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

(DS523)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

February 28, 2018

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, we would like to thank you for agreeing to serve on the Panel in this proceeding. We also would like to thank the Secretariat staff for the hard work they are doing to support the Panel. In our statement today, we will first address issues regarding the Panel's terms of reference raised in the U.S. request for a preliminary ruling and Turkey's response to that request. We will then briefly address Turkey's claims under the SCM Agreement, including challenges to determinations by the U.S. Department of Commerce ("USDOC") and the U.S. International Trade Commission ("USITC") related to: 1) benchmarks, 2) public body, 3) specificity, 4) facts available, and 5) injury.

I. THE PANEL SHOULD GRANT THE UNITED STATES' PRELIMINARY RULING REQUEST BECAUSE THE MEASURES AND CLAIMS AT ISSUE FALL OUTSIDE THE PANEL'S TERMS OF REFERENCE

2. Turkey has raised a number of claims and measures that fall outside the Panel's terms of reference. First, in its panel request, Turkey identified new measures that were not the subject of its consultations request. Second, Turkey's first written submission includes claims that were not identified in the panel request. Finally, Turkey has challenged a measure that had ceased to exist as of the time of the Panel's establishment. In order to avoid unnecessary submissions by the parties and evaluation by the Panel, the United States respectfully requests the Panel to issue a preliminary ruling that each of the relevant claims and measures falls outside the Panel's terms of reference.

A. Turkey's Panel Request Improperly Included Measures and Claims that Were Not the Subject of Consultations

3. With respect to the first issue, Turkey included two new measures in its request for the establishment of a panel that were not identified in its consultations request. In particular,

Turkey's panel request asserts that the United States has a "practice," in assessing material injury, of "cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, *i.e.*, non-subsidized imports, from all countries with respect to which antidumping or countervailing duty petitions are filed on the same day."[1] Turkey's panel request also asserts 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."[2] Turkey claims that these alleged measures are inconsistent "as such" with Article 15.3 and Article 14(d) of the SCM Agreement, respectively.[3]

4. As discussed in the U.S. preliminary ruling request, neither of these alleged practices was identified in Turkey's request for consultations.[4] In its consultations request, Turkey challenged the United States' "Injury Determination[s]" and "Benefit Determination" with respect to specific "measures and underlying administrative proceedings" identified in the first section of the consultations request, entitled "Specific Measures at Issue."[5] In this section, Turkey identifies "preliminary and final countervailing duty measures imposed by the United States on Turkish imports" of 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").[6]

[1] Turkey's Panel Request, para. 8.(A).5.a, 8.(B).4.a, 8.(C).4.a, 8.(D).3.a.
[2] United States' First Written Submission, para. 21.
[3] United States' First Written Submission, paras. 15, 20.
[4] United States' First Written Submission, paras. 13-24.
[5] United States' First Written Submission, paras. 13, 18.
[6] United States' First Written Submission, paras. 13, 18.

5. In the second section of its consultations request, entitled "Legal Basis of the Complaint," Turkey states that "the measures *identified above* [in the first section of the request] … are inconsistent with the United States' obligations under the WTO Agreements."[7] As just discussed, the measures identified in the first section of Turkey's request are the U.S. preliminary and final determinations in the OCTG, WLP, HWRP, and CWP proceedings. Thus, each of the claims identified in Turkey's request for consultations is expressly limited to challenging the determinations made in those four proceedings.[8] Footnote 5 of the consultations request further limits Turkey's claims regarding benefit to one proceeding only – namely, the OCTG proceeding.[9]

6. Under DSU Article 4.4, a request for consultations must state the reasons for the request, "including identification of the measures at issue." DSU Article 6.2 then calls for additional precision in identifying the measures, as the panel request must "identify the specific measures at issue." Because Turkey expressly limited the "measures at issue" in its consultations request to the countervailing duty proceedings identified, Turkey may not expand the scope of this dispute by introducing new measures, not consulted upon, in its panel request.[10] The alleged U.S. practices newly identified in Turkey's panel request are thus not within the Panel's terms of reference.[11] Because those measures are not within the terms of reference, Turkey's newly

[7] United States' First Written Submission, paras. 14, 19.
[8] United States' First Written Submission, paras. 15, 20.
[9] United States' First Written Submission, para. 20.
[10] United States' First Written Submission, paras. 16, 21-22.
[11] United States' First Written Submission, paras. 16-17, 22-24.

identified "as such" claims relating to those measures also necessarily fall outside the Panel's terms of reference.

7. Turkey attempts to argue in its response to the U.S. Preliminary Ruling Request that it identified the injury and benefit "practices" by including the phrase "and related practices" at the end of a description of the challenged measures.[12] In particular, after identifying the specific preliminary and final CVD measures from the OCTG, WLP, HWRP, and CWP proceedings as the measures as issue, the first section of the consultations request states that "these measures include . . . any notices, annexes, memoranda, orders, amendments, or other instruments issued by the United States, *and related practices*, in connection with" said measures.[13] This reference to "related practices" is so general that it does not identify any "practices" at issue.

8. Turkey further argues that its "identification of the measures at issue as the United States' preliminary and final countervailing duty measures imposed in the OCTG, WLP, HWRP, and CWP proceedings does not limit Turkey's legal claims to 'as applied' claims."[14] The issue, however, is not that Turkey described its claims with respect to the alleged practices as "as such" claims in its panel request, but that Turkey failed to identify those alleged measures in its consultations request altogether. The Appellate Body has noted that the panel request may neither "expand the scope" nor change the essence of a consultations request.[15] By including new measures and corresponding claims in its panel request that were not the subject of its consultations request, Turkey has expanded the scope of the dispute in contravention of the DSU.

[12] Turkey's Response to the Preliminary Ruling Request, para. 16 (emphasis added).
[13] Turkey's Response to the Preliminary Ruling Request, para. 16.
[14] Turkey's Response to the Preliminary Ruling Request, para. 19.
[15] United States' First Written Submission, para. 10 (citing *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293).

9. Finally, we note that Turkey argues in response that the Panel should not making a ruling at this time, "because Turkey's further submissions … are of course very likely to shed further light on these claims", and that "[i]f the Panel were to dismiss Turkey's claims preliminarily, it would risk not being able to make adequate factual and legal findings on these issues."[16] Turkey's arguments demonstrate its misunderstanding of the DSU. Article 4.4 of the DSU requires that a complainant must identify the measure at issue in its request for consultations, and Article 4.7 of the DSU provides that the complainant may request the establishment of a panel only after consultations have been held with respect to the relevant dispute. Where the complainant has failed to comply with these requirements, the relevant measures fall outside the Panel's terms of reference, and the Panel thus lacks the authority to make *any* factual or legal findings on the measures.[17] Turkey's further submissions on these issues can do nothing to change that.

10. Therefore, the United States requests that the Panel reject Turkey's arguments regarding these alleged "practices" and find that the claims raised in relation to these measures fall outside the Panel's terms of reference.

B. Turkey's First Written Submission Improperly Included Claims Regarding the Application of Facts Available Not Identified In Its Panel Request

11. Turning to the second issue raised in the U.S. preliminary ruling request, Turkey has improperly included claims under Article 12.7 in its written submission that were not identified in its panel request and are thus also outside the Panel's terms of reference.[18] Any claims Turkey

[16] Turkey's Response to the Preliminary Ruling Request, para. 25.
[17] *EC – Large Civil Aircraft (AB)*, para. 642.
[18] United States' First Written Submission, para. 32.

has raised in its written submissions with respect to programs not identified in its panel request fall outside the Panel's terms of reference.

12. Under DSU Article 6.2, a panel request must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." These two elements – the identification of the specific measures at issue and 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 Article 7.1 of the DSU. "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."[19]

13. With respect to the WLP investigation, Turkey's written submission includes a number of new claims regarding USDOC's application of facts available that were not identified in its panel request. In its request, Turkey listed three claims under the subheading "In connection with the alleged Provision of Hot Rolled Steel for Less than Adequate Remuneration," including one claim under Article 12.7 of the SCM Agreement – namely, that "[t]he USDOC drew adverse inferences in selecting among the facts available for the purpose of punishing Borusan for its alleged failure to cooperate."[20]

14. Yet despite expressly limiting its claim under Article 12.7 in this subsection to a single program, the "Provision of Hot Rolled Steel for Less Than Adequate Remuneration", Turkey subsequently introduced claims relating to 29 additional subsidy programs in its written submission.[21] Having failed to raise claims regarding these 29 programs in its panel request,

[19] United States' First Written Submission, para. 26 (citing *Australia – Apples (AB)*, para. 416).
[20] United States' First Written Submission, para. 30.
[21] United States' First Written Submission, paras. 30-31.

Turkey may not argue for the first time in its written submission that the applications of facts available with respect to these programs are inconsistent with Article 12.7.

15. Turkey's arguments to the contrary are unavailing. In its response to the U.S. preliminary ruling request, Turkey attempts to draw a distinction between the "claims" being asserted and the "arguments put forth by a party in support of its claims."[22] Turkey then argues that the "claim" advanced in its panel request relates to the application of facts available with regard to Borusan in the WLP proceeding, and that it was not obligated to include "all potential arguments" in support of that claim,[23] apparently suggesting that the identification of the Provision of HRS for LTAR program in the title to the section was merely an argument that did not limit the scope of its claim.

16. Turkey's arguments should be rejected. Turkey's panel request specifically identified the relevant claim as the application of facts available "In connection with the alleged Provision of Hot Rolled Steel for Less than Adequate Remuneration" in the WLP proceeding.[24] This is not a mere "argument" in support of some broader claim – it *is* the claim. As the Appellate Body has explained, for purposes of DSU Article 6.2, a "claim" refers to an "allegation that the respondent party has violated . . . an identified provision of a particular agreement," whereas "arguments . . . are statements put forth by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision."[25] Here, Turkey *alleged* that the U.S. application of facts available in connection with the Provision of HRS for LTAR

[22] Turkey's First Written Submission, para. 27.
[23] Turkey's First Written Submission, para. 28.
[24] United States' First Written Submission, para. 30.
[25] *US – Countervailing Measures (China) (AB)*, para. 4.26.

breached Article 12.7 of the SCM Agreement. Turkey's *arguments* with respect to that allegation would be any "statements put forth . . . to demonstrate" that the application of facts available in connection with the Provision of HRS for LTAR did indeed breach Article 12.7. If Turkey had intended to raise legal claims regarding the application of facts available with respect to subsidy programs other than the Provision of HRS for LTAR program, it should have identified those claims in its panel request.

17. Indeed, that is precisely what Turkey did for the HWRP proceeding. In identifying its claims with respect to the HWRP proceeding, Turkey not only identified two claims under the SCM Agreement "In connection with the alleged Provision of Hot Rolled Steel for Less than Adequate Remuneration,"[26] Turkey also raised a separate claim under Article 12.7 regarding the application of facts available "In connection with 'other subsidies' not previously reported to the USDOC," a reference to three subsidies for which respondents had failed to provide information in their questionnaire responses.[27]

18. In contrast to the HWRP proceeding, in the WLP proceeding Turkey failed to raise any claims under Article 12.7 regarding subsidy programs other than the Provision of HRS for LTAR program. Having expressly limited the claims raised in its panel request to this single program, Turkey cannot now assert that the application of facts available for other programs is inconsistent with Article 12.7.

19. Turkey's other arguments on this issue are equally unavailing. For example, Turkey claims that USDOC's determination to apply facts available in the WLP proceeding was not a

[26] Turkey's Panel Request, para. 8.(C).1.
[27] Turkey's Panel Request, para. 8.(C).2.

"program-specific determination," but was based on respondent Borusan's decision not to participate in verification.[28] However, Turkey's characterization of USDOC's findings regarding Borusan cannot have the effect of curing the deficiencies in its panel request, and does not change the fact that the only claim Turkey raised in its panel request regarding Article 12.7 was with respect to the Provision of HRS for LTAR subsidy program. As the Appellate Body stated in *EC – Bananas III*, "[i]f a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission."[29] If Turkey intended to bring different claims than those identified in its panel request, it had the option to rectify its mistake by filing a new panel request.

20. We note that Turkey also claims that the United States was not "prejudiced" by its deficient panel request because "USDOC made the same factual findings and applied the same legal reasoning in drawing adverse inferences to select subsidy rates for all investigated programs in the WLP proceeding."[30] However, Turkey's arguments in this respect are not relevant to the Panel's analysis under DSU Article 6.2. As discussed above, Article 6.2 requires a complainant to "identify the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Such an examination "must be objectively determined on the basis of the panel request as it existed at the time of filing" and be "demonstrated on the face" of the panel request.[31] Thus, the Panel need not make a finding of

[28] Turkey's Response to the Preliminary Ruling Request, para. 29.
[29] United States' First Written Submission, para. 27 (citing *EC – Bananas III (AB)*, para. 143).
[30] Turkey's Response to the Preliminary Ruling Request, para. 30.
[31] *US – Carbon Steel (AB)*, para. 127.

prejudice to the United States in order to find the additional claims under Article 12.7 to be outside its terms of reference.

21. With respect to Turkey's claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, Turkey has stated in its response that those claims depend upon the Panel finding a breach of Article 12.7 of the SCM Agreement.[32] This is consistent with Turkey's panel request, which raised claims under Article 19.4 and Article VI:3 that are expressly dependent on the Panel finding that the United States' practices are inconsistent with other provisions of the SCM Agreement.[33] As explained in the U.S. request for a preliminary ruling, however, certain of Turkey's claims under Article 19.4 and Article VI:3 in its submission appear to be new, independent claims that do not depend on claims under Article 12.7 that were properly raised in Turkey's panel request. Therefore, if the Panel agrees that these claims were not properly identified in Turkey's panel request, the Panel should issue a preliminary ruling that such claims are outside the Panel's terms of reference.

C. The Benchmark Measure Challenged by Turkey Ceased to Have Exist and Have Legal Effect Prior to The Date of The Panel's Establishment

22. Next, the benchmark measure challenged by Turkey falls outside the Panel's terms of reference because it ceased to exist and have legal effect prior to the date of the Panel's establishment.

23. As explained in the U.S. first written submission, under Articles 7.1 and 6.2 of the DSU, the task of a panel is to determine whether the measure at issue is consistent with the relevant

[32] Turkey's Response to the Preliminary Ruling Request, para. 32.
[33] United States' First Written Submission, para. 34.

obligations "*at the time of establishment of the Panel.*"[34] It is thus the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel must make findings.[35]

24. As the United States explained in its request for a preliminary ruling,[36] 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.[37] 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.[38] 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.[39] 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 – ceased to have any legal effect.[40]

[34] United States' First Written Submission, para. 40 (citing to *EC – Chicken Cuts (AB)*, para. 156; *EC – Selected Customs Matters (AB)*, para. 187).
[35] United States' First Written Submission, para. 40 (citing to *China – Raw Materials (AB)*, para. 254*; China – Raw Materials (Panel)*, para. 7.19.
[36] United States' First Written Submission, paras. 42-47.
[37] United States' First Written Submission, para. 43.
[38] United States' First Written Submission, para. 46.
[39] United States' First Written Submission, paras. 43-46.
[40] United States' First Written Submission, paras. 46-47.

25. In its response to the United States' preliminary ruling request, Turkey "acknowledges that the USDOC reversed its benefit determination on remand, but disputes that the measures at issue has {sic} ceased to have legal effect."[41] Turkey claims that because of potential subsequent domestic litigation, there was still the possibility that the OCTG remand determination still *could have been* reversed at the time of its panel request.[42] This is both factually inaccurate and legally irrelevant.

26. As the United States explained in its First Written Submission, as a result of the U.S. Court of International Trade sustaining USDOC's remand determination, USDOC issued an amended final determination on March 10, 2016, which effectuated USDOC's remand determination to use in-country benchmarks.[43] On that date, the OCTG final determination with respect to the use of out-of-country benchmarks ceased to have any legal effect.[44] The potential for a subsequent appeal did not alter the legal effect of the amended OCTG final determination, which changed the subsidy rates and served as the legal basis for the collection of cash deposits on entries at the time of the Panel's establishment. In fact, the subsidy rate for one Turkish company, Toscelik, was reduced to *de minimis* in the amended final determination, and therefore USDOC completely ceased collecting cash deposits on Toscelik's entries altogether prior to the establishment of the panel.[45] That legal action in U.S. courts might have allowed USDOC to further amend the duty rates, or to alter the legal basis of those rates, at a later date, does not

[41] Turkey's Response to Preliminary Ruling Request, para. 33.
[42] Turkey's Response to Preliminary Ruling Request, para. 34.
[43] United States' First Written Submission, para. 45.
[44] United States' First Written Submission, para. 46.
[45] Oil Country Tubular Goods From Turkey: Notice of Court Decision Not in Harmony With the Final Determination of the Countervailing Duty Investigation, 81 Fed. Reg. 12,691, 12,692 (USDOC March 10, 2016) (Amended OCTG Final Determination) (Exhibit USA-3).

mean that the superseded determination continued to have legal effect. If a challenge were permitted based on Turkey's arguments, it would mean that a complainant could equally challenge a countervailing duty order in which no inconsistency was identified or claimed, based on the possibility that a domestic legal challenge to that order might result in an inconsistency at some time in the future. This would lead to absurd results, and is not consistent with a proper interpretation of the DSU.

27. Finally, we recall that Turkey has also claimed that the OCTG benefit determination "continues to have legal effect because it reflects the USDOC's long-standing practice of rejecting in-country or "tier one" benchmarks based on evidence of government ownership or control of domestic producers," which Turkey has also attempted to challenge in this dispute.[46] Turkey also argues that "[t]he United States has not demonstrated that the remand determination in the OCTG proceeding altered or eliminated this practice or that the United States will not continue to apply this practice in other countervailing duty proceedings involving products from Turkey."[47]

28. Contrary to Turkey's claims, not only has the United States demonstrated that no such practice exists,[48] Turkey's suggestion that the existence of a "practice" would preserve the legal effect *under U.S. law* of a superseded USDOC countervailing duty determination makes no sense. As already explained, the Panel must examine the matter before it based on the measures as they existed at the time of the panel's establishment, and at that time the original final benefit

[46] Turkey's Response to Preliminary Ruling Request, para. 35.
[47] Turkey's Response to Preliminary Ruling Request, para. 35.
[48] United States' First Written Submission, paras. 56-71.

determination in the OCTG proceeding had ceased to have any legal effect. Specifically, a U.S. court determined that USDOC's use of out-of-country benchmarks in the OCTG proceeding was *not* consistent with U.S. law, and remanded the determination to USDOC for that reason.[49] Thus, Turkey's arguments fail to establish either that the superseded OCTG benefit determination continues to have any legal effect under U.S. law, or that this long-expired measure could fall within the Panel's terms of reference.

29. Therefore, the United States requests that the Panel find Turkey's claims with respect to USDOC's use of out-of-country benchmarks in the OCTG investigation to be outside the Panel's terms of reference, and to decline to make findings on those claims accordingly.

II. TURKEY'S CLAIMS UNDER THE SCM AGREEMENT ARE WITHOUT MERIT

A. Turkey's "As Such" Claims Concerning Benchmarks Are Without Merit

30. Turkey's "as such" challenge concerning benchmarks fails on its merits for two reasons. First, Turkey has failed to establish that a rule or norm of general and prospective application exists with respect to the use of out-of-country benchmarks in U.S. countervailing duty investigations. Second, Turkey has not established that the alleged measure necessarily results in a breach of the SCM Agreement.

31. Turkey argues that the USDOC has a practice "of rejecting in-country prices as a benchmark based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good, with no consideration of whether in-country prices are distorted."[50] The Appellate Body in *US – Zeroing (EC)* found the existence of a rule or norm

[49] United States' First Written Submission, para. 43.
[50] Turkey's First Written Submission, para. 172.

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."[51] Turkey fails to present even a string of cases where USDOC rejected in-country prices as a benchmark. Indeed, Turkey points only to a statement in the final benchmark determination for OCTG – which, as explained, was reversed by a U.S. domestic court and 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.[52] 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)*, which the Appellate Body found to demonstrate the existence of a rule or norm of general and prospective application.

32. Contrary to Turkey's arguments, in addition to the government's market share, USDOC discussed and considered evidence relevant to the distortion of in-country prices to determine whether in-country prices provide an appropriate benchmark. Indeed, the determinations at issue in this dispute themselves demonstrate circumstances in which USDOC considered such evidence and ultimately determined to rely on in-country benchmarks to determine subsidy amounts for products from Turkey, notwithstanding the government's significant participation in the market.[53]

33. We note that three of the preliminary determinations cited by Turkey in support of its contention are older than the determinations at issue in this case where USDOC determined to

[51] *US – Zeroing (EC) (AB)*, para. 204.
[52] United States' First Written Submission, paras. 58, 66-67.
[53] United States' First Written Submission, paras. 61-65.

use in-country benchmarks. These three determinations are insufficient to establish any "practice", and at best relate to a purported *past* practice. The evidence before the Panel therefore demonstrates that, contrary to Turkey's claims, the use of out-of-country benchmarks as described in Turkey's challenge was decidedly not a "practice" at the time of the Panel's establishment. A past "practice" no longer in existence as of panel establishment, even had Turkey been able to demonstrate its existence, is not susceptible to challenge under the DSU.

34. Therefore, the United States respectfully requests that the Panel reject Turkey's "as such" claim because Turkey has not carried its burden to bring forward sufficient evidence to establish a rule or norm of general and prospective application.

B. Turkey's Article 1.1(a)(1) Claims Regarding OYAK Must Fail Because USDOC Did Not Find OYAK to be a Public Body

35. We next turn to Turkey's challenge concerning OYAK – the pension fund of the Turkish armed forces – as a public body. Turkey's arguments concerning OYAK demonstrate a fundamental misunderstanding of the challenged determinations. USDOC never made a finding that OYAK provided a financial contribution. Thus, USDOC did not, and did not need to, find OYAK to be a public body within the meaning of Article 1.1(a)(1). Rather, in determining that hot-rolled steel was provided for less than adequate remuneration, USDOC found Erdemir and Isdemir – the producers of hot-rolled steel – to be public bodies. USDOC's examination of OYAK was for the purposes of discussing the GOT's meaningful control over Erdemir and Isdemir and the financial contribution provided by *those* two entities.

36. Therefore, because USDOC did not find OYAK to be a public body that provided a financial contribution, Turkey's claim with respect to OYAK under Article 1.1(a)(1) of the SCM Agreement must fail.

C. Turkey' Claims Concerning Erdemir and Isdemir As Public Bodies Are Also Without Merit

37. Turkey has also failed to demonstrate that USDOC's determinations that Erdemir and Isdemir are public bodies are inconsistent with Article 1.1(a)(1). We have responded to Turkey's arguments fully in our first written submission, and in this statement wish to highlight for the Panel a few points.

38. In challenging USDOC's public body determinations, Turkey seeks for the Panel to conduct a *de novo* evidentiary review of the record.[54] However, the Panel is not an "initial trier of fact."[55] Rather, the role of the Panel is to determine whether an unbiased and objective investigating authority could have reached the conclusion, as USDOC did, that Erdemir and Isdemir are public bodies.[56]

39. In *US – Antidumping and Countervailing Duty Measures (China)*, the Appellate Body found that "the term public body in Article 1.1(a)(1) of the SCM Agreement means 'an entity that possesses, exercises or is vested with governmental authority.'"[57] The United States considers that this standard can be understood to erroneously collapse the term "public body" into "government" (or "government agency"), and in this way fails to properly interpret the ordinary meaning of the term, in its context.[58] Prominent negotiators of the SCM Agreement[59],

---

[54] United States' First Written Submission, paras. 5, 113.
[55] United States' First Written Submission, para. 5 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188).
[56] *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.
[57] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para 317.
[58] United States' First Written Submission, para. 89.
[59] Michael Cartland, Gérard Depayre & Jan Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?* Journal of World Trade 46, no. 5 (2012), pp. 979-1015; *see* United States' First Written Submission, para. 89 n.132 (citing U.S. Appellee Submission, *US – Carbon Steel (India) (AB)*, para. 509 and n. 650).

as well as several WTO Members – including Turkey[60] – have agreed. As we have explained in prior disputes, 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. Under such circumstances, the transfer of financial resources would constitute a "financial contribution" attributable to the government.[61]

40. The Appellate Body also has pointed to meaningful control of an entity as potentially satisfying its understanding of this standard.[62] USDOC in the determinations at issue found that the government exercised meaningful control over Erdemir and Isdemir. These findings are sufficient to determine that an entity is a public body under a proper interpretation of Article 1.1(a)(1), as well as under the interpretation set out by the Appellate Body.

41. In the challenged determinations, after examining the totality of evidence, USDOC determined Erdemir and Isdemir to be public bodies. As the United States detailed in its First Written Submission, USDOC examined OYAK – the majority shareholder of Erdemir – as an organ of the GOT, detailing OYAK's statutory authority, as well as the extensive overlap between OYAK's leadership structure and other organs of the GOT.[63] USDOC then considered numerous indicia of the GOT's meaningful control over Erdemir and Isdemir, including: the

[60] Dispute Settlement Body, Minutes of Meeting Held on March 25, 2011, WT/DSB/M/294, at 18 (U.S.), 21 (Mexico), 22 (Turkey), 24 (EU), 25 (Canada), 25 (Australia), 26 (Japan), 29 (Argentina).
[61] *See, e.g.*, 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).
[62] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para 318; *US – Carbon Steel (India) (AB)*, para. 4.20.
[63] United States' First Written Submission, paras. 98-99.

GOT's controlling stake in Erdemir; the Prime Ministry Privatization Administration's (TPA) 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. The GOT's exercise of meaningful control was further evidenced through the alignment of Erdemir's stated corporate objectives and achievements in its 2012 and 2013 Annual Reports with the GOT's macroeconomic policies. The alignment of Erdemir's stated corporate objectives and achievements with the GOT's policies also indicated that Erdemir was engaged in conduct that is *governmental* in nature, exceeding the conduct that one would expect of a typical profit-oriented firm. This evidence, in totality, demonstrated that Erdemir and Isdemier are public bodies within the meaning of Article 1.1(a)(1).[64]

42. Turkey attempts to undermine USDOC's determinations by arguing against the evidence relied upon by USDOC.[65] However, Turkey's arguments focus on statements from a position paper authored by a law firm that was commissioned by OYAK for the express purpose of rebutting a report from WYG, a consulting firm ("WYG report").[66] The WYG report found OYAK to be a public undertaking and that State aid rules were applicable to OYAK's investment decisions.[67] OYAK then commissioned the law firm to author a position paper to rebut the findings in the WYG report.[68] Turkey, thus, presents as "facts" what are actually statements from a non-objective piece of record evidence reflecting a law firm's "legal analysis."

[64] United States' First Written Submission, paras. 100-106.
[65] Turkey's First Written Submission, paras. 111-131, 260-281, 374-393, 485-504.
[66] United States' First Written Submission, para. 110.
[67] United States' First Written Submission, para. 110.
[68] United States' First Written Submission, para. 110.

43. As just described, USDOC considered the evidence that was submitted, taking into account the totality of the evidence before it. Turkey essentially asks the Panel to disregard USDOC's evidentiary findings, and to come to a different conclusion. This is not the role of a panel, and Turkey's arguments should be rejected accordingly. 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 context of the totality of 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."[69] An analysis of the evidence in this dispute – when examined in light of the totality of the record evidence – demonstrates that an objective and unbiased investigating authority could have determined that Erdemir and Isdemir are public bodies.[70] The Panel should therefore find that Turkey has failed to demonstrate that USDOC's public body determinations with respect to Erdemir and Isdemir are inconsistent with Article 1.1(a)(1) of the SCM Agreement.

D. Turkey's Challenge to USDOC's Specificity Determinations Is Without Merit

44. Turkey has failed to show that USDOC's specificity determinations are inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement. In each challenged proceeding, USDOC identified the subsidy program at issue, and based on record evidence, found the program to be *de facto* specific.

[69] United States' First Written Submission, para. 96 (citing *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted)).
[70] *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.

45. Turkey alleges that USDOC failed to identify or provide evidence of the existence of a "subsidy programme" for the provision of hot-rolled steel. However, Turkey's claim ignores the underlying facts of the specificity determinations – facts demonstrating that USDOC *did* identify the subsidy programs in each investigation, and that USDOC's determination of the existence of the provision of HRS for LTAR was grounded in record facts and consistent with Articles 2.1(c) and 2.4 of the SCM Agreement.

46. Here, the record supports USDOC's determination that the provision of HRS for LTAR is a "subsidy program" in the form of "plan or scheme" through a systematic series of actions.[71] USDOC in each proceeding explained that record evidence established that Erdemir and Isdemir were providing hot-rolled steel for less than adequate remuneration in furtherance of the GOT's policies to decrease dependency on imports and enhance domestic production capacity.[72] USDOC then examined information submitted by the Turkish respondents, who each provided USDOC with a complete transaction-specific accounting of the provision of hot-rolled steel, that is, *a series of transactions* for the provision of hot-rolled steel for less than adequate remuneration.[73]

47. Thus, USDOC properly determined that, through the repeated provision of hot-rolled steel for less than adequate remuneration 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. Therefore, Turkey's claims that there was no subsidy "program" within the meaning of

[71] United States' First Written Submission, paras. 225-230.
[72] United States' First Written Submission, paras. 227-229.
[73] United States' First Written Submission, paras. 226-229.

Article 2.1(c) of the SCM Agreement, and that USDOC's determination lacked positive evidence under Article 2.4, are without merit.

48. USDOC likewise took into account the required factors under Article 2.1(c) in reaching its specificity determination. As Turkey acknowledges, previous panels have found that taking into account the length of the program and extent of diversification need not be done explicitly.[74] Such implicit findings are all the more reasonable where, as here, none of the parties to the countervailing duty proceedings argued or suggested that the factors had any bearing on the facts at issue.[75] Importantly, Turkey does not point to any such evidence in its written submission that would have warranted the explicit discussion of these two factors.[76] Accordingly, Turkey has failed to demonstrate that USDOC's determinations are inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement.

E. USDOC's Application of Facts Available Was Consistent With Article 12.7 of the SCM Agreement

49. We now turn to Turkey's claims regarding the use of facts available under Article 12.7. Turkey challenges in particular USDOC's use of facts available in calculating subsidy rates in the OCTG, WLP, and HWRP investigations. As explained in the U.S. first written submission, in each investigation, USDOC acted in accordance with Article 12.7 by selecting a reasonable replacement for necessary information that was missing from the record due to the responding

[74] Turkey's First Written Submission, paras. 218-219, 336-337, 449-450, 550-551; *see also US – Countervailing Measures (China) (Panel)*, para. 7.253; *US – Washing Machines (Panel*), para. 7.251 (quoting *US – Countervailing Measures (China) (Panel)*, para. 7.253).
[75] *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.").
[76] Turkey's First Written Submission, paras. 218-219, 336-337, 449-450, 550-551.

companies' failure to cooperate. We address Turkey's claims with respect to each of these three investigations in turn.

1. Turkey Has Failed to Show That USDOC's Application of Facts Available in the OCTG Investigation Was Inconsistent With the SCM Agreement

50. With respect to the OCTG investigation, Turkey argues that USDOC's determination to rely on facts available is inconsistent with Article 12.7 because USDOC allegedly failed to take "due account" of the difficulties Borusan claimed to have experienced in gathering and reporting the requested information.[77] In particular, Turkey claims that USDOC improperly failed to select a reasonable replacement for the missing information in light of these difficulties and that USDOC's application of facts available was therefore "punitive."[78]

51. Turkey's argument is not supported by the text of Article 12.7, or the record evidence. Article 12.7 permits an investigating authority to make determinations based on "facts available" in cases where an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." In its first written submission Turkey attempts to collapse the obligation to take "due account" of "difficulties experienced by interested parties . . . in supplying information requested" in Article 12.11 of the SCM Agreement into the obligation under Article 12.7. While Article 12.11 may provide the panel with context for its interpretation of the text of Article 12.7, that context cannot have the effect of reading into Article 12.7 an obligation that is not reflected in its text. Therefore, to the extent Turkey relies on a finding of inconsistency with Article 12.11 to

[77] United States' First Written Submission, para. 122.
[78] United States' First Written Submission, para. 122.

demonstrate a breach of Article 12.7, that claim must fail, as Turkey has not raised a challenged under Article 12.11.

52. Moreover, as the record shows, USDOC did in fact take into account Borusan's difficulties in gathering data regarding its hot-rolled steel purchases.[79] In particular, USDOC granted an extension when Borusan requested additional time to respond to the initial questionnaire, and then later issued a supplemental questionnaire to allow Borusan to remedy its initial deficient reporting.[80] Notwithstanding this additional time, Borusan still chose not to provide the requested information for its Halkali and Izmit facilities, and further failed to file an extension request to provide the requested information after the deadline.[81] Therefore, USDOC was justified in finding that Borusan failed to cooperate with the investigation despite its apparent difficulties in collecting the necessary information.[82]

53. Due to Borusan's non-cooperation, necessary information pertaining to a subsidization determination was missing from the record. As the Appellate Body has recognized, "non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact."[83] USDOC thus appropriately resorted to the application of facts available to fill in the gaps. That the outcome was less favorable than Borusan would have liked does not mean the application of facts available was punitive or otherwise inconsistent with Article 12.7.

[79] United States' First Written Submission, paras. 148-152.
[80] United States' First Written Submission, paras. 137, 139, 151.
[81] United States' First Written Submission, paras. 151-152.
[82] United States' First Written Submission, para. 154.
[83] United States' First Written Submission, para. 154.

54. Moreover, Turkey has not explained why the facts selected by USDOC were not a reasonable replacement for the missing purchase data. The quantity of hot-rolled steel identified for the Halkali and Izmit facilities does not exceed their yearly production capacity, and the purchase price selected by USDOC was a price actually paid by Borusan for the Gemlik facility. No evidence on the record contradicted or raised questions about this price and its reasonableness as a replacement for the missing data. Because Borusan only provided purchase data for the Gemlik facility, the use of such data is not "punitive," but, consistent with Article 12.7, serves as a reasonable replacement for the data Borusan failed to provide for its other mills.

2. USDOC's Application of Facts Available To Determine the Amount of the Benefit in the WLP Investigation Was Fully Consistent With the SCM Agreement and GATT 1994

55. Turning now to the WLP investigation, Turkey asserts that USDOC acted inconsistently with Article 12.7 because its use of facts available resulted in a subsidy calculation for 30 subsidy programs that is "not accurate and has no factual connection to the alleged subsidy programs actually investigated."[84] As discussed earlier, however, 29 of those claims fall outside the Panel's terms of reference because Turkey's panel request expressly limited its claims under Article 12.7 with respect to the WLP proceeding to the Provision of HRS for LTAR program. In addition, Turkey opted not to raise any substantive arguments in its submission with respect to the Provision of HRS for LTAR program, so Turkey has not properly raised any claims under Article 12.7.[85]

[84] United States' First Written Submission, para. 175.
[85] United States' First Written Submission, para. 161.

56. In the interest of completeness, however, we note that Turkey's claims also fail on the merits. Borusan, a responding party also in the WLP investigation, decided not to participate in verification, thereby preventing USDOC from verifying the accuracy of any information that Borusan had reported with respect to the asserted subsidy programs.[86] As a result, USDOC was left with no verifiable benefit information on the record for Borusan.[87] An investigating authority cannot calculate a rate for a non-cooperating company when verifiable information required for such a calculation is not available.[88] Therefore, USDOC appropriately relied on the application of facts available.

57. In particular, Turkey has challenged USDOC's determination of a combined 20% rate for the seven income tax-related programs and 14.01% rate for six programs where no above-*de minimis* rates had been calculated for the same or similar programs.[89] With respect to the income tax programs, USDOC found that the programs pertained to either the reduction of income tax or the payment of no income tax.[90] USDOC thus inferred that Borusan had paid no income tax during the period of investigation and determined that the amount of that benefit was 20 percent, the standard income tax rate for corporations in Turkey according to record evidence submitted by the Government of Turkey.[91] Although Turkey appears to consider these determinations to be "inaccurate," Turkey has offered no explanation or argumentation to support that claim, nor has it pointed to any record evidence demonstrating that to be the case.[92]

[86] United States' First Written Submission, paras. 163-170.
[87] United States' First Written Submission, para. 176.
[88] United States' First Written Submission, para. 176.
[89] United States' First Written Submission, para. 175.
[90] United States' First Written Submission, para. 181.
[91] United States' First Written Submission, para. 181.
[92] United States' First Written Submission, para. 181.

58. For the six subsidy programs where USDOC was unable to identify above-zero rates calculated for either the same or similar programs, USDOC applied the highest calculated subsidy rate for any program identified in a Turkish CVD proceeding that could have been used by Borusan – namely, 14.01 percent.[93] By focusing on prior CVD proceedings involving Turkey and specifically excluding programs that Borusan could not have benefitted from, USDOC sought to arrive at an accurate benefit determination, consistent with Article 12.7.[94]

59. As for the remaining subsidy programs challenged by Turkey, Turkey failed to provide *any* arguments or evidence that USDOC's rate determinations were inconsistent with Article 12.7. Therefore, to the extent Turkey intended to challenge USDOC's subsidy rate determinations for these other programs under Article 12.7, its challenge has failed.

3. USDOC's Application of Facts Available To Determine the Amount of the Benefit in the HWRP Investigation Was Fully Consistent With the SCM Agreement and GATT 1994

60. Turning now to the HWRP proceeding, Turkey disagrees with USDOC's application of facts available to determine subsidy rates for the Deduction from Taxable Income for Export Revenue program ("Deduction from Taxable Income"), (2) Provision of Electricity for Less Than Adequate Remuneration program ("Provision of Electricity for LTAR"), and (3) Exemption from Property Tax program.[95] However, Turkey's arguments are unsupported by the evidence and fail to demonstrate an inconsistency with Article 12.7.

[93] United States' First Written Submission, para. 179.
[94] United States' First Written Submission, para. 179.
[95] United States' First Written Submission, paras. 191, 199, 201.

61. For each of the relevant programs, the responding companies claimed in their questionnaire responses that they did "not use" or were "not eligible" for the program.[96] However, at verification USDOC discovered that respondents had in fact benefitted from the programs.[97] As a result, USDOC appropriately relied on facts available in determining subsidy rates.[98]

62. For the Deduction from Taxable Income program, USDOC selected the same rate that it had calculated for another respondent for the same program in the same proceeding.[99] For the remaining subsidy programs, Provision of Electricity for LTAR and Exemption from Property Tax, USDOC was unable to find previously-calculated rates for the same programs, and therefore selected rates calculated for similar programs based on program type and treatment of the benefit from other Turkish CVD proceedings.[100] Turkey has not explained why USDOC's determinations do not reflect an appropriate use of facts available and points to no evidence on the record that contradicted or raised questions about the accuracy of the selected subsidy rates.[101] Because the subsidy rate for each program was on a par with the same or similar subsidy programs, these rates are not "punitive," but instead provide a reasonable estimate of the level of government subsidization consistent with Article 12.7.[102]

[96] United States' First Written Submission, paras. 191-193.
[97] United States' First Written Submission, paras. 194-197.
[98] United States' First Written Submission, para. 198.
[99] United States' First Written Submission, para. 201.
[100] United States' First Written Submission, para. 202.
[101] United States' First Written Submission, para. 202.
[102] United States' First Written Submission, para. 202.

F. Turkey's Claims Under Article 15.3 of the SCM Agreement Must Fail

63. Turkey argues that USITC has a "practice," in both material injury determinations and sunset reviews, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations.[103] Turkey further asserts that this practice is inconsistent with Article 15.3 of the SCM Agreement, both "as such" and "as applied" in its investigations of OCTG, WLP, and HWRP, and in the sunset review of CWP.[104]

64. Turkey's claims have no merit. Not only has Turkey failed to demonstrate that a "practice" regarding cumulation exists, but Turkey is wrong that Article 15.3 prohibits the cumulation of dumped and subsidized imports.

1. Turkey Has Failed to Demonstrate the Existence of a U.S. Practice Regarding Cumulation

65. We note at the outset that Turkey is challenging a "practice" with respect to cumulation, not a written measure. Where a written measure, like a statute, is challenged, there would be no uncertainty as to the existence or content of the measure that has been challenged.[105] The situation is different, however, where the challenge relates to an alleged unwritten measure, in which case the very existence of the challenged measure may be uncertain.[106]

66. In particular, Turkey has challenged USITC's alleged practice as a "rule or norm of general and prospective application."[107] As the Appellate Body explained in *US – Zeroing (EC)*, in such a case, there is a "high [evidentiary] threshold" that must be reached by the complaining

[103] United States' First Written Submission, para. 237.
[104] United States' First Written Submission, para. 237.
[105] United States' First Written Submission, para. 241.
[106] United States' First Written Submission, para. 241.
[107] United States' First Written Submission, para. 240.

party.[108] Turkey must not only show that the alleged "rule or norm" is attributable to the United States, but must establish its precise content, and that it has general and prospective application.[109]

67. Turkey's showing with respect to USITC's alleged "practice" in original investigations falls far short of its burden. In support of its claim, Turkey points to the three original injury determinations at issue in this dispute.[110] However, the fact that USITC cumulated the effects of subsidized and non-subsidized imports in the investigations at issue does not demonstrate that the alleged practice has been "systemic[ally] appli[ed]" or that it has general and prospective application.[111] As the panel in *US – Export Restraints* found, the fact that an investigating authority may have employed a practice in the past "would not be sufficient to accord such a practice an independent operational existence."[112]

68. Moreover, the evidence to which Turkey refers does not support the existence of the practice articulated by Turkey in its panel request and first written submission. For example, Turkey cites to statements in the OCTG, WLP, and HWRP injury determinations regarding the "cumulat[ion] of subject imports from all countries as to which petitions were filed . . . on the same day."[113] This language, however, describes the cumulation of imports from various countries, not the cumulation of subsidized imports and dumped, non-subsidized imports. Thus, it fails to support Turkey's articulation of USITC's alleged "practice."

---

[108] United States' First Written Submission, para. 242 (citing *US – Zeroing (EC) (AB)*, para. 196).
[109] United States' First Written Submission, para. 242 (citing *US – Zeroing (EC) (AB)*, para. 198).
[110] United States' First Written Submission, para. 245.
[111] United States' First Written Submission, para. 242 (citing *US – Zeroing (EC) (AB)*, para. 198).
[112] United States' First Written Submission, para. 248 (citing *US – Export Restraints (Panel)*, para. 8.126).
[113] United States' First Written Submission, para. 243.

69. Turkey also cites to statements where USITC has referred to a "practice of 'cross-cumulating' imports subject to Commerce's affirmative subsidy determinations with imports subject to Commerce's affirmative dumping determinations."[114] Turkey, however, has specifically claimed in its panel request that USITC has a practice of "cumulating imports that are subject to countervailing duty investigations with imports that are subject *only* to antidumping duty investigations, i.e., *non-subsidized* imports . . . ."[115] But because imports may be subject to both subsidy and dumping determinations, USITC's statements do not show that it has a practice of cumulating imports that are "subject to countervailing duty investigations" with imports that are "subject *only* to antidumping duty investigations." In short, again, the evidence cited by Turkey does not prove the existence of the "practice" it has alleged.

70. Finally, we recall that Turkey also cites to statements by USITC regarding the agency's interpretation of the U.S. statute and what that statute requires.[116] This evidence too fails to support Turkey's allegations. Turkey has not challenged the U.S. statute governing cumulation, which was in any event not identified in Turkey's panel request.[117] Therefore, Turkey must demonstrate the existence of the alleged "practice" independent of the U.S. statute.[118] Statements by USITC regarding the meaning of this statute thus fail to support the existence of an alleged "practice" regarding cumulation independent of that written U.S. law.

[114] United States' First Written Submission, para. 246, fn. 495.
[115] Turkey's Panel Request, paras. 8.(A).5, 8.(B).4, 8.(C).4 (emphasis added).
[116] United States' First Written Submission, paras. 243-244.
[117] United States' First Written Submission, para. 245.
[118] United States' First Written Submission, para. 245.

2. Turkey Has Failed to Demonstrate that Article 15.3 Prohibits the Cumulation of Subsidized and Dumped, Non-Subsidized, Imports

71. Because Turkey has not established the existence of the measure it seeks to challenge, Turkey's claim fails, and the Panel need not proceed further. For completeness, however, the United States also points out that Turkey has also failed to make its legal case under Article 15.3 of the SCM Agreement. As numerous panels and the Appellate Body have stated, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[119] Therefore, Turkey bears the burden of proving that USITC's cumulation of imports in the OCTG, WLP, and HWRP investigations is inconsistent with Article 15.3.[120] Yet Turkey has failed to engage in any analysis of Article 15.3 that would allow that burden to be met. In particular, Turkey has provided no interpretation of the text, in context, of Article 15.3, or of the object and purpose of the SCM Agreement.[121]

72. Instead, Turkey has simply quoted statements made by the Appellate Body in a previous dispute.[122] This is not a sufficient basis upon which to make a legal showing. Under DSU Article 11, a panel must make an "objective assessment" of the matter before it, and that a breach has been made out by application of a covered agreement, properly interpreted, to the facts before it.[123] It is not for the Panel to supply evidence or arguments necessary to make out a claim for a party.[124] Turkey has failed to provide the Panel with any argumentation that would allow the Panel to engage in such an interpretation, and its claims thus must fail.

---

[119] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also EC – Selected Customs Matters (AB)*, para. 266.
[120] United States' First Written Submission, paras. 252-253.
[121] United States' First Written Submission, para. 255.
[122] United States' First Written Submission, para. 255.
[123] United States' First Written Submission, para. 256.
[124] *Japan – Agricultural Products II (AB)*, para. 129; *US – Gambling (AB)*, paras. 140-141.

73. Therefore, even aside from Turkey's failure to establish the existence of the measure it purports to challenge, given Turkey's failure to engage with the text of Article 15.3 of the SCM Agreement, the Panel would need to find on that basis that Turkey has failed to make out a *prima facie* case in support of its claims.

74. Finally, and although the Panel need not engage with the interpretation of Article 15.3 in this dispute, as the United States explained in its first written submission, a proper interpretation of Article 15.3 reveals that nothing in the text of that provision prohibits the cumulation of subsidized imports with imports that are dumped.[125] Article 15.3 addresses the conditions under which an authority may cumulatively assess the effects of imports from multiple countries that are found to be subsidized: namely, "[w]here imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of *such imports*" only if certain criteria are met.[126] The phrase "such imports" makes clear that the category of imports to which the criteria in Article 15.3 apply are imports from countries that "are simultaneously subject to countervailing duty investigations."[127] Article 15.3 does not address – or set any prohibition against – an investigating authority conducting a cumulative assessment of the effects on the domestic industry of subsidized imports and dumped, non-subsidized imports.[128] Article 15.3 is silent on this issue, and silence cannot be read as a prohibition.

[125] United States' First Written Submission, paras. 258-263.
[126] United States' First Written Submission, paras. 258-259.
[127] United States' First Written Submission, para. 259.
[128] United States' First Written Submission, para. 260.

75. The cumulation of subsidized imports and dumped, non-subsidized imports is also consistent with the rationale underlying the cumulation provisions of both the SCM Agreement and the AD Agreement.[129] In explaining this rationale in the context of anti-dumping investigations, the Appellate Body stated that cumulation is "premised on the recognition that the domestic industry faces the impact of the 'dumped imports' as a whole and that it may be injured by the total impact of the dumped imports, even though those dumped imports originate from various countries."[130] In such cases, a country-specific analysis may not "adequately take[] into account" the injurious effects of dumped imports.[131] Dumped imports and simultaneous subsidized imports will often have cumulative price or volume effects on the relevant domestic industry, and this combined effect may not be adequately taken into account if cross-cumulation is prohibited.[132]

3. Turkey's Claims Regarding Cumulation in the Context of Sunset Reviews Also Fail

76. Turkey's "as such" challenge to USITC's alleged practice of cross-cumulation in sunset reviews must fail because Turkey has not established the existence of a rule or norm of general and prospective application. As Turkey itself concedes, USITC "has discretion in electing whether or not to cumulate in five-year reviews."[133] Although Turkey claims that "in practice [USITC] cumulates all imports for which reviews of antidumping and countervailing duty orders are initiated on the same day," it cites to no evidence to support this assertion, other than the

[129] United States' First Written Submission, paras. 264-269.
[130] United States' First Written Submission, para. 264 (citing *EC – Tube or Pipe Fittings (AB)*, para. 116).
[131] United States' First Written Submission, para. 264 (citing *EC – Tube or Pipe Fittings (AB)*, para. 116).
[132] Japan's Third Party Submission, para. 42; *see also* U.S. First Written Submission, para. 265.
[133] United States' First Written Submission, paras. 282-283.

sunset determination in the CWP proceeding.[134] Turkey's reference to a single sunset determination is patently insufficient to show the existence of an alleged practice. To succeed in an "as such" challenge to any measure, a complainant must show that the application of the measure necessarily leads to WTO-inconsistent action. Evidence that USITC has exercised its discretion on one occasion does not demonstrate the existence of a measure, much less that it necessarily leads to WTO-inconsistent action.

77. Turkey has similarly failed to show that Article 15.3 prohibits the cumulation of dumped and subsidized imports, such that USITC's cumulation in the sunset review determination at issue breaches that provision as applied. Review proceedings, including sunset review proceedings, are governed by Article 21 of the SCM Agreement – not Article 15.3.[135] In fact, the Appellate Body has expressly rejected claims that the SCM and AD Agreements' specific requirements relating to cumulation in original investigations can be applied directly in sunset reviews.[136] In *US – Carbon Steel (India)*, the panel similarly rejected India's claim that U.S. provisions on cumulative assessment in sunset reviews are inconsistent with Article 15 of the SCM Agreement; a finding which India did not appeal.[137] Therefore, Article 15.3 does not apply to the CWP sunset review determination, and the Panel should reject Turkey's claim on that basis.

[134] United States' First Written Submission, paras. 282-283.
[135] United States' First Written Submission, para. 285.
[136] United States' First Written Submission, para. 290.
[137] United States' First Written Submission, para. 286.

III. CONCLUSION

78. Mr. Chairman and members of the Panel, this concludes the opening statement of the United States. We thank you for your attention and would be pleased to respond to any questions you may have.