[140] United States' First Written Submission, para. 104; OCTG Final I&D Memo, p. 22 (Exhibit TUR-85).
[141] United States' First Written Submission, para. 104; OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).
[142] United States' First Written Submission, para. 104; OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).

board.[143] Likewise, in the CWP, HWRP, and WLP determinations,[144] USDOC similarly considered Erdemir's Articles of Association which state that "[e]ach share has only one voting right,"[145] and that the "Board of Directors consists of minimum 5 and maximum 9 members to be selected by the General Assembly of Shareholders."[146]

88. In each of the challenged determinations, USDOC also examined the role of the TPA. USDOC examined Erdemir's Annual Reports, which state that OYAK and the TPA both maintain members on Erdemir's Board of Directors.[147] In addition, USDOC cited the TPA's veto power over any decision related to the closure, sale, merger, or liquidation of Erdemir and Isdemir.[148] In the OCTG final determination, USDOC examined Erdemir's 2012 Annual Report, which 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."[149] In the CWP, HWRP, and WLP determinations, USDOC examined Articles 21, 22 and 37 of Erdemir's Articles of Association and similarly found that the TPA holds veto power over any decisions related to the closedown, sale, merger, or liquidation, as well as capacity adjustments, for both Erdemir and Isdemir.[150]

89. Moreover, as detailed in the United States' First Written Submission,[151] USDOC considered language from Erdemir's 2012 and 2013 annual reports that demonstrates that Erdemir designed and executed policies and objectives that are consistent with the GOT's macroeconomic policies, representing action that transcends mere commercial behavior. As discussed by USDOC, the 2012-2014 Medium Term Programme was promulgated by the Ministry of Development to achieve certain objectives, including "increasing employment, maintaining fiscal discipline, increasing domestic saving, reducing the current account deficit, so

[143] United States' First Written Submission, para. 104; OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).
[144] United States' First Written Submission, para. 104; CWP Final I&D Memo, p. 9, n. 45 (Exhibit TUR-22); WLP Final I&D Memo, p. 14, n. 69 (Exhibit TUR-122); HWRP Final I&D Memo, p. 12, n. 60 (Exhibit TUR-46).
[145] United States' First Written Submission, para. 104; CWP Final I&D Memo, p. 9, n. 45 (Exhibit TUR-22); WLP Final I&D Memo, p. 14, n. 69 (Exhibit TUR-122); HWRP Final I&D Memo, p. 12, n. 60 (Exhibit TUR-46). *See also* Erdemir's Articles of Association (as submitted in WLP, CWP, HWRP, and OCTG) (Erdemir's Articles of Association), Article 21 (Exhibit USA-8).
[146] United States' First Written Submission, para. 104; CWP Final I&D Memo, p. 9, n. 45 (Exhibit TUR-22); WLP Final I&D Memo, p. 14, n. 69 (Exhibit TUR-122); HWRP Final I&D Memo, p. 12, n. 60 (Exhibit TUR-46). *See also* Erdemir's Articles of Association, Article 10 (Exhibit USA-8).
[147] United States' First Written Submission, para. 105; OCTG Final I&D Memo, pp. 21-22 (Exhibit TUR-85) (noting that "one of the board's two auditors is a "Representative of the Ministry of Finance"); OCTG Erdemir 2012 Annual Report (complete), pp. 54-55 (Exhibit USA-5); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); Erdemir 2013 Annual Report (complete), pp. 65-66 (Exhibit USA-7); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[148]United States' First Written Submission, para. 106; OCTG Final I&D Memo, p. 21 (Exhibit TUR-85). *See* Erdemir's Articles of Association, Articles 21, 22, 37 (Exhibit USA-8).
[149] United States' First Written Submission, para. 106; OCTG Final I&D Memo, p. 21 (Exhibit TUR-85). *See* Erdemir 2012 Annual Report (complete), pp. 62-63 (Exhibit USA-5).
[150] United States' First Written Submission, para. 106; WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[151] United States' First Written Submission, paras. 101-103.

by this way strengthening macroeconomic stability in stable growth process."[152] Erdemir's conduct adhered to the Medium Term Programme's stated objective to "decrease high dependency of production and exports on imports" through "policies and supports enhancing domestic production capacity."[153] Examples of language from Erdemir's 2012 and 2013Annual Reports include the following statements:

- Erdemir "implemented policies which promoted the customers to engage in export-oriented production."[154] (2012 Annual Report)

- Erdemir "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."[155] (2012 Annual Report)

- "Producing 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 . . . ."[156] (2012 Annual Report)

- 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."[157] (2013 Annual Report)

- 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."[158] (2013 Annual Report)

- "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."[159] (2013 Annual Report)

90. Accordingly, USDOC demonstrated that the GOT effectuates governmental interests. Turkey's reliance on a diagram and narrative statement regarding Erdemir's pricing and production decision-making processes does not demonstrate that the totality of the record evidence on which USDOC relied could not support its determination that the GOT exercised

[152] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); Medium Term Programme, p. 12 (Exhibit USA-6). *See also* WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[153] OCTG Final I&D Memo, p. 21 n. 160 (TUR-85); Medium Term Programme, p.23 (Exhibit USA-6).
[154] Erdemir 2012 Annual Report (complete), p. 29 (emphasis added) (Exhibit USA-5).
[155] Erdemir 2012 Annual Report (complete), p. 35 (emphasis added) (Exhibit USA-5).
[156] Erdemir 2012 Annual Report (complete), p. 5 (emphasis added) (Exhibit USA-5).
[157] Erdemir 2013 Annual Report (complete), pp. 18-19 (emphasis added) (Exhibit USA-7).
[158] Erdemir 2013 Annual Report (complete), p. 6 (emphasis added) (Exhibit USA-7).
[159] Erdemir 2013 Annual Report (complete), p. 6 (emphasis added) (Exhibit USA-7).

meaningful control over Erdemir and Isdemir, such that Erdemir and Isdemir are public bodies within the meaning of Article 1.1(a)(1).

Question 27 (*To the United States*): Is there specific evidence on record that Erdemir's executive officers or directors did not act independently?

91. As explained in response to Question 26, the record evidence before USDOC demonstrates that the GOT exercised meaningful control over Erdemir and Isdemir. This evidence included information concerning Erdemir's Board of Directors, which governs the business and management of Erdemir.[160] Moreover, as detailed in response to Question 26, the record evidence also indicates that Erdemir's business conduct was executed pursuant to the GOT's macroeconomic policies, further confirming that the GOT exercised meaningful control over Erdemir and Isdemir, such that these companies are public bodies within the meaning of Article 1.1(a)(1).

Question 28 (*To the United States*): Absent specific evidence to the contrary, would the fact that six of nine Erdemir board members are private investors mitigate the influence of two OYAK members on the board?

92. In determining that the GOT exercised meaningful control over Erdemir and Isdemir, the GOT's presence on the Board of Directors was one, but not the only factor that USDOC examined. USDOC also considered evidence indicating that "OYAK effectively decides the composition of the majority of Erdemir's board through its majority shareholder voting rights in Erdemir."[161] Specifically, USDOC explained that Erdemir's Annual Report states, "[e]ach shareholder or the representative of the shareholder attending an Ordinary or an Extraordinary General Assembly Meetings shall have one voting right for each share."[162] USDOC also pointed to Erdemir's Articles of Association, which states, "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."[163] As a result, USDOC determined that OYAK controls the selection of Erdemir's board.[164] Likewise, in the CWP, HWRP, and WLP determinations,[165] USDOC similarly considered Erdemir's Articles of Association which state that "[e]ach share has only one voting right,"[166] and that the "Board of

[160] Erdemir's Articles of Association, Article 10 (Exhibit USA-8).
[161] OCTG Final I&D Memo, p. 22 (Exhibit TUR-85).
[162] OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).
[163] OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).
[164] OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).
[165] CWP Final I&D Memo, p. 9, n. 45 (Exhibit TUR-22); WLP Final I&D Memo, p. 14, n. 69 (Exhibit TUR-122); HWRP Final I&D Memo, p. 12, n. 60 (Exhibit TUR-46).
[166] CWP Final I&D Memo, p. 9, n. 45 (Exhibit TUR-22); WLP Final I&D Memo, p. 14, n. 69 (Exhibit TUR-122); HWRP Final I&D Memo, p. 12, n. 60 (Exhibit TUR-46). *See also* Erdemir's Articles of Association, Article 21 (Exhibit USA-8).

Directors consists of minimum 5 and maximum 9 members to be selected by the General Assembly of Shareholders."[167]

93. USDOC further examined the role of the TPA, which held one seat on the Board of Directors. Specifically, USDOC cited the TPA's veto power over any decision related to the closure, sale, merger, or liquidation of Erdemir and Isdemir.[168] In the OCTG final determination, USDOC examined Erdemir's 2012 Annual Report, which 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."[169] In the CWP, HWRP, and WLP determinations, USDOC examined Articles 21, 22 and 37 of Erdemir's Articles of Association and similarly found that the TPA holds veto power over any decisions related to the closedown, sale, merger, or liquidation, as well as capacity adjustments, for both Erdemir and Isdemir.[170]

94. Moreover, in the OCTG investigation, of the nine members of Erdemir's Board of Directors, Erdemir's 2012 Annual Report only listed three as "independent" board members.[171] Of the remaining six members, one was a representative of the TPA, one was a representative of Ataer Holding (OYAK's wholly-owned holding company), and four were representatives of companies that are a part of OYAK.[172]

95. Therefore, USDOC's determination that the GOT exercised meaningful control over Erdemir and Isdemir was based on the totality of the evidence on the record.[173] The Appellate Body has found previously 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

[167] CWP Final I&D Memo, p. 9, n. 45 (Exhibit TUR-22); WLP Final I&D Memo, p. 14, n. 69 (Exhibit TUR-122); HWRP Final I&D Memo, p. 12, n. 60 (Exhibit TUR-46). *See also* Erdemir's Articles of Association, Article 10 (Exhibit USA-8).
[168] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85). *See* Erdemir's Articles of Association, Articles 21, 22, 37. (Exhibit USA-8).
[169] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85). *See* Erdemir 2012 Annual Report (complete), pp. 62-63 (Exhibit USA-5).
[170] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[171] Erdemir 2012 Annual Report (complete), pp. 54-55 (Exhibit USA-5).
[172] For a list of companies that are part of OYAK, see TESEV Publications, "Military-Economic Structure in Turkey: Present Situation, Problems, and Solutions," p. 10 (Exhibit USA-4)).
[173] WLP Final I&D Memo, p. 36 (Exhibit TUR-122) ("Therefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); HWRP Final I&D Memo, p. 23 (Exhibit TUR-46) ("Therefore, 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 . . . ."); CWP Final I&D Memo, p. 30 (Exhibit TUR-22) ("Therefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); OCTG Final I&D Memo, p. 35 (Exhibit TUR-85) ("Based 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 . . . .").

inferences that could not have been justified by a review of the individual pieces of evidence in isolation."[174] 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."[175]

Question 30 (*To the United States*): Turkey argues at paragraph 147 of its first written submission that statements in Erdemir's 2012 Annual Report that exports increased are consistent with Erdemir's goals of increasing its own growth and competitiveness. In arguing that Erdemir's polices are "in line" with GOT policies, the United States refers to the statement at page 29 of Erdemir's 2012 Annual Report, "The [Erdemir] Group also implemented policies which promoted the customers to engage in export-oriented production". Could the fact that Erdemir sought to encourage customers to increase exports not be seen as consistent with the behaviour of private company seeking to increase its own input sales to customers? Is this view in turn consistent with the statement at page 29 of Erdemir's 2012 Annual Report that "ERDEMIR Group managed to boost its sales by 22% in 2012 with the assistance of industries that are export-driven"?

96. See the U.S. response to Question 31, below.

Question 31 (*To the United States*): Turkey argues at paragraph 151 of its first written submission that statements in Erdemir's 2012 Annual Report that Erdemir's increased use of domestically produced raw materials is consistent with the strategic goals of reducing costs and ensuring a secure supply chain. Does the fact that Erdemir's 2012 Annual Report (at page 35) refers to the "added-value created by the domestic suppliers in favour of the local industries" necessarily mean that Erdemir is implementing a GOT policy? Is such a conclusion supported by the additional statements at page 35 that "cooperation with raw material suppliers is of a great strategic significance for the ERDEMIR Group", including in relation to "supply safety and minimizing price risk"?

97. The United States responds to Questions 30 and 31 together. As already discussed, USDOC based its finding that Erdemir and Isdemir are public bodies on the totality of the evidence, including the statement in Erdemir's Annual Report, to which the Panel's question refers. Specifically, USDOC's consideration of the alignment of Erdemir's Annual Report with the GOT's policies in the Medium Term Program, was in addition to the fact that Erdemir was majority owned by the GOT, that the GOT had presence on Erdemir's board, and that the GOT had veto power over decisions related to closure, sale, merger and liquidation.[176]

98. Although Turkey attempts to broaden the context and meaning of specific statements from the Annual Reports, as detailed in response to Question 26, the language from Erdemir's

[174] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted).
[175] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted).
[176] OCTG Final I&D Memo, pp. 21-22,32-35 (Exhibit TUR-85); CWP Final I&D Memo, pp. 8-9, 28-30 (Exhibit TUR-22); HWRP Final I&D Memo, pp. 11-12, 21-23 (Exhibit TUR-46); WLP Final I&D Memo, pp. 13-14, 34-36 (Exhibit TUR-122).

Annual Reports stand on their own. In presenting to the Panel alternative interpretations of isolated pieces of evidence, Turkey attempts to argue that USDOC should have weighed the evidence before it differently, and thereby come to a different conclusion. However, that a panel might have come to a different conclusion than the investigating authority based on the same facts would not support a finding that the authority acted inconsistently with the SCM Agreement.[177] Rather, the Panel must find that an objective and unbiased authority, after reviewing the totality of the evidence, could not have come to the conclusion that the GOT exercised meaningful control over Erdemir and Isdemir.

99. Likewise, to the extent that Turkey argues that the language from the Annual Report illustrates that Erdemir was engaged in commercial behavior, as discussed in response to Questions 24 through 26, Turkey's view does not change the fact that these statements, when viewed in light of the totality of the evidence, supported USDOC's determination that the GOT meaningfully controlled Erdemir and Isdemir.

100. Therefore, unless the Panel finds that the record facts, when viewed in their totality, could not support a conclusion that Erdemir is a public body within the meaning of Article 1.1(a)(1), Turkey's arguments must be rejected.

Question 32 (*To the United States*): Turkey submits that the requirements of Article 1.1(a)(1) of the SCM Agreement should apply to any entity that meet the requirements of a public body even if an entity is not directly involved in the provision of goods, as in the case of institutional investors such as pension funds that invest widely in industries that produce and sell goods. Please comment.

101. Article 1.1(a)(1) provides that "a subsidy shall be deemed to exist if there is a financial contribution by a government or any public body." The focus of the text then is on the financial contribution *by* that government or public body. As explained in response to Question 7, 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 under Article 1.1(a)(1).[178]

102. Rather, the Panel's inquiry concerning OYAK is a factual one, and requires the Panel to determine whether the evidence supports USDOC's examination of OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir, such that those entities could be considered public bodies with the meaning of Article 1.1(a)(1) of the SCM agreement.

Question 33 (*To the United States*): At paragraph 50 of its oral statement at the first substantive meeting, Turkey argues that an investigating authority should consider policies in place to ensure that an entity behaves in a profit-maximizing manner, in evaluating whether an entity is a public body. This statement was made in the context of discussing

[177] *See US – Hot-Rolled Steel (Panel),* para. 7.205 (finding that the panel was not able to overturn the evaluation of the administering authority if the establishment of the facts was proper and the evaluation unbiased and objective, even though the panel might have reached a different conclusion).
[178] United States' First Written Submission, paras. 77-80.

whether the commercial conduct of an entity is relevant to a public body determination. Please comment.

103. The paragraph referenced in the question is preceded by paragraph 49 of its oral statement, where Turkey argues that "the Appellate Body has made it clear that evidence of an entity's conduct is relevant to whether that entity is a public body."[179] Turkey goes on to cite *US – Carbon Steel (India)* where the Appellate Body explained that the panel did not properly consider India's argument that USDOC failed to consider evidence regarding the NMDC's possible status as a *Miniratna* or *Navratna* company, which India had argued conferred greater autonomy on public sector enterprises to make them more efficient and competitive.[180]

104. This is in contrast to the record of the proceedings here. The records before USDOC did not contain evidence of the government expressly granting Erdemir and Isdemir autonomy. Rather, Turkey proffers an unsubstantiated diagram that purportedly illustrates Erdemir's decision-making process with respect to pricing.[181] Turkey has not demonstrated that USDOC failed to consider this evidence, nor does this diagram demonstrate that Erdemir made autonomous, and market-based pricing decisions. Therefore, Turkey's argument again suggests that USDOC erred in not giving to the GOT's "evidence" the weight Turkey would have preferred. This is not sufficient to show that the USDOC acted inconsistently with Article 1.1(a)(1), and the Panel should reject Turkey's arguments accordingly.

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

Question 35 (*To the United States*): Are there specific examples of prior CVD investigations, or examples of CVD investigations concurrent or subsequent to the WLP, HWRP and CWP proceedings, in which USDOC did not determine it was necessary to resort to out-of-country prices in reaching a benefit determination, despite finding that the government accounted for a majority or a substantial portion of the market in the domestic market of the investigated producers? In any such investigations, what factors led USDOC to conclude that it was not necessary to resort to out-of-country prices?

Response:

105. As explained in the United States' first written submission, Turkey has failed to satisfy its burden to demonstrate that USDOC has a practice that is a rule or norm of general and prospective application.[182] The Appellate Body in *US – Zeroing (EC)* found the existence of a rule or norm of general and prospective application where "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."[183] Here, Turkey points only to a statement in the final benchmark determination for OCTG – which, as explained in the

[179] Turkey's Oral Statement at the First Panel Meeting, para. 49.
[180] *US – Carbon Steel (India*) (*AB*), paras. 4.40-4.41.
[181] *See* GOT Questionnaire Response, Ex. 4-K, "Target Base Price Determination Diagram" (Exhibit TUR-61).
[182] United States' First Written Submission, paras. 50-72.
[183] *US – Zeroing (EC) (AB)*, para. 204.

preliminary ruling request, was reversed by a U.S. domestic court and then amended by USDOC – and the preliminary benchmark determinations in four other investigations, one of which also was reversed in the final benchmark determination for that investigation.[184] Thus, the evidence that Turkey cites as to the existence of a measure contrasts sharply with the evidence put before the panel in *US – Zeroing (EC)*, and is clearly insufficient to support a *prima facie* case of the existence of a "practice." On that basis alone, the Panel must reject Turkey's claims as they relate to the purported U.S. practice regarding out-of-country benchmarks.

106. While the Panel need not and should not proceed further in its analysis, for completeness, the United States notes that the OCTG remand determination on the record before the Panel illustrates a finding in which USDOC did not determine it was necessary to resort to out-of-country prices in reaching a benefit determination, despite finding that the government accounted for a majority or a substantial portion of the market in the domestic market of the investigated producers. As the United States explained in its first written submission, USDOC reversed its benchmark determination in the OCTG final determination, and determined to use in-country benchmarks in the OCTG remand determination.[185] Likewise, although Turkey has cited the CWP preliminary results in support of its "as such" claim,[186] as the United States explained in its first written submission, in the CWP final results, USDOC found that "the record of this review does not contain evidence of the GOT's direct or indirect involvement resulting in the distortion of the Turkish HRS market during the POR sufficient to warrant using an out-of-country benchmark."[187]

107. In other words, in each case, USDOC evaluates the facts on the record and determines to use in-country prices as a benchmark for a benefit determination despite finding that the government accounted for a majority or a substantial portion of the domestic market for that good in the investigated country. The United States also refers the Panel to the findings in *Truck and Bus Tires from the People's Republic of China*, published in January 2017, where USDOC "determined that it is appropriate to use a Tier 1 [(*i.e.*, in-country price)] benchmark for measuring the adequacy of remuneration from the provision of Synthetic Rubber and Butadiene" notwithstanding that rubber producers owned by the government of the People's Republic of China (PRC) accounted for a substantial portion of the market, and thus composed a benchmark using "actual import purchase prices provided from imports by both respondent companies."[188]

Question 36 (*To both parties*): Are there any domestic judicial rulings upholding USDOC's decision to resort to tier two (i.e. out-of-country) prices based only on a finding of that government involvement in the market was "substantial", without resort to other evidence

[184] United States' First Written Submission, paras. 56, 58, 66-67.
[185] United States' First Written Submission, para. 58.
[186] Turkey's First Written Submission, para. 179, n. 437.
[187] CWP Final I&D Memo, p. 19 (Exhibit TUR-22) (citation omitted).
[188] Truck and Bus Tires from the People's Republic of China, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation (Dep't Commerce January 19, 2017) ("Truck and Bus Tires from China Final I&D Memo"), pp. 19, 44 (Exhibit USA-36). The United States notes that although the issues and decision memorandum is dated "January 19, 2016," this was a typographical error. The issues and decision memorandum was issued in January 2017.

of distortion? If so, how were the facts in those CVD investigations similar or different to those in the OCTG investigation?

Response:

108. Turkey has alleged in this dispute that the United States 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, with no consideration of whether in-country prices are distorted."[189] As Turkey is the complainant in this case, it therefore bears the burden of supporting its allegations. Turkey has not done so, and the Panel therefore may reject Turkey's claims on this basis alone. With respect to the Panel's specific question, the United States is not aware of any domestic judicial rulings upholding a decision by USDOC to resort to tier two (*i.e.*, out-of-country) prices based solely on a finding that government involvement in the market was "substantial," without resort to other evidence of distortion.

Question 37 (*To the United States*): The Preamble to of 19 CFR 351.511 provides that distortion arising from government involvement "will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market".

a. In accordance with US law, what are examples of "certain circumstances" that would allow USDOC to proceed to adjust prices to account for government distortion of the market?

b. In accordance with US law, is USDOC permitted to resort to tier two (out-of-country) prices solely on the basis of a finding that the government accounts for a "majority … of the market"?

Response (Subpart A and B):

109. The United States responds to subparts A and B of the question together. As an initial matter, as the United States demonstrated in its first written submission, Turkey has not successfully raised a claim that USDOC has a "practice" that is "as such" inconsistent with the SCM Agreement.[190] Turkey, in its oral statement at the first panel hearing, now attempts to shift its approach to argue that, "the practice at issue is expressed in a written document, namely the Preamble to the Department's regulations."[191] However, the Panel should review the purported measure at issue as it is expressed in Turkey's panel request. To recall, in the panel request, Turkey challenges 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

[189] Turkey's Panel Request, pp. 3-4.
[190] United States' First Written Submission, paras. 50-72.
[191] Turkey's Oral Statement at the First Panel Meeting, para. 54.

> 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 . . . "as such", as a practice . . . .[192]

110. Turkey did not include a challenge to the U.S. regulations in its panel request, and any attempt to modify its claims to target this instrument now necessarily would fall outside the Panel's terms of reference.

111. Moreover, in its first written submission, Turkey explicitly acknowledges that the text of the Preamble does not support the purported practice, stating,

> [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 an alternative benchmark. However, as a matter of practice, the USDOC systematically 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 of whether in-country market prices are, in fact, distorted.[193]

112. Therefore, Turkey's reference to the Preamble now does not support a finding by the Panel that the purported "practice," as articulated in Turkey's panel request, existed at the time of the Panel's establishment.

113. For completeness, and in response to the Panel's specific questions, USDOC's determinations demonstrate that USDOC engages in an evaluation of the record evidence even where it determines that the government constitutes a majority of the market for a good. Specifically, with respect to the Panel's question in subpart A concerning "certain circumstances," the United States refers the Panel to the OCTG Remand Redetermination, where USDOC considered "factors such as government export restraints (*e.g.*, export quotas, export licensing requirements, and export taxes) and low import levels as additional evidence that the market for a good was subject to government distortion."[194] The CWP 2013 Final Results similarly discussed additional "certain circumstances" that could lead to a finding of market distortion, notwithstanding that the government constitutes a substantial portion of that market.[195]

114. In response to the Panel's question in subpart B concerning "majority" of the market, USDOC similarly considers whether "actual transaction prices are significantly distorted" for reasons other than majority market share, even where it reverts to tier two (out-of-country) benchmark prices.[196] As Turkey states, the Preamble provides that "USDOC would conduct an

[192] Turkey's Panel Request, pp. 3-4.
[193] Turkey's First Written Submission, para. 179.
[194] OCTG Remand Redetermination, pp. 16-17 (Exhibit USA-1).
[195] CWP Final I&D Memo, p. 19 (Exhibit TUR-22).
[196] *Preamble*, 63 Fed. Reg. at 65,377 (Exhibit TUR-4).

investigation of whether 'actual transaction prices are significantly distorted,' prior to rejecting in-country market prices and resorting to an alternative benchmark."[197] USDOC's determinations demonstrate that USDOC engages in such an evaluation of the record evidence even where it determines that the government constitutes a majority of the market for a good.

115. For example, in *Cold-Rolled Steel from the Russian Federation*, a natural gas provider controlled by the Russian government accounted for between 77.96 to 81.2 percent of the natural gas market in Russia between 2012 and 2014.[198] USDOC ultimately concluded that it was appropriate to rely on out-of-country gas prices as a benchmark to measure the adequacy of remuneration of the Russian companies' purchases of natural gas. In coming to this conclusion, in addition to the Russian gas company's majority share of the market, USDOC also considered that the government of Russia "maintains rigid export restrictions" on natural gas and had "granted to [the Russian gas company] the exclusive right to export natural gas in gaseous state," and concluded that those restrictions "artificially increase the supply [of natural gas] in the domestic market, resulting in domestic prices that are lower than the otherwise would be."[199]

116. Likewise, in *Supercalendered Paper from Canada*, in evaluating restraints on log and wood residue exports in British Columbia, USDOC determined that the government constituted a majority of the market for the good.[200] Although USDOC ultimately concluded it was appropriate to rely on out-of-country prices as a benchmark, the determination was not based solely on the percentage of the government's ownership or control of the market for the good.[201] Rather, USDOC also evaluated the fact that "the prices for stumpage rights [(*i.e.*, the right to harvest timber)] on these Crown lands during the [period of review] were administratively and uniformly set by the government" in conjunction with the government restriction on the export of logs and wood residue from British Columbia. USDOC further considered the "multiple independent academic studies on the record that state unequivocally that the market is distorted as a result of the government's export restrictions," and "an opinion article written by the President and CEO of a major timber company located in British Columbia that states the export restrictions result in an 'artificially depressed domestic market.'"[202]

117. As demonstrated above, Turkey has not, and cannot, demonstrate 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."[203]

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[197] Turkey's First Written Submission, para. 179.
[198] Cold-Rolled Steel Flat Products from the Russian Federation, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation (July 20, 2016) ("Cold-Rolled Steel from Russia Final I&D Memo"), p. 53 (Exhibit USA-37).
[199] Cold-Rolled Steel from Russia Final I&D Memo, p. 55 (Exhibit USA-37).
[200] Supercalendered Paper from Canada, Issues and Decision Memorandum for the Final Results of the Expedited Review of the Countervailing Duty Order (April 17, 2017) ("SC Paper Final I&D Memo"), p. 49 (Exhibit USA-38).
[201] SC Paper from Canada Final I&D Memo, p. 49 (Exhibit USA-38) ("[T]he Department does not apply a *per se* rule that a government's majority market share equates to government distortion.").
[202] SC Paper from Canada Final I&D Memo, p. 49 (Exhibit USA-38).
[203] Turkey's Panel Request, pp. 3-4.

c. USDOC states in the OCTG investigation that information was required on production and consumption of HRS in Turkey "to measure accurately the level of distortion in the Turkish HRS market" (Issues and Decision Memorandum for the OCTG investigation, p. 37 (Exhibit TUR-85)). Does this statement imply that USDOC considered that the level of distortion in the Turkish market could have in fact been either significant or minimal?

Response:

118. As an initial matter, as described in the United States' preliminary ruling request, the benchmark determination within the OCTG final determination was superseded by the OCTG remand determination, and ceased to exist and have legal effect on March 10, 2016, the date the OCTG amended final determination effectuated the OCTG remand redetermination.[204] Accordingly, statements related to benchmarks in the OCTG final determination fail to demonstrate that USDOC has a practice that is a rule or norm of general and prospective application that was in existence at the time of the Panel's establishment.

119. With respect to the Panel's specific question, the quoted statement in the question implies that the level of distortion in the hot-rolled steel market could have been either significant or minimal, despite the government's ownership interest in the market. And, as discussed in detail in the United States' first written submission, all four countervailing duty orders challenged by Turkey in this dispute demonstrate that, when presented with an allegation of the government's provision of a good to a respondent for less than adequate remuneration, USDOC weighs the evidence relevant to the distortion of private prices in the market in question, and may conclude that it is appropriate to rely on in-country prices as a benchmark notwithstanding the government's significant participation in the market.[205]

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

Question 38 (*To both parties*): At paragraph 231 of its first written submission, the United States argues that Turkey failed to explain how USDOC's lack of consideration of the factors listed in the final sentence of Article 2.1(c) of the SCM Agreement affected the specificity determination. Is the burden of proof on a WTO complainant to explain how the failure to consider the factors in the final sentence had an effect on the specificity determination under Article 2.1(c) of the SCM Agreement? Please explain by reference to Article 2.1(c) or elsewhere in the SCM Agreement.

Response:

120. Turkey, as the complainant, must demonstrate that USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to consider the two factors. Article 2.1(c) of the SCM Agreement states that in applying subparagraph (c), "account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as

[204] United States' First Written Submission, paras. 45-47, 58-60.
[205] United States' First Written Submission, paras. 61-65.

the length of time during which the subsidy progamme has been in operation." The term "shall" indicates that it is mandatory for investigating authorities to deal or reckon with those factors.[206] But 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.

121. 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."[207] Indeed, panels have upheld determinations by investigating authorities where these factors were taken into account implicitly.[208] 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.[209]

122. Turkey has the burden to demonstrate that USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to consider the two factors. Turkey acknowledges that "taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly."[210] Yet in its first written submission, Turkey merely asserts, "USDOC did not explicitly or even implicitly consider the extent of economic diversification in Turkey or the length of time that the alleged programme for the provision of hot rolled steel for less than adequate remuneration had been in operation in reaching a finding of specificity."[211] Turkey provides nothing further to substantiate this assertion, however, or to explain why explicit discussion was warranted based on the evidence before USDOC. Indeed, Turkey could not provide such an explanation because the record contains no such facts.

123. As explained in response to Questions 40 and 41, below, USDOC took the relevant factors into account in making its findings regarding specificity. Given that 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, USDOC was not required to reflect this consideration explicitly in its determination.

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[206] *US – Countervailing Measures (China) (Panel)*, para. 7.251.
[207] *US – Countervailing Measures (China) (Panel)* (internal citations omitted), para. 7.253; *US – Washing Machines (Panel*), para. 7.251 (quoting *US – Countervailing Measures (China) (Panel)*, para. 7.253).
[208] *US – Softwood Lumber IV (Panel)*, para. 7.124; *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.229.
[209] *See EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.229 ("[T]he record does not indicate that the parties ever raised the issue that the disproportionate use of the Program's funds for Hynix was somehow to be explained by the lack of diversification of the Korean economy or the length of time the program had been in operation. We therefore do not find it unreasonable that the EC did not include in the Final Determination any explicit statement regarding these matters.").
[210] Turkey's First Written Submission, paras. 218-219, 336-337, 449-450, 550-551 (citing *US – Countervailing Measures (China) (Panel)*, para. 7.253 ("[T]aking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly.")); *see also US – Washing Machines (Panel*), para. 7.251 (quoting *US – Countervailing Measures (China) (Panel)*, para. 7.253).
[211] Turkey's First Written Submission, paras. 219, 337, 450, 551.

124. Therefore, here, Turkey has failed to offer any evidence or argumentation to demonstrate that USDOC acted inconsistently with Article 2.1(c), and its claims under this provision must therefore fail.

Question 39 (*To both parties*): Is it relevant that neither of the two factors in the last sentence of Article 2.1(c) was alleged in the proceeding at issue to have any bearing on the specificity inquiry, as the United States contends at paragraph 234 of its first written submission?

Response:

125. Although it is not determinative, the fact that neither of the two factors was raised by parties in the proceedings is relevant to the Panel's assessment of USDOC's specificity finding, and supports a finding that explicit discussion of the two factors was not required. A similar issue was addressed by the panel in *EC – DRAMS (Korea)*. There, Korea had argued that the EC failed to take into account the two factors, and the panel concluded that, where interested parties have not raised the relevance of the two factors, "[w]e do not find it unreasonable that the EC did not include in the Final Determination any explicit statement regarding these matters."[212] The Panel should come to a similar conclusion here. Where, as here, parties in the underlying proceeding did not raise an issue with the two factors, and Turkey has not identified the relevance of the factors that would have warranted explicit discussion, the Panel should find that Turkey has not shown that USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement.

Question 40 (*To the United States*): At paragraph 234 of its first written submission, the United States argues that USDOC "found no evidence tending to demonstrate that the HRS subsidy program was subject to the complications that can arise with new subsidy programs". Is this reflected in USDOC's determination?

Response:

126. Yes, USDOC's determinations reflect its consideration of this factor. As the United States explained in its first written submission,[213] in evaluating the HRS for LTAR program, USDOC examined Erdemir's 2012 and 2013 Annual Reports, which identify Erdemir as "Turkey's iron and steel power,"[214] as well as evidence that Erdemir has been in existence since 1960 and Isdemir has been in existence since 1970.[215] Moreover, USDOC 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

[212] *EC – Countervailing Measures on DRAM Chips (Panel)*, para 7.229.
[213] United States' First Written Submission, para. 234.
[214] Erdemir's 2013 Annual Report (complete), p. 5 (Exhibit USA-7).
[215] Erdemir's 2013 Annual Report (complete), p. 2 (Exhibit USA-7); Erdemir's 2012 Annual Report (complete), p. 8 (Exhibit USA-8).

comparison to data for past years.[216] Therefore, the record evidence did not indicate that the length of time in which the subsidy program had existed gave rise to the issues that would accompany a new subsidy program, and therefore warrant explicit discussion in USDOC's determination.

Question 41 (*To the United States*) At paragraph 235 of its first written submission, the United States argues that "the extent of diversification of Turkey's economy had no bearing on the specificity analysis" and that "USDOC was aware of the publicly known fact that Turkey has a wealthy and diversified economy". Did USDOC conclude that this factor had no bearing on its specificity analysis? If so, where is this conclusion reflected in USDOC's determination?

Response:

127. Yes, USDOC concluded that the extent of diversification factor had no bearing on its specificity analysis. This conclusion is reflected in USDOC consideration and discussion of the Medium Term Programme, Erdemir's 2012 and 2013 Annual Reports, and the publicly known fact of Turkey's highly diversified economy.[217]

128. The Medium Term Programme discusses the placement of the Turkish economy in comparison with the world economy. It states that "Turkey was among the countries that had highest growth rates around the world."[218] It also explains that "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."[219] Erdemir's 2012 and 2013 Annual Reports likewise identify Turkey as the eight largest steel producer in the world, with a production capacity of 35.9 million tons in 2012 and 34.7 million tons in 2013.[220] It also stated

[216] OCTG GOT Initial Questionnaire Response, pp. 4-6 (Nov. 22, 2013) (Exhibit TUR-60); WLP GOT Initial Questionnaire Response, pp. 14-16 (Jan. 20, 2015) (Exhibit USA-43); HWRP GOT Initial Questionnaire Response, pp. 12-15 (Oct. 28, 2015) (Exhibit USA-44); CWP GOT Initial Questionnaire Response, pp. 7-10 (Dec. 10, 2014) (Exhibit USA-45).
[217] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); CWP Final I&DM Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); WLP Final I&D Memo, p.14 (Exhibit TUR-122).
[218] Medium Term Programme (2012-2014), p. 9 (Exhibit USA-6); *see also* OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); CWP Final I&DM Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); WLP Final I&D Memo, p.14 (Exhibit TUR-122).
[219] Medium Term Programme (2012-2014), p. 10 (Exhibit USA-6); *see also* OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); CWP Final I&DM Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); WLP Final I&D Memo, p.14 (Exhibit TUR-122).
[220] Erdemir's 2013 Annual Report (complete), p. 2 (Exhibit USA-7); Erdemir's 2012 Annual Report (complete), p.16 (Exhibit USA-5); *see also* OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); CWP Final I&DM Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); WLP Final I&D Memo, p.14 (Exhibit TUR-122).

that the Turkish economy expanded more than 3% in 2013, despite the global crisis,[221] and that Turkeys' manufacturing exports grew by 4.6% in 2013.[222]

129. Therefore, when examining the HRS for LTAR subsidy program and reaching a specificity finding, USDOC took into account this information when considering the extent of diversification of the Turkish economy. Because the extent of the Turkish economy's diversity did not impact its specificity finding, USDOC did not explicitly discuss the factor in its determination.

Question 42 (*To both parties*) The Appellate Body in *US – Countervailing Measures (China)* has defined a subsidy programme under Article 2.1(c) of the SCM Agreement as referring to "a plan or scheme regarding the subsidy at issue"[223]. For subsidies in the form of a provision of goods for less than adequate remuneration, how could a list of transactions demonstrate that there is a series of systematic actions that constitute a subsidy programme under Article 2.1(c) of the SCM Agreement? What would be the relevance, if any, of the fact that some of the transaction prices are higher than the benchmark price whereas other prices are lower than the benchmark price? If such a list of transactions alone does not demonstrate a series of systematic actions, what else would be required to establish the existence of a subsidy programme within the meaning of Article 2.1(c) of the SCM Agreement?

Response:

130. USDOC did not rely upon a list of transactions alone in the determinations at issue. Rather, USDOC determined the existence of a subsidy program based on the Medium Term Program, Erdemir's Annual Report, *and* the transaction-specific accounting of the provision of HRS provided by the respondents in the proceedings.

131. As the United States explained in its first written submission, USDOC first examined Erdemir's Annual Reports and the GOT's Medium Term Programme.[224] In the OCTG final determination, USDOC discussed 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."[225] In the WLP, CWP and HWRP determinations, USDOC examined Erdemir's 2013 Annual Report, which states that through "flat steel sales to exporting industries," Erdemir "made a major contribution to the 4.6%

[221] Erdemir's 2013 Annual Report (complete), p. 8 (Exhibit USA-7); *see also* OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); CWP Final I&DM Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); WLP Final I&D Memo, p.14 (Exhibit TUR-122).
[222] Erdemir's 2013 Annual Report (complete), p. 9 (Exhibit USA-7); *see also* OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); CWP Final I&DM Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); WLP Final I&D Memo, p.14 (Exhibit TUR-122).
[223] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.142.
[224] United States' First Written Submission, paras. 227-228.
[225] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); *see also* Erdemir 2012 Annual Report (complete), pp. 29, 35 (Exhibit USA-5).

increase in Turkey's manufacturing exports in 2013"[226] and "continues to create value added for Turkish industry through initiatives to increase the use of domestic sources of raw materials."[227] USDOC then examined the GOT's Medium Term Programme, which was promulgated by the Ministry of Development to achieve certain objectives, including "increasing employment, maintaining fiscal discipline, increasing domestic saving, [and] reducing the current account deficit, [in] this way strengthening macroeconomic stability in stable growth process."[228] USDOC then found Erdemir's Annual Report to be in line with GOT's policies.[229]

132. It was in light of this evidence that a systematic series of actions establishing a "plan" or "scheme" was then found, based on the transaction specific accounting that was submitted by the Turkish respondents in each proceeding.[230] USDOC's specificity determination thus relied both on the repeated provision of the inputs at issue and statements from Erdemir's Annual Reports indicating that it was acting in accordance with the GOT's stated industrial policies.

133. Thus, USDOC properly determined that through the repeated provision of HRS for LTAR, in accordance with stated GOT policy, Erdemir and Isdemir engaged in a systematic series of actions that is probative of the existence of a subsidy program in accordance with Article 2.1(c) of the SCM Agreement.

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

Question 44 (*To the United States*): Did USDOC consider data pertaining to hot rolled steel purchases for the Halkaali and Izmit mills "necessary information" within the meaning of Article 12.7 of the SCM Agreement? If so, please explain why the information was necessary, given Borusan's argument that Halkali and Izmit mills do not produce OCTG.

Response:

134. As an initial matter, the United States notes that Turkey has not raised any claims or provided any arguments that the data requested by USDOC with respect to the Halkali and Izmit

[226] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[227] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[228] OCTG Final I&D Memo, p. 21 n.160 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22).
[229] OCTG Final I&D Memo, p. 21 n.160 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22).
[230] *See* OCTG Tosçelik Questionnaire Response, p. 14 (Exhibit TUR-82); OCTG Toscelik Questionnaire Response, Exhibit 22 (Exhibit USA-16); OCTG Borusan Questionnaire Response, pp. 10-12 (Exhibit TUR-53); OCTG Borsuan Questionnaire Response, Exhibit 9B (Exhibit USA-14); WLP Tosçelik Questionnaire Response, pp. 9-10 and Exhibit 12 (Exhibit USA-18); WLP Borusan Initial Questionnaire Response, p. 11-12 and Exhibit 18 (Exhibit USA-15); CWP Borusan Supplemental New Subsidy Allegations Questionnaire Response, p. 2 and Exhibits NSA-8, NSA-9 (Exhibit USA-19); HWRP MMZ Initial Questionnaire Response, p. 7 and Exhibit 5 (Exhibit USA-24).

mills was not "necessary information" within the meaning of Article 12.7 of the SCM Agreement.

135. Consistent with its panel request, Turkey argued in its written submission that USDOC's determination to rely on facts available in the OCTG proceeding was "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 chose to draw an adverse inference in selecting among the 'facts' otherwise 'available' in order to punish Borusan for its alleged non-cooperation."[231] While Turkey noted that Borusan did not believe the purchase data for the Halkali and Izmit facilities was "necessary" for USDOC's subsidization determination, Turkey did not assert, much less substantiate, a claim that the information was not "necessary information" under Article 12.7.[232]

136. Similarly, in its oral statement, Turkey did not include *any* discussion of its claims under Article 12.7 with respect to the OCTG proceeding, much less any discussion of whether the information requested by USDOC in that proceeding was "necessary."[233] Thus, Turkey again failed to argue that the requested information was not "necessary information" within the meaning of Article 12.7.

137. As Turkey has failed to adduce any arguments or evidence under Article 12.7 regarding USDOC's determination that the requested data was "necessary information," the Panel need not evaluate such an argument and its analysis should therefore end here.

138. Even aside from Turkey's failure to adduce arguments or evidence in this respect, for the sake of completeness the United States notes that the USDOC considered the data pertaining to hot-rolled steel purchases for the Halkali and Izmit mills to be "necessary information" within the meaning of Article 12.7 of the SCM Agreement. As USDOC stated in its final determination:

> Because Borusan failed to report its HRS purchases for the Halkali and Izmit mills when we requested that information in two different questionnaires, we find that *necessary information* regarding Borusan's HRS purchases for these facilities is not on the record. Without this information, we cannot fully determine the benefit that Borusan received from each purchase of HRS from Erdemir and Isdemir. Thus, we determine we must rely on "facts available" in this final determination in calculating Borusan's CVD margin.[234]

139. In particular, USDOC found that the design, structure, and operation of the Provision of HRS for LTAR program was not aimed at benefiting only the production of OCTG, but rather benefited all products – including OCTG – produced by Borusan.[235] This finding was not

[231] Turkey's First Written Submission, para. 196.
[232] Turkey's First Written Submission, para. 199.
[233] Turkey's Oral Statement, paras. 63-76.
[234] OCTG Final I&D Memo, p. 12 (emphasis added) (Exhibit TUR-85).
[235] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).

disputed by Borusan or the Government of Turkey.[236] Accordingly, in order to calculate the subsidy rate for this program, USDOC needed information regarding all of Borusan's purchases of HRS, as well as information regarding Borusan's total sales of all products produced during the period of investigation.

140. Thus, USDOC properly applied facts available in determining the subsidy rate for the Provision of HRS for LTAR program, in accordance with Article 12.7 of the SCM Agreement, as a result of Borusan's failure to provide necessary information.

Question 47 (*To both parties*): Please comment on Brazil's statement at paragraph 8 of its oral statement at the first substantive meeting that "a weighted average of the prices paid by the Gemlik Facility could be found and, in all likelihood, would serve as a better approximation of the missing information, thus serving the purpose of allowing the investigating authority to reach an 'accurate subsidization or injury determination'".

Response:

141. 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.[237] However, Brazil has not provided any explanation based on the text of Article 12.7 that would support such an assertion. And as explained below, such an interpretation would serve only to incentivize non-cooperation.

142. SCM Article 12.7 permits determinations to be made on the basis of facts available where an "interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." That is, Article 12.7 "permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization . . . and injury."[238]

143. We recall that, where an investigating authority is not provided with the actual information necessary to make a particular determination, an interested party's lack of cooperation could lead to a less favorable result than if the party had cooperated. The final sentence of paragraph 7 of Annex II of the AD Agreement, which provides relevant context for the interpretation of Article 12.7,[239] states that:

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[236] *See, e.g.,* OCTG Borusan Initial Questionnaire Response at Responses, p. 11 (Exhibit TUR-53); Letter from Government of Turkey to USDOC, "Response of the Government of Turkey in the Countervailing Duty Investigation on Certain Oil Country Tubular Goods from the Republic of Turkey," at Responses, pp. 1, 7-8 (Exhibit TUR-60).

[237] Brazil's Oral Statement, paras. 7-8.

[238] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.

[239] Article 12.7 contains similar obligations to those under Article 6.8 of the AD Agreement, and the Appellate Body has explained that "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." *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295; *see also id.*, para. 291.

> It is clear, however, 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.

144. In light of this context, the Appellate Body also has found 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.[240] Therefore, Article 12.7 also does not require an investigating authority to ignore the circumstances surrounding the absence of "necessary information," as Brazil's argument appears to suggest.

145. In this case, if Borusan had provided the purchase information that was requested by USDOC, then USDOC would have been able to determine the *actual* prices paid by Borusan for HRS for the Halkali and Izmit facilities. Due to Borusan's non-cooperation, however, this information was not on the record, and USDOC had to rely on facts available.[241] As explained in the United States' written submission, the price selected by USDOC was a price that Borusan had actually paid for HRS for the Gemlik mill.[242] Therefore, it is entirely possible that the actual prices paid by Borusan for HRS for the Halkali and Izmit mills were *less* than the lowest price it paid for the Gemlik mill. 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.

146. Brazil's suggestion of a weighted average transaction price would ignore the procedural circumstances of the investigation, including the lack of cooperation by the responding party, to require a finding that is necessarily *better* than some of the outcomes for cooperating entities. Brazil provides no explanation for why such an outcome would be a "better approximation" of the actual subsidization rates than the price selected by USDOC in the underlying investigation. Nor does Brazil explain how such an interpretation would be consistent with the text of Article 12.7, or the context provided by Annex II of the Antidumping Agreement. To the contrary, Brazil's interpretation would provide an incentive for more responding parties not to cooperate; for, if an interested party knows it received a greater or equal subsidy level from the government relative to most other companies, it could anticipate receiving either the same, or a more favorable, rate from the investigating authority as it would have received had it cooperated. An incentive already exists for a responding party to not cooperate if it knows it receives a higher rate of subsidization than other, cooperating parties, to the extent the investigating authority would then apply the highest known rate for a cooperating party. Brazil's suggested interpretation therefore would extend the existing incentive for non-cooperation to more interested parties by increasing the chances of a better outcome.

147. Therefore, the Panel should decline to adopt the interpretation proposed by Brazil in its oral statement, because it lacks any legal basis in the text or context of Article 12.7 of the SCM

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[240] *US – Carbon Steel (India) (AB)*, para. 4.426.
[241] United States' First Written Submission, paras. 151-153.
[242] United States' First Written Submission, para. 155.

Agreement, and would in fact create an incentive for non-cooperation inconsistent with the aims of that provision.

Question 51 (*To both parties*): The Appellate Body stated in *US – Carbon Steel (India)*[243] 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, which calls for a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case". Please answer the following in relation to selecting facts available under Article 12.7 of the SCM Agreement, including references to jurisprudence cited in support of your response:

a. What legal standard should a panel apply, that of a "reasonable replacement" or an "accurate determination"?

b. When resorting to facts available, what parameters should a panel assess if applying a "reasonable replacement" standard?

c. When resorting to facts available, how should an investigating authority select the relevant facts available to achieve an accurate determination?

Response:

148. Article 12.7 of the SCM Agreement states: "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." Article 12.7 thus permits investigating authorities to apply facts available when information necessary to determining subsidization or injury is not available on the record.[244] In such cases, the authority does not have the information required to calculate the *actual* rate of subsidization. Given that the standard for WTO review of an investigating authority's action is whether an unbiased and objective authority could have made a finding, it is reasonable to conclude that an authority must seek to arrive at an "accurate determination" by finding a "reasonable replacement" for the missing information.[245] That is, "an investigating authority must use those 'facts available' that 'reasonably replace the information that an interested party failed to provide', with a view to arriving at an accurate determination."[246]

149. The "facts available" refer "to those facts that are in the possession of the investigating authority and on its written record."[247] Thus, an Article 12.7 determination "'cannot be made on

[243] *US – Carbon Steel (India) (AB)*, para. 4.435.
[244] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.
[245] *US – Carbon Steel (India) (AB)*, para. 4.435.
[246] *US – Carbon Steel (India) (AB)*, para. 4.416 (quoting *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 293-294) (emphasis added by Appellate Body); *see also US – Countervailing Measures (China) (AB)*, para. 4.178.
[247] *US – Countervailing Measures (China) (AB)*, para. 4.178 (citing *US – Carbon Steel (India) (AB)*, para. 4.417).

the basis of non-factual assumptions or speculation.'"[248] 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, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made in the course of an investigation."[249]

150. Similarly, whether the "facts available" used by an authority reflect a reasonable replacement of the missing information "is to be determined in light of the particular circumstances of a given case."[250] Among these circumstances, the investigating authority may take into account "the procedural circumstances in which information is missing, including the non-cooperation of an interested party."[251] As the Appellate Body has observed, "non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact."[252]

151. That said, where there are several "facts available" from which to choose, an unbiased and objective investigating authority must have a reasonable basis for its choice, and greater accuracy would be an important criterion.[253] Therefore, to the extent there may be evidence on the record demonstrating that a particular fact is not accurate, for example, such a fact would not be a reasonable replacement for the missing information.

152. 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, however. To the contrary, as described above, Annex II of the Antidumping Agreement, which provides relevant context for the interpretation of Article 12.7, expressly acknowledges this possibility. Therefore, simply because, *e.g.*, one subsidy rate is higher than another does not mean that the higher subsidy rate is not a reasonable replacement for missing rate information or that its use would result in an inaccurate benefit determination. 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.

Question 53 (*To the United States*): For the purpose of calculating the subsidy rate for MMZ's Provision of Electricity for Less Than Adequate Remuneration programme in the HWRP investigation, Turkey argues that USDOC used the subsidy rate for the Provision of Hot Rolled Steel for Less Than Adequate Remuneration programme in *OCTG from Turkey*,

[248] *US – Countervailing Measures (China) (AB)*, para. 4.178 (quoting *US – Carbon Steel (India) (AB)*, para. 4.417); *see also US – Carbon Steel (India) (AB)*, para. 4.428.
[249] *US – Carbon Steel (India) (AB)*, para. 4.421; *see also US – Countervailing Measures (China) (AB)*, para. 4.179 (citing *US – Carbon Steel (India) (AB)*, para. 4.421) ("the nature and extent of the explanation and analysis required will necessarily vary from determination to determination").
[250] *EU – Biodiesel from Argentina (AB)*, para. 6.276.
[251] *US – Carbon Steel (India) (AB)*, para. 4.468.
[252] *US – Carbon Steel (India) (AB)*, para. 4.426.
[253] *US – Carbon Steel (India) (AB)*, para. 4.426 ("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").

which was itself based on facts available and an adverse inference. Why did the USDOC not use the Hot Rolled Steel for Less Than Adequate Remuneration programme rate that was determined for MMZ in the same HWRP investigation? Please explain by reference to the HWRP determination.

Response:

153. To determine a reasonable replacement for the information that MMZ failed to provide regarding the Provision of Electricity for Less Than Adequate Remuneration ("LTAR") program, with a view towards arriving at an accurate subsidy determination, USDOC took the following steps. First, USDOC searched the record of the HWRP proceeding for above-zero subsidy rates calculated for another respondent for the identical program.[254] Next, USDOC searched for non-*de minimis* rates calculated for the identical program in another countervailing duty proceeding involving Turkey.[255] Finally, USDOC searched for non-*de minimis* rates calculated for a similar program used in any countervailing duty proceeding involving Turkey.[256] For each category, USDOC noted the highest rate actually calculated. USDOC determined that the Provision of Electricity for LTAR program was similar to the Provision of HRS for LTAR program, based on program type and treatment of the benefit.[257]

154. In following the procedure described above, USDOC originally selected the 15.58 percent subsidy rate calculated for the Provision of HRS for LTAR program in the OCTG investigation because it was the highest rate calculated for a subsidy program that was similar to the Provision of Electricity for LTAR program for which MMZ had failed to provide necessary information.[258] USDOC did not select the 7.61 percent rate calculated for the Provision of HRS for LTAR program for MMZ in the HWRP proceeding because it was not the highest rate for a similar subsidy program.[259]

155. While Turkey is correct that the subsidy rate for the Provision of HRS for LTAR program in the OCTG investigation was itself partially based on facts available, Turkey has not explained why the use of that rate would be inconsistent with Article 12.7 of the SCM Agreement. As explained in the United States' first written submission, the rate USDOC calculated in OCTG for the Provision of HRS for LTAR program was calculated based on data submitted by the responding party, Borusan.[260] In particular, USDOC applied information provided by Borusan with respect its Gemlik facility in determining the quantity and price of subsidized HRS used by Borusan's Halkali and Izmit facilities.[261] USDOC's subsidy rate determination was thus

[254] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46).
[255] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46).
[256] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46).
[257] HWRP Final I&D Memo, p. 7 (Exhibit TUR-46).
[258] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46).
[259] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46).
[260] United States' First Written Submission, paras. 146, 155.
[261] United States' First Written Submission, paras. 146, 155.

grounded in the data submitted by Borusan itself and serves as a "reasonable replacement" for necessary information that was missing from the record, consistent with Article 12.7.

156. We also note that USDOC lowered this rate after the final determination was issued in the HWRP proceeding. Following issuance of the HWRP final determination, USDOC received comments from the Government of Turkey and MMZ arguing that the USDOC had made a ministerial error in using the 15.58 percent rate, because that rate had been changed to 2.08 percent following litigation in the OCTG proceeding.[262] USDOC agreed, and changed the rate to 2.08 percent in its amended final determination.[263] Thus, the final rate calculated for MMZ for the Provision of Electricity for LTAR program was actually *lower* than it would have been if USDOC had selected the rate calculated for MMZ for the Provision of HRS for LTAR program.

157. Notably, Turkey has pointed to no evidence on the record that contradicted or raised questions about the subsidy rate that USDOC applied as facts available. In particular, there is no evidence on the record that would suggest that the 7.61 percent rate calculated for the Provision of HRS for LTAR program in the HWRP proceeding would have been more accurate than the 2.08 rate calculated for the same program in the OCTG proceeding. Because the subsidy rate selected for the Provision of Electricity for LTAR program is on a par with a similar subsidy program, it provides a reasonable estimate of the level of subsidization provided by the government consistent with Article 12.7 of the SCM Agreement.

Question 54 (*To the United States*): Regarding the HWRP investigation, did Ozdemir also benefit from the Electricity for LTAR programme? If so, what was Ozdemir's subsidy rate for this programme?

Response:

158. USDOC found that Ozdemir did not use the Electricity for LTAR Program.[264] Thus, USDOC did not calculate a subsidy rate for Ozdemir for this program.

V. CLAIMS UNDER ARTICLE 15.3 OF THE SCM AGREEMENT

Question 59 (*To the United States*): Are there any cogent reasons why the Panel should depart from the Appellate Body's reasoning in *US – Carbon Steel (India)* that "cross-cumulation" is not permitted under Article 15.3 of the SCM Agreement in original investigations? Please explain.

[262] *See* HWRP Ministerial Error Memo, pp. 5-6 (Exhibit USA-32).
[263] *See* HWRP Ministerial Error Memo, pp. 5-6 (Exhibit USA-32); *see also* Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 81 Fed. Reg. 62,874, 62,875 (September 13, 2016) (Exhibit TUR-44).
[264] HWRP Preliminary Decision Memo, p. 16 (Exhibit USA-26).

Response:

159. As the United States explained at the first panel meeting, the DSU does not require, or even permit, the Panel to apply as law or controlling "precedent" the reasoning set out in prior Appellate Body reports. Rather, the DSU is explicit that WTO adjudicators are to apply the text of the covered agreements. Therefore, if the Panel determines, based on the application of customary rules of public international law regarding interpretation, that Article 15.3 of the SCM Agreement does not prohibit "cross-cumulation," the Panel need not provide "cogent reasons" to justify its different interpretation than that of the Appellate Body in *US – Carbon Steel (India)*.

160. Article 11 of the DSU provides that "[t]he function of panels is to assist the DSB in discharging its responsibilities" under the DSU and the covered agreements. In exercising this role, a panel is to conduct "an objective assessment of the matter before it." An objective assessment requires that the panel properly weigh the evidence and make factual findings based on the totality of the evidence and within its bounds as trier of fact in this dispute. An objective assessment also requires that the panel make a legal interpretation as to whether the measures in question apply to and conform with a Member's obligations under the relevant covered agreements.[265]

161. Article 3.2 of the DSU further informs the role and duty of the panel as under Article 11. It explains that the dispute settlement system, through panel and Appellate Body findings adopted by the DSB,[266] "serves to . . . clarify" the provisions of the covered agreements in accordance with those customary rules of interpretation of public international law.[267] For purposes of legal interpretation, the DSU directs WTO adjudicators to apply to the "existing provisions" of the covered agreements – that is, their text – the customary rules of interpretation of public international law,[268] reflected in Articles 31 and 32 of the Vienna Convention.[269]

162. 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 previous panels or the Appellate Body. Nor is there any provision that refers to "cogent reasons" or suggests that a panel must justify

[265] DSU, Art. 11 ("Accordingly, 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* . . . .") (emphasis added).
[266] *See* DSU, Art. 16.4 (adoption of panel report); *id.*, Art. 17.14 (adoption of Appellate Body report).
[267] In this regard, the United States also notes that panel reports frequently present an approach to interpretation of the covered agreements (as well as the standard of review and burden of proof). *See, e.g.*, *China – GOES (Panel) (Article 21.5 – U.S.)*, section 7.1; *Ukraine – Passenger Cars (Panel)*, section 7.1.4; *China – HP-SSST (Panel)*, section 7.1. For example, in the report in *Peru – Agricultural Products*, the panel set out the legal framework for the panel's assessment in logical sequence: its terms of reference, the function of the panel and standard of review, interpretation of the covered agreements, and burden of proof. *See Peru – Agricultural Products (Panel)*, section 7.1.
[268] DSU, Art. 3.2 ("The Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.").
[269] *See Japan – Alcoholic Beverages II (AB)*, p. 10.

legal findings not consistent with the reasoning set out in prior reports. 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.[270]

163. Certain panels and the Appellate Body have focused on additional language in Article 3.2 stating that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system" and how that informs the functions of the panel as provided under Article 11. According to the Appellate Body in *US – Stainless Steel (Mexico)*, ensuring "security and predictability" in the dispute settlement system "implies that" panels should apply the WTO provisions consistent with prior Appellate Body findings, and that cogent reasons therefore would be necessary for a panel to depart from such findings.[271] But these views derive an interpretation from Article 3.2 far beyond what plain reading of the text allows. The text of Article 3.2 does not state that a "key objective" of the dispute settlement system is "to provide security and predictability to the multilateral trading system." It provides a narrative statement that security and predictability to the multilateral trading system is what the dispute settlement system helps to provide – when that system functions according to the rules and procedures set out in the DSU.

164. The Appellate Body has never attempted to explain how this sentence on "security and predictability", which is copied directly from the Montreal Decision on GATT dispute settlement, could "imply" that the WTO dispute settlement system had been effectively transformed into a system of precedent.[272] The identical language to that used to describe GATT dispute settlement would rather seem to "imply" that the nature of dispute settlement in the WTO had not changed.

165. 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. There is little remarkable about the concept that prior Appellate Body reports are relevant for consideration by a panel or the Appellate Body in a subsequent dispute. 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.

166. 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

[270] Article 3.2 of the DSU states: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."
[271] *US – Stainless Steel (Mexico) (AB)*, para. 160.
[272] See GATT Ministerial Decision on Improvements to the GATT Dispute Settlement Rules and Procedures, GATT Doc. L/6489 (13 April 1989), Sec. A, para. 1: "Contracting parties recognize that the dispute settlement system of GATT serves to preserve the rights and obligations of contracting parties under the General Agreement and to clarify the existing provisions of the General Agreement. It is a central element in providing security and predictability to the multilateral trading system."

Trade Agreements." The DSU confirms that panel and Appellate Body reports do not set out authoritative interpretations in Article 3.9, which states that "[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement."

167. The Appellate Body itself has recognized that prior reports may not bind future adjudicators in its report in *Japan – Alcohol*. That report explains that a panel may take into account the reasoning in prior reports and, to the extent a panel finds the reasoning persuasive, rely on that reasoning in conducting its own objective assessment of the matter. However, the report goes on to state that while "[a]dopted panel reports are an important part of the GATT *acquis* … they are not binding, except with respect to resolving the particular dispute between the parties to that dispute."[273] According to the Appellate Body,[274] 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,[275] an "authoritative interpretation" of a covered agreement, as explicitly established in DSU Article 3.9 and WTO Agreement Article IX:2. The Appellate Body report in *US – Stainless Steel (Mexico)* does not engage with this interpretation in the *Japan – Alcohol* report, and so does not explain how its non-textual "cogent reasons" assertion can be reconciled with DSU Article 3.9, WTO Agreement Article IX:2, or the Appellate Body's own prior report.

168. If, in making its own determinations regarding the interpretation and application of Article 15.3, the Panel wishes to examine whether there may be cause to reach a different interpretation from that set out in *US – Carbon Steel (India) (AB)*, the United States refers the Panel to its first written submission, in which we 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.[276] 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)*.

[273] *Japan – Alcoholic Beverages II (AB)*, p. 14.
[274] *Japan – Alcoholic Beverages II (AB)*, pp. 12-15 (Section E: Status of Adopted Panel Reports) (examining WTO Agreement Article IX:2, DSU Article 3.9, and adoption of GATT 1947 reports, and explaining: "We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in [Article IX:2 of] the WTO Agreement. . . . . The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.").
[275] WTO Agreement, Arts. IX:1-2.
[276] United States' First Written Submission, paras. 258-277.

Question 61 (*To both parties*): Is there evidence that USITC has declined to "cross-cumulate" the effect of imports in any prior sunset reviews?

Response:

169. As the United States explained in its first written submission, USITC has declined on multiple occasions to exercise its discretion to cumulate the effects of imports from different countries in sunset reviews.[277] Moreover, the USITC has specifically declined to cumulate the effects of subsidized imports and dumped, non-subsidized imports in multiple sunset reviews, as the following examples illustrate:

- *Stainless Steel Sheet and Strip from Germany, Italy, Japan, Korea, Mexico, and Taiwan*: In these sunset reviews, USITC exercised its discretion, *inter alia*, not to cumulate subject imports from Korea (subject to a countervailing duty order and an antidumping order) with subject imports from Germany, Italy, and Mexico (subject to antidumping duty orders only).[278]

- *Stainless Steel Plate from Belgium, Italy, Korea, South Africa, and Taiwan*: In these sunset reviews, USITC exercised its discretion, *inter alia*, not to cumulate subject imports from South Africa (subject to a countervailing duty order and an antidumping order) with subject imports from Italy (subject to an antidumping duty order only).[279]

- *Certain Lined Paper School Supplies from China, India, and Indonesia*: In these sunset reviews, a majority of USITC Commissioners exercised their discretion, *inter alia*, not to cumulate subject imports from Indonesia (subject to a countervailing duty order and an antidumping order) with subject imports from China (subject to antidumping duty order only).[280]

- *Lightweight Thermal Paper from China and Germany*: In these sunset reviews, USITC exercised its discretion, *inter alia*, not to cumulate subject imports from China (subject to a countervailing duty order and an antidumping order) with subject imports from Germany (subject to an antidumping duty order only).[281]

[277] United States' First Written Submission, para. 249, n. 499 (citing *Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam*, Inv. Nos. 731-TA-1063-1064 and 1066-1068 (Second Review), USITC Pub. 4688 (May 2017), pp. 26-27 (imports from Brazil not cumulated with imports from other subject countries)).
[278] *Stainless Steel Sheet and Strip from Germany, Italy, Japan, Korea, Mexico, and Taiwan*, Inv. Nos. 701-TA-382 and 731-TA-798-803 (Second Review), USITC Pub. 4244, pp. 1, 11 (July 2011) (Exhibit USA-39).
[279] *Stainless Steel Plate from Belgium, Italy, Korea, South Africa, and Taiwan*, Inv. Nos. 701-TA-379 and 731-TA-788, 790-793 (Second Review), USITC Pub. 4248, pp. 1, 10 (Aug. 2011) (Exhibit USA-40).
[280] *Certain Lined Paper School Supplies from China, India, and Indonesia*, Inv. Nos. 701-TA-442-443 and 731-TA-1095-1097 (Review), USITC Pub. 4344, pp. 1, 19 (Aug. 2012) (Exhibit USA-41).
[281] *Lightweight Thermal Paper from China and Germany*, Inv. Nos. 701-TA-451 and 731-TA-1126-1127 (Review), USITC Pub. 4511, pp. 1, 10-11 (Jan. 2015) (Exhibit USA-42).