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

(DS523)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

April 10, 2018

TABLE OF CONTENTS

TABLE OF REPORTS

Short Form	Full Citation
Australia – Apples (AB)	Appellate Body Report, Australia – *Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
Brazil – Aircraft (AB)	Appellate Body Report, Brazil – *Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
Canada – Dairy (AB)	Appellate Body Report, Canada – *Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999
Canada – Wheat Exports and Grain Imports (AB)	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004
China – Broiler Products (Panel)	Panel Report, China – *Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
China – Publications and Audiovisual Products (Panel)	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
China – Raw Materials (Panel)	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / Add. 1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
EC – Bananas III (AB)	Appellate Body Report, European Communities – *Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EC – Chicken Cuts (AB)	Appellate Body Report, European Communities – *Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1

Short Form	**Full Citation**
EC – Countervailing Measures on DRAM Chips (Panel)	Panel Report, European Communities – *Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EC – Fasteners (China) (Panel)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – IT Products (Panel)	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
EC – Selected Customs Matters (AB)	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
Japan – DRAMs (Korea) (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007
Japan – Film (Panel)	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998
Korea – Commercial Vessels (Panel)	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
Mexico – Anti-Dumping Measures on Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005

Short Form	**Full Citation**
Turkey – Rice (Panel)	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Anti-Dumping and Countervailing Duties (China) (Panel)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Carbon Steel (India) (Panel)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R, adopted 19 December 2014, as modified by Appellate Body Report, WT/DS/436/AB
US — Coated Paper (Indonesia) (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R and Add.1, adopted 22 January 2018
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Countervailing Measures (China) (AB)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015
US – Countervailing Measures (China) (Panel)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015

Short Form	**Full Citation**
US – Shrimp (Thailand) / US – Customs Bond Directive (AB)	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008
US – FSC (AB)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Gambling (Panel)	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R
US – Gasoline (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Poultry (China) (Panel)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010
US – Shrimp (Ecuador) (Panel)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007

Short Form	**Full Citation**
US – Shrimp (Thailand) (Panel)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R
US – Softwood Lumber IV (Panel)	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
US – Upland Cotton (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Washing Machines (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1
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

TABLE OF ABBREVIATIONS

Abbreviation	Definition
AD Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
Borusan	Borusan Istikbal Ticaret and Borusan Mannesmann Boru Sanayi
CBP	United States Customs and Border Protection
Commerce, USDOC	United States Department of Commerce
CWP	Circular Welded Carbon Steel Pipes and Tubes
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
Erdemir	Eregli Demir ve Celik Fabrikalari T.A.S.
GATT 1994	*General Agreement on Tariffs and Trade 1994*
GOT	Government of Turkey
HRS	Hot-Rolled Steel
HWRP	Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes
Isdemir	Iskenderun Iron & Steel Works Co.
LTAR	Less Than Adequate Remuneration
MMZ	MMZ Onur Boru Profil uretim San Ve Tic. A.S.
OCTG	Oil Country Tubular Goods
OYAK	Ordu Yardimlasma Kurumu
Ozdemir	Ozdemir Boru Profil San ve Tic. Ltd. Sti.
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
Toscelik	Toscelik Profil ve Sac Endustrisi A.S.
TPA	Turkish Prime Ministry Privatization Administration

USCIT	United States Court of International Trade
USITC	United States International Trade Commission
WLP	Welded Line Pipe
WTO	World Trade Organization

TABLE OF EXHIBITS

Exhibit No.	Description
USA-46	Memorandum from USDOC, "Verification of the Questionnaire Responses of the Government of Turkey (GOT)," (June 18, 2015) ("WLP Verification of GOT Questionnaire Responses").
USA-47	Decision Memorandum for the Affirmative Preliminary Determination in the Countervailing Duty Investigation of Welded Line Pipe from the Republic of Turkey, (March 16, 2015).

I. INTRODUCTION

1. Throughout this dispute, Turkey's arguments have failed to meaningfully address the specific rights and obligations provided in the covered agreements and ignored relevant facts. In its prior submissions and at the first meeting of the Panel with the parties, the United States explained why none of Turkey's claims in this dispute has merit. Specifically, the United States has shown that several of Turkey's claims fall outside the Panel's terms of reference, because Turkey failed to identify the measures at issue in its request for consultations, failed to include claims in its request for the establishment of this Panel, or challenged a measure that ceased to exist and have legal effect at the time of the Panel's establishment. Where Turkey's claims were properly raised, Turkey has failed to demonstrate a *prima facie* case of inconsistency with the relevant obligations under the SCM Agreement.

2. In fact, Turkey's arguments reveal a misunderstanding of the role of a WTO panel and a misuse of WTO dispute settlement. Instead of demonstrating that the findings of the U.S. Department of Commerce ("USDOC") or the U.S. International Trade Commission ("USITC") are not findings that could be reached by an objective and unbiased investigating authority,[1] Turkey has sought to reargue the facts as if it were before an investigating authority, in an attempt to redo the underlying investigations and get different substantive findings from this Panel. However, it is not for this Panel to review an investigating authority's assessment of the facts *de novo* and come to its own conclusions. Rather, to succeed in its challenge to the U.S. countervailing duty orders at issue in this dispute, Turkey must show that an objective and unbiased investigating authority could not have come to the conclusions reached by USDOC or USITC. Turkey has made no such showing with respect to any of the claims at issue in this dispute.

3. In previous U.S. submissions, the United States has described in detail why each of Turkey's claims must fail. In this second submission, the United States will focus on the arguments Turkey has now made in its oral statement at the first substantive panel meeting and in its answers to the Panel's questions following that meeting.

4. This submission is organized as follows: in section II, the United States explains why Turkey's opposition to the U.S. preliminary ruling request lacks merit; and in section III, the United States demonstrates why Turkey has failed to demonstrate that USDOC and USITC determinations are inconsistent with the SCM Agreement.

5. Specifically, with respect to Turkey's opposition to the U.S. preliminary ruling request, section II.A demonstrates that Turkey's panel request identified new measures that were not the subject of its consultations request. Section II.B then demonstrates that Turkey's first written submission includes claims that were not identified in the panel request. Lastly, section II.C explains that Turkey has challenged a measure that ceased to exist and have legal effect as of the time of the Panel's establishment. Therefore, the United States respectfully requests the Panel to find that each of the relevant claims and measures falls outside the Panel's terms of reference.

[1] *US –Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

6. Section III then addresses the lack of merit in Turkey's claims, as follows:

- Section III.A demonstrates that Turkey's "as such" challenge with respect to benchmarks fails because Turkey has failed to raise a *prima facie* case demonstrating a "practice" that is a rule or norm of general and prospective application.

- Section III.B explains that the Panel must reject Turkey's claims under Article 1.1(a)(1) with respect to USDOC's examination of OYAK because USDOC did not find OYAK to be a public body.

- Section III.C then explains that Turkey has failed to demonstrate that USDOC's determinations that Erdemir and Isdemir are public bodies is inconsistent with Article 1.1(a)(1) because an objective and unbiased investigative authority could have determined that the evidence on the record demonstrated that the Government of Turkey ("GOT") exercised meaningful control over Erdemir and Isdemir, as USDOC did.

- Section III.D demonstrates that USDOC's application of facts available in the challenged determinations is consistent with Article 12.7 of the SCM Agreement because USDOC selected reasonable replacements for necessary information that was missing from the record due to the responding companies' failure to cooperate.

- Section III.E. explains that Turkey has failed to demonstrate that USDOC's specificity determinations are inconsistent with Articles 2.1(c) and 2.4 because USDOC's determinations establish the existence of a subsidy program and USDOC took account of the two factors in Article 2.1(c) in reaching its specificity findings.

- Section III.F explains that USITC's cumulative assessment of the effects of imports is not inconsistent with Article 15, either "as applied" in the underlying determination, or "as such" because Turkey failed to demonstrate that a "practice" regarding cumulation exists and because Article 15.3 does not prohibit the cumulation of dumped and subsidized imports.

- Finally, in Section III.G, the United States explains that the Panel must reject Turkey's newly added claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 because they are both untimely and unpersuasive.

II. THE PANEL SHOULD ISSUE A PRELIMINARY RULING THAT THE MEASURES AND CLAIMS ADDRESSED IN THE UNITED STATES' PRELIMINARY RULING REQUEST FALL OUTSIDE THE PANEL'S TERMS OF REFERENCE

7. As detailed in the United States' request for a preliminary ruling, as well as its oral statement and responses to the Panel's questions,[2] Turkey has raised a number of claims and

[2] United States' First Written Submission, section III; United States' Opening Oral Statement at the First Panel Meeting ("United States' Oral Statement"), paras. 2-29; United States' Responses to Panel Questions, paras. 1-27.

measures that fall outside the Panel's terms of reference: (1) in its panel request, Turkey identified new measures that were not the subject of its consultations request; (2) Turkey's first written submission includes claims that were not identified in the panel request; and (3) Turkey has challenged a measure that ceased to exist and have legal effect 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 has respectfully requested the Panel to issue a preliminary ruling that each of the relevant claims and measures falls outside the Panel's terms of reference.

8. Turkey has raised various arguments against the United States' preliminary ruling request[3]; however, as discussed in detail below, those arguments are unpersuasive.

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

9. As already addressed extensively in prior submissions,[4] Turkey's request for establishment of a panel included measures and claims with respect to alleged U.S. injury and benefit "practices" that were not included in Turkey's consultation 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."[5] 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."[6] Turkey claims that these alleged measures are inconsistent "as such" with Article 15.3 and Article 14(d) of the SCM Agreement, respectively.[7]

10. Neither of these alleged practices was identified in Turkey's request for consultations, which instead 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.[8] In this section, entitled "Specific Measures at Issue," 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").[9]

---

[3] *See* Turkey's Response to the United States' Request for a Preliminary Ruling; Turkey's Responses to Panel Questions; paras. 7-21.
[4] United States' First Written Submission, section III.A; United States' Responses to Panel Questions, paras. 1-10; *see also* United States' Oral Statement, paras. 3-10.
[5] Panel Request, paras. 8.(A).5.a, 8.(B).4.a, 8.(C).4.a, 8.(D).3.a.
[6] Panel Request, paras. 8.(A).5.b, 8.(B).4.b, 8.(C).4.b, 8.(D).3.b.
[7] Panel Request, paras. 8.(A).5.a-b, 8.(B).4.a-b, 8.(C).4.a-b, 8.(D).3.a-b.
[8] United States' First Written Submission, paras. 13, 18.
[9] United States' First Written Submission, paras. 13, 18.

11. 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."[10] 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. Footnote 5 of the consultations request further limits Turkey's claims regarding benefit to one proceeding only: the OCTG proceeding.[11]

12. 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.[12] The alleged U.S. practices newly identified in Turkey's panel request, as well as Turkey's newly identified "as such" claims relating to those practices, are thus not within the Panel's terms of reference.

13. Turkey's arguments to the contrary fail to demonstrate otherwise. In particular, in its responses to the Panel's questions, Turkey argues that Section A of its consultation request, including its reference to "related practices," is "sufficient to establish that Turkey's challenges extend beyond the preliminary and final countervailing duty determinations in the OCTG, WLP, HWRP, and CWP proceedings."[13] Turkey further argues that "panels have found there to be a 'natural evolution' of claims where there is 'some connection' between the claims set forth in the panel request and those identified in the request for consultations"[14] and that the claims in its panel request regarding the United States' alleged injury and benefit practices are "clearly connected" to the claims in its consultation request.[15]

14. However, Turkey's "some connection" argument has almost no limit, and would effectively read out the consultation requirement in DSU Article 4. Perhaps for this reason, in none of the disputes cited to by Turkey had the complainant failed to identify the measure at issue in its consultations request altogether. As the United States has previously explained, without the relevant measures having been identified in the consultations request, Turkey's subsequent claims with respect to the alleged U.S. "practices" had nothing to evolve from. Contrary to Turkey's arguments, the reference to specific provisions of the SCM Agreement and

[10] United States' First Written Submission, paras. 14, 19.
[11] United States' First Written Submission, para. 20.
[12] United States' First Written Submission, paras. 16, 21-22.
[13] Turkey's Responses to Panel Questions, para. 7.
[14] Turkey's Responses to Panel Questions, para. 10 (citing *China – Publications and Audiovisual Products (Panel)*, paras. 7.121-7.131; *EC – Fasteners (China) (Panel)*, para. 7.207, 7.320-7.323; *China – Broiler Products (Panel)*, para. 7.224).
[15] Turkey's Responses to Panel Questions, para. 10.

the description of USDOC's benchmark determination and USITC's injury determinations in Section B of the consultations request is expressly limited to challenging the preliminary and final determinations in the OCTG, WLP, HWRP, and CWP proceedings, and does not include any reference to the alleged U.S. "practices."[16] In fact, footnote 5 of the consultations request further limits Turkey's claims regarding USDOC's benefit determination to one proceeding only: the OCTG proceeding.[17] As for the mention of "related practices" in Section A, this reference is so general that it does not identify any practices, let alone the specific "practices" Turkey identified for the first time in is panel request.[18]

15. As further explained in the United States' responses to Panel questions, 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.[19] 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.[20]

16. Turkey argues that "the obligation to identify a specific countervailing measure at issue in a consultations or panel request does not limit the nature of the claims that may be brought concerning those measures to 'as applied' claims," but this argument is equally unavailing.[21] As the United States explained in its oral statement, the issue is not that Turkey set out "as such" claims with respect to the alleged practices in its panel request, but that Turkey failed to identify those alleged measures in its consultations request altogether.[22] The obligation, and opportunity, to consult is a requirement of DSU Article 4 and is designed to promote the resolution of disputes. By including new measures and corresponding claims in its panel request that were not the subject of its consultations request, Turkey has ignored a DSU requirement and expanded the scope of the dispute in contravention of the DSU. [23]

17. Since Turkey failed to identify the measures at issue in its consultation request, the addition of these measures in its panel request cannot be a "natural evolution" from its consultation request.[24] To the contrary, Turkey has impermissibly expanded the scope and changed the essence of the dispute, contrary to DSU Article 4.4,[25] and thus its challenges to

[16] Turkey's Consultations Request, section B.
[17] Turkey's Consultations Request, section B, n. 5.
[18] *Compare* Turkey's Consultations Request, sections A-B, *with* Turkey's Panel Request, paras. 8.(A).2, 8.(A).5, 8.(B).4, 8.(C).4, 8.(D).3.
[19] United States' Responses to Panel Questions, paras. 6-10.
[20] *See Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 141, 144; Turkey's Consultations Request, sections A-B.
[21] Turkey's Responses to Panel Questions, para. 11.
[22] United States' Oral Statement, para. 8.
[23] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293.
[24] Turkey's Responses to Panel Questions, para. 10.
[25] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (emphasis omitted).

alleged U.S. injury and benefit practices, as well as its "as such" claims with respect to those practices, fall outside the Panel's terms of reference.

B. Turkey's First Written Submission Improperly Included Claims that Are Not Within the Panel's Terms of Reference

1. Turkey's Claims Regarding Subsidy Programs in the WLP Investigation Other Than the Provision of HRS for LTAR Were Excluded from Its Panel Request and Fall Outside the Panel's Terms of Reference

18. As the United States has addressed at length in prior submissions,[26] Turkey's request for establishment of a panel limited its claims under Article 12.7 of the SCM Agreement with respect to the WLP investigation to a single subsidy program: the Provision of Hot-Rolled Steel (HRS) for Less Than Adequate Remuneration (LTAR). 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.

19. 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."[27]

20. 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: 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."[28]

21. 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.[29] Having failed to raise claims regarding these 29 programs in its panel request,

[26] United States' First Written Submission, Section III.B; United States' Responses to Panel Questions, paras. 11-18; *see also* United States' Oral Statement, paras. 11-20.
[27] United States' First Written Submission, para. 26 (citing *Australia – Apples (AB)*, para. 416).
[28] United States' First Written Submission, para. 30.
[29] 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.

22. Turkey's arguments to the contrary are unavailing. In particular, Turkey argues that the United States was "sufficiently notified" of the legal basis of Turkey's claim[30] and that the United States' "due process" rights were only affected to a limited extent[31]. Turkey also argues that the United States "could have asked for clarification following Turkey's request for the establishment of a panel" or "for an extension of time so as to have sufficient time to prepare its responses" to Turkey's first written submission.[32] In this regard, Turkey points to the panel report in *US – Lamb*, which Turkey claims "made it very clear . . . that while parties may request preliminary rulings until the first substantive meeting and then even later upon showing good cause, a jurisdictional challenge such as the one at issue in the present instance should be made at the earliest possible time."[33]

23. However, Turkey's arguments in this respect are not relevant to the Panel's analysis under DSU Article 6.2. As discussed in the United States' previous submissions,[34] 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." If either of these two elements is not properly identified, the matter would not be within the panel's terms of reference.[35] Moreover, compliance with the requirements of Article 6.2 "must be objectively determined on the basis of the panel request as it existed at the time of filing" and be "demonstrated on the face" of the panel request.[36] Thus, the Panel need not make a finding of whether the United States was "sufficiently notified" or the extent to which its "due process rights" were affected in order to find the additional claims under Article 12.7 to be outside its terms of reference. Turkey's claims with respect to the 29 additional subsidy programs fall outside the Panel's terms of reference because Turkey failed to include them in its request for establishment of a panel, and a request for additional clarification or additional time to respond to them would not have cured that deficiency.[37]

24. In addition, it is simply incorrect that the United States was "sufficiently notified" of Turkey's claims. In fact, the US had no notice or opportunity to begin preparing a defense with respect to the 29 additional subsidy programs, because Turkey failed to raise any legal claims in its panel request with respect to those programs. Nor would the United States have had any reason to ask for "clarification" regarding the scope of Turkey's panel request. The panel request was clear on its face: it explicitly limited its claims with respect to the WLP

[30] Turkey's Responses to Panel Questions, para. 13.
[31] *See* Turkey's Responses to Panel Questions, para. 15.
[32] Turkey's Responses to Panel Questions, para. 14.
[33] Turkey's Responses to Panel Questions, para. 14.
[34] United States' First Written Submission, paras. 25-28; United States' Responses to Panel Questions, paras. 12-13; *see also* United States' Oral Statement, para. 12.
[35] *Australia – Apples (AB)*, para. 416.
[36] *US – Carbon Steel (AB)*, para. 127.
[37] *EC – Bananas III (AB)*, para. 143.

investigation to a single subsidy program: "*In connection with the alleged Provision of Hot Rolled Steel for Less than Adequate Remuneration* . . . 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."[38] Given this express limitation – which, as the United States has previously explained, is consistent with Turkey's identification of claims with respect to the HWRP proceeding[39] – the United States had no reason to suspect that Turkey would subsequently challenge 29 additional subsidy programs in its first written submission and thus also had no reason to seek "clarification" of the panel request. Therefore, the United States "seasonably and promptly" sought a preliminary ruling with respect to Turkey's newly-added claims in the United States' first written submission – the first opportunity to do so after receipt of Turkey's first written submission.[40]

25. With respect to its claims regarding the application of facts available, Turkey argues that "USDOC's determination to apply adverse facts available with regard to Borusan in the WLP proceeding was not a program-specific determination," but was based on Borusan's decision to not participate in verification.[41] Turkey claims that "USDOC applied the same methodology in selecting among the facts available" with regard to all investigated programs, resulting in a subsidy determination that is inconsistent with Article 12.7.[42] Thus, Turkey argues, its panel request "clearly connects the challenged measure, *i.e.*, the USDOC's application of facts available and drawing of adverse inferences with regard to Borusan, with the relevant provision of the SCM Agreement, *i.e.*, Article 12.7."[43]

26. As the United States explained in its oral statement, however, Turkey's arguments regarding the nature and scope of USDOC's applications of facts available cannot cure the deficiencies in its panel request, and do 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 program.[44] 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."[45] USDOC engaged in separate fact-finding and legal determinations with respect to each of the 30 subsidy programs at issue in that proceeding. As explained in USDOC's final determination, for some of these programs it determined a subsidy rate based upon the standard corporate income tax during the period of investigation, for example, while for others it applied the subsidy rates calculated for another respondent in the same proceeding or rates calculated for the same or similar programs in prior Turkish CVD proceedings.[46] Each of the determinations required a separate analysis,

[38] Turkey's Panel Request, para. 8.(B).2.
[39] United States' Oral Statement, para. 17; United States' Responses to Panel Questions, paras. 16-18.
[40] *US – FSC (AB)*, para. 166; *see* Timetable for the Panel Proceedings, para. a.
[41] Turkey's Responses to Panel Questions, para. 12; *see also* Turkey's Response to the United States' Preliminary Ruling Request, para. 29.
[42] Turkey's Responses to Panel Questions, para. 12.
[43] Turkey's Responses to Panel Questions, para. 12.
[44] United States' Oral Statement, para. 19.
[45] *EC – Bananas III (AB)*, para. 143.
[46] United States' First Written Submission, paras. 172-173.

and Turkey's decision to identify only one subsidy program in its panel request, then raise claims regarding the remaining 29 programs in its written submission, has placed the United States at a distinct disadvantage in this proceeding. It was up to Turkey to identify those factual findings or legal determinations that would be subject to challenge in this dispute. If Turkey subsequently determined 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.

2. Turkey's Claims Under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 Fall Outside the Panel's Terms of Reference

27. As previously explained by the United States, Turkey's request for establishment of a panel includes claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 that are expressly dependent on the Panel finding that the United States' determinations are inconsistent with other provisions of the SCM Agreement.[47] Turkey has subsequently clarified in its response to the United States' request for a preliminary ruling that its claims under Article 19.4 and Article VI:3 do, in fact, depend upon the Panel finding a breach of Article 12.7 with respect to USDOC's application of facts available in the WLP and HWRP investigations.[48]

28. However, one of Turkey's claims under Article 19.4 and Article VI:3 in its first written submission appears to be a new, independent claim that does not depend on claims under Article 12.7 of the SCM Agreement that were properly raised in Turkey's panel request.[49] In particular, Turkey raised challenges under Articles 19.4 and VI:3 with respect to USDOC's application of countervailing duty rates calculated for "similar" subsidy programs to certain programs at issue in the WLP proceeding.[50] However, Turkey did *not* raise any arguments under Article 12.7 – the provision on which Turkey's claims under Articles 19.4 and VI:3 depend – regarding USDOC's use of such rates in its application of facts available.[51]

29. Thus, the Panel should issue a preliminary ruling that this new, independent claim under Article 19.4 and Article VI:3 is outside the Panel's terms of reference, as Turkey did not identify any independent claims under those provisions in its panel request.

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

30. Turkey's challenge under Articles 1.1(b) and 14(d) of the SCM Agreement falls outside the Panel's terms of reference because the out-of-country benchmark and benefit determination

[47] United States' First Written Submission, paras. 34-36.
[48] Turkey's Response to the Preliminary Ruling Request, para. 32.
[49] United States' First Written Submission, paras. 34-36.
[50] Turkey's First Written Submission, para. 329.
[51] Turkey's First Written Submission, paras. 322-330.

in the OCTG final determination ceased to exist and have legal effect at least 15 months prior to the date of the Panel's establishment.

31. As explained above and in previous submissions,[52] a panel's terms of reference are set out in Articles 7.1 and 6.2 of the DSU. 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."[53] Turkey does not appear to disagree.[54]

32. In its response to the United States' preliminary ruling request, Turkey argues that the Appellate Body in *EC – Selected Customs Matters* "has also recognized two exceptions to the general requirement that measures must be in force at the time of establishment of the panel: where a measure is enacted subsequently or expires prior to establishment of the panel."[55] Turkey explains that the latter "exception" was recognized by the Appellate Body in *US – Upland Cotton*, where "[t]he Appellate Body held that panels are permitted to examine a measure 'whose legislative basis has expired, but whose effects are alleged to be impairing the benefits accruing to the requesting Member under a covered agreement' at the time of the establishment of the panel."[56] In its response to the Panel's questions, Turkey further argues that the Appellate Body has clarified "that the term measures 'at issue' in Article 6.2 of the DSU should be understood to mean measures 'in dispute' at the time the request for consultations is made – it does not mean the measures at issue must currently be in force."[57] Turkey again points to *US – Upland Cotton* to support this proposition.

33. The Appellate Body's findings in *US – Upland Cotton*, however, are not applicable to this dispute. In *US – Upland Cotton*, the issue was whether two subsidy measures (i.e., contract payments) could be within the panel's terms of reference if the legislative basis for those measures had expired prior to the panel's establishment.[58] The Appellate Body found that Articles 3.3, 4.2 and 6.2 of the DSU "do not preclude a Member from making representations

---

[52] United States' First Written Submission, paras. 39-40; United States' Oral Statement, para. 23; United States' Responses to Panel Questions, paras. 25-26.
[53] *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).
[54] Turkey's Response to the Preliminary Ruling Request, para. 12.
[55] Turkey's Response to the Preliminary Ruling Request, para. 12.
[56] Turkey's Response to the Preliminary Ruling Request, para. 13 (citing *EC – Selected Customs Matters (AB)*, para. 184 (citing *US – Upland Cotton (AB)*, para. 263)).
[57] Turkey's Response to Panel Questions, para. 18.
[58] *US – Upland Cotton (AB)*, paras. 250-251.

with respect to measures whose legislative basis has expired, if that Member considers, with reason, that benefits accruing to it under the covered agreements are still being impaired by those measures."[59] The Appellate Body in this statement pointed to the expiry of the legislative basis while leaving open the possibility that the support payments continued to exist. Indeed, the Appellate Body stated, "whether measures whose legislative basis has expired affect the operation of a covered agreement currently is an issue that must be *resolved on the facts of each case*."[60]

34. The situation before this Panel is very different. As explained in previous submissions, the OCTG final determination in which USDOC used an out-of-country benchmark was successfully challenged by Turkish respondents at the U.S. Court of International Trade (USCIT), was remanded to USDOC, and was subsequently reversed by USDOC with regard to benefit in the OCTG remand determination.[61] After the USCIT sustained the OCTG remand determination, USDOC issued an amended final determination on March 10, 2016, which effectuated USDOC's remand determination to use in-country benchmarks.[62] On that date, the OCTG final determination ceased to exist and have any legal effect with respect to the use of out-of-country benchmarks.[63]

35. Therefore, Turkey cannot demonstrate that the benchmark and benefit determination in the OCTG final determination had effects that were "impairing the benefits accruing to it" at the time of the Panel's establishment. Once the amended OCTG final determination was issued on March 10, 2016, it changed the subsidy rates and served as the legal basis for the collection of cash deposits on entries. 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.[64] Therefore, at the time of the Panel's establishment, the original OCTG benchmark and benefit determination was not "impairing the benefits" of the Turkish respondents and had been superseded 15 months prior by the amended OCTG final determination.

36. Turkey disputes that the original OCTG benefit determination ceased to have legal effect by claiming that: (1) "there was a possibility that USDOC's remand determination would be reversed, and that the original benefit determined reinstated,"[65] and (2) "the OCTG proceeding continues to have legal effect because it reflects the USDOC's long-standing practice of rejecting

[59] *US – Upland Cotton (AB)*, para. 270.
[60] *US – Upland Cotton (AB)*, para. 262 (emphasis added).
[61] United States' First Written Submission, paras. 43-46; United States' Oral Statement, para. 26.
[62] United States' First Written Submission, paras. 45-46.
[63] United States' First Written Submission, para. 46.
[64] 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).
[65] Turkey's Responses to Panel Questions, para. 19; Turkey's Response to Preliminary Ruling Request, paras. 33-34.

in-country or 'tier one' benchmarks based on evidence of government ownership or control of domestic producers."[66]

37. The United States disagrees. That legal action in U.S. courts might have caused USDOC to further amend the duty rates, or to alter the legal basis of those rates, at a later date, does not mean that the superseded determination continued to have legal effect. As described above, as of March 10, 2016, the legal basis of the benefit determination in the OCTG investigation relied on *in*-country benchmarks. Therefore, as a factual matter, Turkey is simply incorrect that the out-of-country benchmarks determination continued to have legal effect in the U.S. system.[67]

38. Moreover, as previously explained,[68] 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.

39. It is also without question that many, if not most, WTO disputes may involve a measure that is subject to challenge or change under the domestic legal system of the relevant Member. To suggest that a panel must look into the system of each Member to assess the extent to which a challenged measure can or cannot change could not only result in a different level of liability for every Member depending on its system, it would also punish Members under whose systems there are multiple opportunities for appeal, by subjecting them to challenge based on measures that in fact have no legal effect in their system. In other words, for such Members, Article 6.2 would require, not that the measure be in existence at the time of the establishment of the panel, but that the measure theoretically could arise at some time in the future. This is not only contrary to the requirements in the DSU (which states that the measure be "affecting the operation of the covered agreements"), but makes little sense, as it would not further the aim of the dispute settlement system to provide a positive solution to disputes. Instead, as the United States has explained, the measure within the Panel's terms of reference must be that which is in existence at the time of the Panel's establishment. This preserves the balance of rights between complainants and respondents and conforms to the DSU.

40. Turkey has also claimed that the original OCTG benchmark and 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.[69]

---

[66] Turkey's Response to Preliminary Ruling Request, para. 35; Turkey's Responses to Panel Questions, para. 20.
[67] As the Panel appears to recognize in Question 6, the OCTG remand determination was upheld by the both the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit, and was not further appealed to the U.S. Supreme Court. Thus, not only did the original OCTG benchmark and benefit determination cease to have any legal effect prior to the time of the Panel's establishment, under U.S. law, that determination cannot in fact be reinstated.
[68] United States' Oral Statement, para. 26.
[69] Turkey's Response to Preliminary Ruling Request, para. 35; Turkey's Responses to Panel Questions, para. 20.

Turkey argues that "similar to the situation in *Turkey – Rice* and *China – Raw Materials*, although the benefit determination in the OCTG proceeding which resulted in the imposition of countervailing duties may have been superseded by the remand determination, the basic legislative framework and implementing regulations that gives rise to the United States' practice of rejecting in-country benchmarks in benefit determinations based on evidence of government ownership or control remains in place."[70]

41. Turkey's reliance on *Turkey – Rice* and *China – Raw Materials* is misplaced for two reasons.[71] First, in both of those cases, the issue was whether a panel could make findings and recommendations where measures expired *after* a panel's establishment.[72] The issue was not whether such measures were properly within the panel's terms of reference.

42. Second, the facts at issue in this dispute are very different to those in *Turkey – Rice* and *China – Raw Materials*. In those disputes, complainants had challenged in their panel requests all the relevant legal instruments pursuant to which the WTO-inconsistent action was purported to have been imposed. To the extent Turkey now attempts to challenge the "basic legislative framework and implementing regulations that gives rise to the United States' practice,"[73] such a claim is outside the Panel's terms of reference. As explained in response to the Panel's questions, the Panel must review the purported measure as identified in Turkey's panel request.[74] 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 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 . . . .[75]

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

44. 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-

[70] Turkey's Response to Preliminary Ruling Request, para. 35.
[71] Turkey's Response to Preliminary Ruling Request, para. 35.
[72] *Turkey – Rice (Panel)*, para. 5.29; *China – Raw Materials (AB)*, para. 254.
[73] Turkey's Response to Preliminary Ruling Request, para. 35.
[74] United States' Responses to Panel Questions, paras. 109-112.
[75] Turkey's Panel Request, pp. 3-4.

> 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.[76]

45. Therefore, Turkey itself does not appear to view the text of the Preamble to the U.S. regulations as operating in a similar way to the legal framework measures at issue in *Turkey – Rice* and *China – Raw Materials*, which specifically authorized the continued imposition of annual instruments found by the panels to be WTO-inconsistent.[77] Rather, Turkey appears to consider that USDOC's "practice" in fact *deviated from* the Preambular text in the U.S. regulations.[78]

46. Therefore, the benchmark and benefit determinations in the OCTG final determination are not within the Panel's terms of reference, and the Panel should therefore decline to making a finding with respect to Turkey's claims under Articles 1.1(b) and 14(d) of the SCM Agreement.

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

A. Turkey's "As Such" Challenge Under Article 14(d) of the SCM Agreement Fails Because It Has Not Established A Rule Or Norm Of General And Prospective Application

47. The United States has demonstrated that Turkey's "as such" claim with respect to benchmarks is not within the Panel's terms of reference. On that basis alone, the Panel should reject Turkey's challenge and should not examine Turkey's claim further. However, for completeness, the United States explains below (and in our previous submissions) that Turkey's "as such" challenge under Article 14(d) is also without merit. Turkey has failed to establish the existence of a "practice" at the time of the Panel's establishment that constitutes a rule or norm of general and prospective application, which necessarily led to WTO-inconsistent action on the part of USDOC.

48. First, as explained in the United States' response to the Panel's questions,[79] Turkey is challenging an unwritten measure. Although Turkey, in its oral statement at the first panel meeting, now attempts to shift its approach to argue that "the practice at issue is expressed in a

---

[76] Turkey's First Written Submission, para. 179.
[77] Turkey's First Written Submission, para. 179 ("The Preamble suggests that the USDOC would conduct an investigation of whether 'actual transaction prices are significantly distorted,' prior to rejecting in-country market prices and resorting to an alternative benchmark. 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.").
[78] Turkey's First Written Submission, para. 179.
[79] United States' Responses to Panel Questions, para. 109.

written document, namely the Preamble to the Department's regulations,"[80] the Panel must review the purported measure as identified in Turkey's panel request. Turkey did not include a challenge to the U.S. regulations or the Preamble of the U.S. regulations in its panel request, and any attempt to modify its claims to target these instruments now necessarily would fall outside the Panel's terms of reference.

49. Therefore, Turkey must demonstrate that, at the time of the Panel's establishment, USDOC had 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."[81] The Appellate Body explained in *US – Zeroing (EC)* that "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document."[82] In finding the existence of a rule or norm of general and prospective application, the evidence may include proof of the systematic application.[83] For instance, in *US – Zeroing (EC)*, the evidence relied on by the Appellate Body "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."[84]

50. As the United States has demonstrated, Turkey's showing with respect to an alleged rule or norm falls far short of its burden. In its first written submission, Turkey pointed only to a statement in the final benchmark determination for OCTG – which, as explained, was reversed by a U.S. domestic court and amended by USDOC – and the preliminary benchmark determinations in four other investigations, one of which also was reversed in the final benchmark determination.[85] As the United States demonstrated in its previous submissions, this evidence is patently insufficient to establish the existence of a rule or norm.[86]

51. Indeed, as previously discussed, 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.[87] Turkey appears to concede as much, now pivoting its argument to suggest that "USDOC's one-time, or even occasional, departure from its normal practice in the WLP, HWRP, and CWP proceedings at the direction of the USCIT does not mean the practice cannot be challenged 'as such.'"[88] However, in raising an "as such" challenge

[80] Turkey's Oral Statement, para. 54.
[81] Turkey's Panel Request, pp. 3-4.
[82] *US – Zeroing (EC) (AB)*, para. 196.
[83] *US – Zeroing (EC) (AB)*, paras. 197-198.
[84] *US – Zeroing (EC) (AB)*, para. 204.
[85] United States' First Written Submission, para. 56.
[86] United States' First Written Submission, paras. 56, 66-70; United States' Responses to Panel Questions, paras. 105-107.
[87] United States' First Written Submission, paras. 61-65; United States' Response to Panel Questions, para. 106.
[88] Turkey's Responses to Panel Questions, para. 70.

against an unwritten measure, Turkey seeks to establish a rule or norm that necessarily leads to WTO-inconsistent action. As previously described, the WLP, HWRP and CWP determinations at issue in this dispute,[89] the USCIT *Borusan* case,[90] and the additional determinations that the United States has cited,[91] demonstrate that Turkey cannot establish a rule or norm necessarily leading to WTO-inconsistent action. Rather, the evidence shows that USDOC does not systematically reject in-country benchmarks solely on the basis of the government constituting a majority or substantial portion of the market. Therefore, at most, Turkey can only point to instances of application, which do not rise to the high threshold of an "as such" challenge.

1. Turkey's New Evidence Should Be Rejected By The Panel

52. Turkey, in its responses to the Panel's questions, presents new evidence relating to 28 USDOC determinations purportedly demonstrating the existence of a "practice" that is a rule or norm, which necessarily led to WTO-inconsistent action on the part of USDOC.[92] The Panel should reject Turkey's new evidence because it is untimely and contrary to the Panel's Working Procedures.[93] Turkey, as the complaining party, bears the burden of demonstrating that USDOC has a "practice" of rejecting in-country benchmarks solely based on evidence of government ownership or control. Having failed to make its affirmative case in its first written submission, or even during the first Panel meeting, that such a "practice" exists, Turkey should not be permitted to make such a case at this late stage of the panel proceedings when the parties are to present rebuttal evidence, or evidence necessary for purposes of answering clarifying questions.[94] For this reason alone, the Panel should not review Turkey's belated evidence.

53. In addition to being untimely, Turkey also fails to attempt to explain how the newly added 28 determinations establish that USDOC had a practice at the time of the Panel's establishment that constitutes a rule or norm of general and prospective application. In its response to Panel Question 34, Turkey merely lists the titles of these 28 determinations, without more. Turkey does not identify which of the subsidy program analyses included in each of the determinations is alleged to support its claims, or even include a page number or section heading in its footnotes.

54. Turkey apparently considers that it is sufficient for it to submit these determinations as exhibits, and leave it to the Panel to review and analyze them on its own. But it is for Turkey, as the complaining party, to demonstrate that what it alleges is true. A panel is not to make an

---

[89] United States' First Written Submission, paras. 61-65.
[90] United States' First Written Submission, para. 43; *Borusan Mannesmann Boru Sanayi Ve Ticaret v. United States*, 61 F. Supp. 3d 1306, 1330 (Ct. Int'l Trade 2015) (Exhibit TUR-131).
[91] United States' Responses to Panel Questions, paras. 106-107, 113-117.
[92] Turkey's Responses to Panel Questions, para. 69.
[93] Working Procedures of the Panel, para. 7 ("Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party.").
[94] Working Procedures of the Panel, para. 7 ("Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party.").

affirmative case for a party through its own review of evidence, not based on the party's own claims and arguments.

55. The Appellate Body has similarly found that a complainant cannot succeed in making a *prima facie* case by submitting evidence without explaining how its content is relevant to the claims before the panel. In *Canada – Wheat*, the Appellate Body noted that:

> [I]t is incumbent upon a party to identify in its submissions the *relevance* of the provisions of legislation—the evidence—on which it relies to supports its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.[95]

56. Similarly, in *US – Gambling*, the Appellate Body found that the panel erred in examining certain U.S. state laws because Antigua's "general discussion of state gambling laws," and inclusion of the measures as exhibits, failed to establish a *prima facie* case with respect to those measures. [96]

57. As in these prior disputes, it is not sufficient for Turkey merely to submit 28 USDOC determinations and expect the Panel to discern, on its own, the relevance of those determinations to Turkey's legal position. Indeed, a panel may not make the case for a complaining party.[97] Therefore, because Turkey has provided no argumentation or analysis in connection with its new evidence, it has failed to support a *prima facie* case of the existence of an alleged "practice." For this reason as well, the Panel should not examine this evidence further.

58. Both of the bases explained above demonstrate that it would not be appropriate for the Panel to engage with Turkey's untimely and unexplained evidence. For purposes of completeness, however, the United States also briefly notes that the determinations fail to support Turkey's claim regarding the existence of the alleged practice at the time of the Panel's establishment, which necessarily led to WTO-inconsistent action on the part of USDOC.

59. First, of the 28 determinations listed, 23 of the determinations could not assist in establishing a practice existing at the time of the Panel's establishment. As the United States has previously explained, Turkey cannot succeed in its challenge by demonstrating that USDOC had, *prior to* the date of the Panel's establishment, a practice regarding the use of out-of-country benchmarks. Rather, Turkey must demonstrate that *at the time of* the Panel's establishment, such a practice existed. And, to the extent that Turkey could show that such a practice previously existed – which it has not – the United States has demonstrated no such practice existed at the time of the Panel's establishment, as evidenced by the HWRP, CWP, and WLP determinations at

[95] *Canada – Wheat Exports and Grain Imports (AB)*, para. 191 (emphasis added).
[96] *US – Gambling (AB)*, paras. 151-54.
[97] *See Japan – Agricultural Products II (AB)*, para. 129.

issue in this dispute,[98] by other determinations that post-date these determinations,[99] as well as the decision of the USCIT in the *Borusan* case, where it found the use of out-of-country benchmarks based solely on a finding of the government constituting a substantial portion of the market to be insufficient under U.S. law.[100] Therefore, these 23 determinations,[101] which preceded the determinations discussed above, cannot demonstrate the existence of a rule or norm of general and prospective application at the time of the Panel's establishment.

60. Second, the five remaining determinations are not sufficient to demonstrate the existence of a rule or norm of general and prospective application, that necessarily led to WTO-inconsistent action, and in any event, in fact contain findings by USDOC demonstrating that no such rule or norm exists.

61. As the United States has explained, to succeed in a showing that an unwritten measure which constitutes a rule or norm of general and prospective application exists, a complaining party must provide evidence of continued and systematic application – much more than a string of cases, or repeated action.[102] Five instances is not sufficient for such a showing, especially in light of the contrary evidence already on the record showing that USDOC does not decide to use an out-of-country benchmark based solely on evidence of the government constituting a majority or substantial portion of the market.

62. Moreover, an examination of these new determinations reveals, again, that the rule or norm of general and prospective application alleged by Turkey does not exist. For example, some of the listed determinations are actually examples of where USDOC did *not* use out-of-country benchmarks. For instance, Turkey cites to *Certain Hot-Rolled Steel Flat Products from the Republic of Turkey*, and provides an excerpt concerning two LTAR programs.[103] As an initial matter, because Turkey has failed to demonstrate how the determination supports its claim, it is unclear if Turkey is alleging that either one or both LTAR programs support its claim. Indeed, one of programs concerns the provision of coal for less than adequate remuneration, where USDOC determined to use an in-country benchmark.[104] Therefore, USDOC's treatment of the provision of coal for less than adequate remuneration in *Certain Hot-Rolled Steel from Turkey* cannot support Turkey's allegation that USDOC has a practice of reverting to out-of-

[98] United States' First Written Submission, paras. 61-65.
[99] United States' Responses to Panel Questions, paras. 106-107, 113-117.
[100] United States' First Written Submission, para. 43; *Borusan Mannesmann Boru Sanayi Ve Ticaret v. United States*, 61 F. Supp. 3d 1306, 1330 (Ct. Int'l Trade 2015) (Exhibit TUR-131).
[101] Specifically, *Light-Walled Rectangular Pipe and Tube from the People's Republic of China* through *Boltless Steel Shelving United Prepackaged for Sale from the People's Republic of China* in Turkey's list. Turkey's Responses to Panel Questions, para. 69.
[102] United States' First Written Submission, paras. 53-54.
[103] Hot-Rolled Steel from Turkey Prelim. Decision Memo, pp. 14-19 (Exhibit TUR-160).
[104] Specifically, USDOC found that, "[b]ased on the small share of hard coal accounted for by state-owned enterprises and the absence of any other apparent government interventions into the hard coal market," the coal market was not distorted, and thus used in-country benchmark prices. Hot-Rolled Steel from Turkey Prelim. Decision Memo, pp. 18-19 (Exhibit TUR-160).

country benchmark prices based solely on evidence that the government owns or controls a majority or substantial portion of the market for a good.

63. Likewise, Turkey also lists the preliminary results of the countervailing duty administrative review of *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China*.[105] As an initial matter, this determination involves six subsidy programs concerning the provision of a good for less than adequate remuneration, and the United States is again left to guess which specific LTAR programs in the determination Turkey is attempting to highlight to support its allegation. For instance, in this determination, USDOC examined the provision of synthetic and natural rubber for less than adequate remuneration.[106] Despite finding that there was substantial government involvement in the market for synthetic and natural rubber, USDOC ultimately determined to use an in-country benchmark after considering evidence concerning distortion.[107] Thus, these two LTAR programs cannot meet Turkey's allegation of a USDOC practice using out-of-country benchmarks based solely on evidence that the government owns or controls a majority or a substantial portion of the market.

64. Other determinations listed by Turkey demonstrate that when USDOC uses an out-of-country benchmark, such findings are not based solely on evidence concerning the government constituting a majority or substantial portion of the market. For instance, Turkey lists the final determination issued in the countervailing duty investigation of *Certain Cold-Rolled Steel Flat Products from the Russian Federation*.[108] However, USDOC's findings in this determination undercut Turkey's argument, as already explained by the United States in its responses to the Panel's questions.[109] In that case, USDOC's determination to use an out-of-country benchmark for the provision of natural gas for less than adequate remuneration was based on a number of factors, and did not depend solely on the government's significant share of the market.[110]

65. Furthermore, although Turkey relies on the preliminary affirmative determination issued in the countervailing duty investigation of *Certain Tool Chests and Cabinets from the People's*

---

[105] Certain New Pneumatic Off-The-Road Tires from the People's Republic of China, Decision Memorandum for the Preliminary Results in the Countervailing Duty Administrative Review, 2014 (October 5, 2016) ("Off-The-Road Tires from China Prelim. Decision Memo") (Exhibit TUR-162).

[106] Off-The-Road Tires from China Prelim. Decision Memo, p. 24 (Exhibit TUR-162).

[107] Specifically, USDOC determined that the market was not distorted because of high import penetration, and thus determined to use an in-country benchmark. Off-The-Road Tires from China Prelim. Decision Memo, p. 24 (Exhibit TUR-162).

[108] Cold-Rolled Steel Flat Products from the Russian Federation, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation, pp. 15-19, 23-31 (July 20, 2016) ("Cold-Rolled Steel from Russia Final I&D Memo") (Exhibit TUR-161). *See also* Cold-Rolled Steel from Russia Final I&D Memo, pp. 51-56 (Exhibit USA-37).

[109] United States' Responses to Panel Questions, para. 115.

[110] USDOC considered that the Russian government accounted for between 77.96 to 81.2 percent of the natural gas market in Russia between 2012 and 2014. 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." Cold-Rolled Steel from Russia Final I&D Memo, pp. 53-55 (Exhibit USA-37).

Republic of China, that determination also does not support its allegation.[111] In that case, USDOC's determination to use an out-of-country benchmark for the provision of hot-rolled coiled steel strip and cold-rolled coiled steel strip also did not rely solely on the government's substantial involvement in the market.[112]

66. We note that Turkey has separately cited in its response to the Panel's questions to a U.S. judicial decision issued in 2013, *Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States*, which Turkey provides as an example of a decision upholding a USDOC decision to use out-of-country benchmarks based solely on a finding of substantial government market share.[113] This is false. Rather, the USCIT in *Guangdong Wireking* affirmed USDOC's benchmark determination because USDOC relied on a number of factors in reaching its determination.[114] This judicial decision thus also demonstrates that USDOC evaluates all the record evidence regarding distortion, including but not limited to substantial government market share, before determining whether it is appropriate to choose an out-of-country benchmark. Thus, as the United States previously demonstrated,[115] USDOC engages in an evaluation of the record evidence concerning distortion when the government constitutes a majority or substantial portion of the market for a good.

67. Therefore, the new evidence provided by Turkey fails to support its claim that the alleged rule or norm of general and prospective application existed at the time of the Panel's establishment, which necessarily led to WTO-inconsistent action on the part of USDOC. As explained, the Panel should decline even to review this evidence because it was presented at such a late stage in these proceedings and because Turkey failed to provide any explanation or argumentation as to how each of the new determinations supported Turkey's claims. Moreover, nearly all of the new determinations pre-date the CWP, HWRP, and WLP determinations at issue in this dispute, as well as the decision by the USCIT in the *Borusan* case, which demonstrate that no such practice existed at the time of the Panel's establishment; and of the five remaining determinations, the United States has demonstrated that the new evidence does not support

[111] Certain Tool Chests and Cabinets from the People's Republic of China, Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation (September 8, 2017) ("Tool Chests from China Prelim. Decision Memo") (Exhibit TUR-164).

[112] With regard to hot-rolled coiled steel strip, USDOC found that state-owned producers accounted for 60.89 percent of domestic wide strip production and 55.28 percent of domestic thin strip production during the period of investigation, and "the volume of imports as a percentage of domestic production and consumption (1.20 and 1.34 percent, respectively, for wide strip and 1.37 and 1.35 percent, respectively, for thin strip), is insignificant." For cold-rolled coiled steel, USDOC found that state-controlled producers accounted for 76.41 percent of domestic cold strip production during the period of investigation, and that "the volume of imports as a percentage of domestic production and consumption (3.95 and 4.02 percent, respectively), is insignificant." Therefore, in addition to the government's substantial market share, USDOC also considered evidence concerning import penetration. Tool Chests from China Prelim. Decision Memo, pp. 30-31 (Exhibit TUR-164).

[113] Turkey's Responses to Panel Questions, para. 71.

[114] These factors included, "the GOC's near-majority market share, the low market share of wire rod imports, and regulations on the exportation of wire rod." *Guandong Wireking Housewares & Hardware Co., Ltd. v. United States*, 900 F. Supp. 2d 1362, 1382 (Ct. Intl Trade 2013) (Exhibit TUR-165).

[115] United States' First Written Submission, paras. 61-65; United States' Responses to Panel Questions, paras. 106-107, 113-117.

Turkey's claim 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."[116] The Panel should reject Turkey's claims accordingly.

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

68. Turkey has challenged all four countervailing duty determinations under Article 1.1(a)(1) of the SCM Agreement, claiming that, "[t]he USDOC's determinations that OYAK, Erdemir, and Isdemir are public bodies is inconsistent with Article 1.1(a)(1)."[117] However, as the United States has explained in its previous submissions,[118] Turkey's claim with respect to OYAK must fail because the requirements of Article 1.1(a)(1) of the SCM Agreement do not apply to USDOC's analysis of OYAK. Specifically, USDOC did not find that OYAK provided a countervailable subsidy, and therefore did not – and did not need to – make a legal finding regarding the "government" or "public body" status of OYAK for purposes of Article 1.1(a)(1) of the SCM Agreement.[119]

69. Turkey argues that, although USDOC "did not explicitly refer to OYAK as a public body," "it is clear from the overall analysis that the USDOC analyzed OYAK under its standard for 'public body,' and not as a 'government organ' or part of the [GOT] in some other way."[120] For instance, Turkey highlights the statement that "the GOT exercised meaningful control over OYAK" in USDOC's determinations, and argues that this statement means that USDOC analyzed OYAK as a public body.[121]

70. However, Turkey misses the point in suggesting that the use of particular terminology in a domestic determination can convert a factual finding into a legal finding for purposes of WTO dispute settlement. USDOC did not need to make a finding regarding whether OYAK was a public body under Article 1.1(a)(1), and none of Turkey's arguments change that fact. Rather, as the United States has explained,[122] in its determinations, 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. As Turkey highlights, USDOC stated: "[t]he GOT's meaningful control of OYAK extends to Erdemir (and its subsidiary Isdemir)," and "[t]he record evidence [ ] shows that the GOT exercises meaningful control over Erdemir and Isdemir through its control of OYAK. Therefore we find Erdemir and Isdemir to be public bodies . . . ."[123] The

[116] Turkey's Panel Request, pp. 3-4.
[117] Turkey's First Written Submission, paras. 94, 244, 357, 468.
[118] United States' First Written Submission, paras. 77-80; United States' Responses to Panel Questions, paras. 28-32.
[119] OCTG Final I&D Memo, pp. 21-22 (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, pp. 11-12 (Exhibit TUR-46).
[120] Turkey's Responses to Panel Questions, para. 25.
[121] Turkey's Responses to Panel Questions, para. 25-26.
[122] United States' First Written Submission, para. 79; United States' Responses to Panel Questions, para. 29.
[123] Turkey's Responses to Panel Questions, para. 25 n. 48-49.

determinations thus demonstrate that USDOC examined OYAK as an entity through which the GOT meaningfully controlled Erdemir and Isdemir, and do not demonstrate that USDOC determined OYAK to be a "public body" within the meaning of the SCM Agreement, as Turkey suggests.

71. Turkey's arguments with respect to the *Borusan* court case are equally unavailing. In that proceeding, Turkey suggests that the United States "did not dispute" that USDOC treated OYAK as a public body in the OCTG investigation.[124] Turkey's assertion is again both misplaced and incorrect. First, USDOC's treatment of OYAK under U.S. municipal law – as a public body or otherwise – was not at issue in the *Borusan* court case. Rather, Borusan challenged that "Erdemir and its subsidiary Isdemir, suppliers to Borusan of the hot rolled steel input, are statutorily 'authorities.'"[125] In examining the merits of Borusan's claims with respect to Erdemir and Isdemir, the USCIT held that "there is substantial evidence of record to support [USDOC's] OYAK findings, *e.g.*, that OYAK was created as part of the Turkish Ministry of National Defense, that the Turkish government has 'extensive' voting rights in OYAK, and that OYAK has the same privileges as state property."[126] This finding is consistent with the USCIT's earlier observation that "[USDOC] determined that the Turkish government controls Erdemir and Isdemir through its ownership and control of the military pension fund OYAK and through other means of control." Accordingly, it is inaccurate for Turkey to assert that the United States "did not dispute" – in this litigation or elsewhere – that USDOC treated OYAK as a public body in the OCTG investigation.

72. Therefore, because Turkey's claim in relation to OYAK relates to an alleged error of USDOC finding OYAK to be a public body – a finding that USDOC did *not* make – Turkey's claim with respect to OYAK must be rejected on that basis alone.

73. Turkey now suggests that, because the United States described OYAK as "an organ of the GOT" in its first written submission, the Panel must review USDOC's examination of OYAK according to a legal standard of "government" under the SCM Agreement.[127] This is a separate claim, and equally unavailing because USDOC did not need to make a finding regarding whether OYAK was a "government" under Article 1.1(a)(1). Again, as previously discussed, because USDOC did not find that OYAK made a financial contribution, the Panel need not make any legal determination regarding whether OYAK is a "government or any public body" capable of making such a contribution under the SCM Agreement.[128]

74. Both of the bases explained above demonstrate that it would not be appropriate for the Panel to evaluate Turkey's claim concerning OYAK under Article 1.1(a)(1) of the SCM Agreement. Moreover, because Turkey's arguments concerning OYAK are raised separately from its challenge against USDOC's determinations concerning Erdemir and Isdemir, the Panel

[124] Turkey's Responses to Panel Questions, para. 26.
[125] *Borusan*, 61 F. Supp. 3d at 1310 (Exhibit TUR-131).
[126] *Borusan*, 61 F. Supp. 3d at 1321 (Exhibit TUR-131).
[127] Turkey's Responses to Panel Questions, paras. 28-29.
[128] United States' First Written Submission, paras. 77-80; United States' Responses to Panel Questions, paras. 28-32.

should decline to review Turkey's OYAK arguments because they are made on an independent basis.

75. However, for completeness, to the extent that the Panel considers Turkey's arguments concerning OYAK to be understood as a basis of its challenge against USDOC's determinations concerning Erdemir and Isdemir, the Panel could examine whether USDOC's factual findings regarding the relationship between the GOT and OYAK, and the relationship between OYAK and Erdemir and Isdemir, support USDOC's legal determination that Erdemir and Isdemir are public bodies for purposes of Article 1.1(a)(1) of the SCM Agreement.

76. Thus, as the United States explained in its response to the Panel's questions,[129] while the Panel should not consider whether OYAK has a particular governmental status under Article 1.1(a)(1), the Panel may consider whether USDOC's factual findings regarding the relationship between the GOT and OYAK were sufficient to support a finding that, for purposes of Article 1.1(a)(1), Erdemir and Isdemir are public bodies.

77. Nothing in the text of Article 1.1(a)(1) suggests that only a particular type of governmental entity, such as a government "organ," could exercise such meaningful 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 the characteristics examined by other panels or the Appellate Body with respect to "government," "public body," and other governmental entities in other contexts.[130]

78. But contrary to Turkey's arguments, the review of USDOC's findings with respect to OYAK is not "a mixed question of law and fact;"[131] it is a factual question that may be examined as part of the Panel's analysis of whether USDOC, as an objective and unbiased investigating authority, could have found Erdemir and Isdemir to be public bodies within the meaning of Article 1.1(a)(1).

79. Therefore, as explained above, because Turkey's claim in relation to OYAK relates to an alleged error by USDOC in finding OYAK to be a public body – a finding that was neither made nor necessary – the Panel must reject Turkey' claim on that basis. Nor should the Panel consider Turkey's arguments with respect to OYAK in the context of its challenge to Erdemir and Isdemir because the claim was independently raised. For completeness, however, to the extent that the Panel considers Turkey's OYAK arguments to support its challenge against USDOC's determinations concerning Erdemir and Isdemir, the United States addresses the claims below.

[129] United States' Responses to Panel Questions, paras. 28-32.
[130] *Canada – Dairy (AB)*, para. 97; *US – Gambling (Panel)*, para. 6.514; *US – Carbon Steel (India) (AB)*, para. 4.37.
[131] Turkey's Responses to Panel Questions, para. 28.

C. Turkey Has Not Demonstrated That USDOC's Determination That Erdemir and Isdemir Are Public Bodies Is Inconsistent with Article 1.1.(a)(1) of the SCM Agreement

80. Turkey has failed to show that USDOC's determinations that Erdemir and Isdemir are public bodies are inconsistent with Article 1.1(a)(1) of the SCM Agreement.

81. 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.'"[132] As previously stated,[133] 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. Prominent negotiators of the SCM Agreement[134], as well as several WTO Members – including Turkey[135] – have agreed. As we have explained, 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.[136]

82. The Appellate Body also has pointed to meaningful control of an entity as potentially satisfying its understanding of this standard.[137] Specifically, the Appellate Body has found that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions" such that the entity could be deemed a "public body" under Article 1.1(a)(1).[138]

83. As detailed in previous submissions and below, in the challenged determinations, after consideration of the record as a whole, USDOC determined that the GOT exercises meaningful control over Erdemir and Isdemir, such that the two entities are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. USDOC's findings are sufficient to determine that

---

[132] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para 317.
[133] United States' Oral Statement, para. 39; United States' First Written Submission, para. 89.
[134] 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).
[135] 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).
[136] *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).
[137] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para 318; *US – Carbon Steel (India) (AB)*, para. 4.20.
[138] *US – Carbon Steel (India) (AB)*, para. 4.10 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318).

an entity is a public body under the proper interpretation of Article 1.1(a)(1), as articulated above, as well as under the interpretation set out by the Appellate Body.[139]

1. USDOC's Evaluation of OYAK Supported Its Finding That Erdemir and Isdemir Are Public Bodies

84. In its previous submissions, the United States detailed at length the basis for USDOC's determinations that Erdemir and Isdemir are public bodies within the meaning of Article 1.1(a)(1), and responded to Turkey's first written submission. The United States has explained that USDOC determined Erdemir and Isdemir to be public bodies based on numerous considerations. Because of OYAK's involvement in Erdemir and Isdemir, USDOC first examined the record evidence concerning OYAK to determine whether it could consider OYAK as an entity through which 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). As previously described at length,[140] USDOC examined the totality of the record evidence and 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.

85. Throughout this dispute, however, Turkey has attempted to draw the Panel away from its standard of review and from considering the totality of the record evidence, as USDOC did. Rather, Turkey isolates specific facts and assertions on the record of the proceedings, and continues to make assertions that rely on secondary non-objective material on the record, that is, a law firm position paper and case briefs from interested parties. Thus, in arguing that USDOC's determinations are inconsistent with the SCM Agreement, Turkey merely offers its own interpretation of the record, and seeks for the Panel to conduct a *de novo* review.

86. However, a panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action."[141] Moreover, 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."[142] 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."[143] Thus, the inquiry for the Panel is whether an unbiased and objective investigating authority could have determined Erdemir and Isdemir to be public bodies based on the totality of the record evidence before it.

---

[139] United States' Oral Statement, para. 40.
[140] United States' First Written Submission, para. 98; United States' Response to Panel Questions, paras. 35-38,
[141] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis in original).
[142] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted).
[143] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted).

87. A close examination of the arguments that Turkey has continued to make since its first written submission demonstrates that Turkey fails to engage with or undermine USDOC's examination of the totality of the record evidence. For example, in its responses to the Panel's questions, Turkey continues to raise several arguments concerning the text of Law No. 205, the characterization of a pension fund as "governmental," the financial and administrative autonomy of OYAK, and the independence of OYAK's leadership. As discussed below, however, many of these arguments are either premised on secondary non-objective material from the record, or are simply unsupported. Other arguments are premised on the isolation of a sentence pulled from the record, where Turkey thereby attempts to shield that sentence from the remainder of the record, which USDOC considered in totality.

88. For instance, Turkey does not contest the establishment of OYAK by the text of Law No. 205, but argues that the creation of OYAK by statute "does not distinguish or designate a mandatory occupational fund as a 'governmental' entity," pointing to material concerning the Turkish pension fund system in general and a July 6, 2010 Ministry of National Defense letter referenced in the law firm position paper.[144] Turkey also argues that "management of a pension fund and the provision of retirement and other benefits are not functions that are inherently 'governmental' in character."[145] However, in making these arguments, Turkey relies upon documents that were not on the record before USDOC. As the United States explained in its first written submission,[146] the material concerning occupational pension funds in Turkey and other OECD countries[147] has no bearing on the Panel's review of USDOC's determinations because the documents and information on which Turkey's discussion is based were not before USDOC as record evidence in any of the challenged determinations. Likewise, the July 6, 2010 Ministry of Defense letter, which was not provided by Turkey as an exhibit in this dispute, was also not on the record before USDOC. As the Appellate Body has explained, "the task of a panel [is] to assess whether the explanations provided by the authority are 'reasoned and adequate' by testing the relationship between the evidence *on which the authority relied* in drawing specific inferences, and the coherence of its reasoning."[148]

89. Turkey also continues to make assertions that rely upon either the unsubstantiated law firm position paper, an interested party's case brief, or are completely unsupported. For instance, Turkey argues that the text of Law No. 205 that provides that OYAK is "'an institution related to the Ministry of National Defense' is somewhat misleading" because OYAK is "'related' to the Ministry of National Defense in the sense that it was created as a mandatory private occupational pension fund for the benefit of employees of the Ministry of National Defense."[149] Turkey also continues to argue that the government officials within OYAK's leadership act in their individual capacities or as members and beneficiaries of OYAK, and do not act in an official governmental

[144] Turkey's Responses to Panel Questions, paras. 36-37; Turkey's First Written Submission, para. 111-114.
[145] Turkey's Responses to Panel Questions, para. 40; *see also* Turkey's First Written Submission, paras. 6-16.
[146] United States' First Written Submission, para. 83.
[147] Turkey's Responses to Panel Questions, para. 40; Turkey's First Written Submission, paras. 6-16.
[148] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193) (emphasis added)).
[149] Turkey's Responses to Panel Questions, para. 37; Turkey's First Written Submission, para. 111-114.

capacity.[150] These arguments, however, carry little weight because of their reliance on secondary non-objective material, that is, the unsubstantiated law firm position paper.[151]

90. As explained in the United States' previous submissions,[152] given the circumstances of the law firm position paper'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, and USDOC weighed the evidence accordingly. Specifically, the law firm 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").[153] 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.[154] 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."[155] The position paper states that its "legal analysis . . . should result in rectifying any erroneous statements, especially as to any misrepresentations contained in the WYG report that could potentially be very damaging to OYAK if further relied upon by the Commission."[156]

91. Although the GOT submitted the law firm position paper, the GOT declined to submit the underlying WYG report on the record of the determinations at issue, precluding an independent assessment of the report by USDOC. In response to repeated requests by USDOC for that

[150] Turkey's Responses to Panel Questions, para. 52 n. 142 (citing Turkey's First Written Submission, paras. 123-131); *id.*, para. 55 n. 148 (citing Turkey's First Written Submission, paras. 126, 276, 389, 499); *id.*, para. 58 n. 151 (citing Turkey's First Written Submission, paras. 126, 276, 389, 499).

[151] A review of the law firm position paper reveals the following unsupported statement: "Article 1 of Law 205 is misleading when stating that OYAK is 'an institution relating to the Ministry of National Defence. OYAK is not part of the Ministry of Defence; it is not listed under the organogram of the Ministry of National Defence or any other public authority." OCTG Position Paper by Hogan Lovells, para. 3.21 (Exhibit TUR-66); WLP Position Paper by Hogan Lovells, para. 3.21 (Exhibit TUR-99); HWRP Position Paper by Hogan Lovells, para. 3.21 (Exhibit TUR-39).

[152] United States' First Written Submission, para. 110; United States' Responses to Panel Questions, paras. 74-76.

[153] 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).

[154] 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).

[155] 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." The WYG Report also apparently concluded that State aid rules are applicable to OYAK's investment decisions. 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).

[156] 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).

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.[157] The position paper itself does not refer to any record evidence to substantiate its assertions, and on which USDOC could have relied in making its findings. Therefore, the position paper reflects the unsupported positions of a law firm.

92. Similarly, a case brief in a USDOC administrative proceeding, at which point parties are not permitted to submit new record evidence, is simply argument made by an interested party in a proceeding. Moreover, just as the law firm position paper contains assertions that are unsupported by record evidence, the statements that Turkey relies upon in the interested party's case brief are themselves unsupported by record evidence, and are merely assertions presented by an interested party.[158]

93. To demonstrate the extent of Turkey's reliance on these documents, for the ease of the Panel, below, the United States identifies each of Turkey's arguments in support of its assertions that OYAK's leadership acts in their individual capacity, and identifies which pieces of the record, if any, Turkey relies upon to support its assertions.

- OCTG*:* "These members are 'acting in OYAK's bodies in their capacity as individual contributors and beneficiaries of the fund,' not in their capacity as government officials, both when they elect members to OYAK's governing bodies and when they serve as members of those governing bodies."[159] This sentence cites paragraphs 3.10 through 3.18 of the law firm position paper, which are paragraphs that contain unsupported assertions.

- OCTG: Concerning the Representative Assembly of OYAK, the "'representative commanders and superiors' of the Turkish military are not acting in their official government capacity when they 'elect' or 'designate' their employees to serve as members of the Representative Assembly."[160] This sentence cites paragraph 3.14 of the law firm position paper, which is a paragraph that contains unsupported assertions.

---

[157] 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).

[158] *See* Turkey's First Written Submission, para. 499, n. 1206 (arguing that members of OYAK's board act in their individual, not governmental capacities, and citing CWP Borusan's Case Brief, pp. 13-14 (Exhibit TUR-5)). On page 13 of Borusan's Case Brief, Borusan argues, "The 'commanders or superiors' are acting in their capacity as members and beneficiaries of the fund and not as part of their job description in the Turkish Armed Forces." Borusan also states, "However, 20 members are elected by the Representative Assembly, and they are contributors to and beneficiaries of the pension fund and are acting in that capacity." Both of these sentences cite the GOT's Supplemental New Subsidy Allegation Response at page 3 of Exhibit 2 (Exhibit TUR-15). A review of this cited page, however, offers nothing in support of Borusan's (and now Turkey's) allegation that these individuals acted in their individual, as opposed to governmental, capacities.

[159] Turkey's Responses to Panel Questions, para. 52 n. 142; Turkey's First Written Submission, para. 126 n. 311-312.

[160] Turkey's Responses to Panel Questions, para. 52 n. 142; Turkey's First Written Submission, para. 127 n. 315.

- OCTG: "Rather, because the 'representative commanders or superiors' are also employees of the military, and thus members of OYAK, they act in their individual capacity as members and beneficiaries of OYAK when they perform this function."[161] There is no citation attributed to this sentence.

- OCTG: "As previously discussed, all employees of the Turkish military, and the Ministry of National Defense, are also members and beneficiaries of OYAK and should be understood to be acting in that capacity as members of the General Assembly."[162] This sentence cites paragraphs 3.15 and 3.16 of the law firm position paper, which are paragraphs that contain unsupported assertions.

- OCTG: Concerning OYAK's Board of directors, Turkey states, "[t]hey all act in their individual capacity as contributors and beneficiaries of OYAK in the performance of their duties as directors, not in an official government capacity."[163] There is no citation attributed to this sentence.

- OCTG: "[Hasan Memişoğlu, Enver Salihoğlu, Mehmet Ali Kaynar and Hakan Serdar Cöpoğlu] also represent OYAK's members on the Board, not the GOT."[164] There is no citation attributed to this sentence.

- WLP: With respect to the Representative Assembly, the General Assembly, and the Board of Directors, "[t]hese three bodies are predominantly composed of members and beneficiaries of OYAK, who happen to be current and former government employees. These members are "acting in OYAK's bodies in their capacity as individual contributors and beneficiaries of the fund," not in their capacity as government officials, both when they elect members to OYAK's governing bodies and when they serve as members of those governing bodies."[165] There is no citation attributed to the first sentence. The second sentence cites paragraphs 3.10 to 3.18 of the law firm position paper, which are paragraphs that contain unsupported assertions.

- HWRP: With respect to the Representative Assembly, the General Assembly, and the Board of Directors, "[t]hese three bodies are predominantly composed of members and beneficiaries of OYAK, who happen to be current and former government employees; these members are 'acting in OYAK's bodies in their

[161] Turkey's Responses to Panel Questions, para. 52 n. 142; Turkey's First Written Submission, para. 127.
[162] Turkey's Responses to Panel Questions, para. 52 n. 142; Turkey's First Written Submission, para. 128 n. 317.
[163] Turkey's Responses to Panel Questions, para. 52 n. 142; Turkey's First Written Submission, para. 130.
[164] Turkey's Responses to Panel Questions, para. 52 n. 142; Turkey's First Written Submission, para. 130.
[165] Turkey's Responses to Panel Questions, paras. 55 n. 148, 55 n. 151; Turkey's First Written Submission, para. 276 n. 657-658.

capacity as individual contributors and beneficiaries of the fund,' not in their capacity as government officials, both when they elect members to OYAK's governing bodies and when they serve as members of those governing bodies."[166] This sentence cites paragraphs 3.10 to 3.18 of the law firm position paper, which are paragraphs that contain unsupported assertions.

- CWP: "These members are acting in OYAK's bodies in their capacity as individual members and beneficiaries of the fund, not in their capacity as government officials, both when they elect members to OYAK's governing bodies and when they serve as members of those governing bodies."[167] This sentence cites unsupported assertions within Borusan's case brief.[168]

Accordingly, as is clear from these excerpts, Turkey's broad assertions that the government officials in OYAK's leadership act in their individual capacities are either unsupported or supported merely by non-objective pieces of the record (*i.e.*, the law firm position paper or an interested party's case brief).

94. In addition to relying on material not on USDOC's record, or relying on non-objective documents, Turkey also isolates statements from the record and asks for the Panel to reweigh the record evidence and conduct a *de novo* review. For instance, Turkey argues that OYAK is financially and administratively autonomous from the GOT, citing to OYAK's Annual Report.[169] However, the isolated statements from OYAK's Annual Report relied on by Turkey do not contradict or undermine USDOC's examination of the totality of the evidence concerning OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir.

95. Indeed, in contrast to Turkey's presentation of isolated record facts, USDOC weighed the totality of the record evidence. As the United States has explained, USDOC considered both the fact that OYAK was created, by virtue of its authorizing statute,[170] Law No. 205 (1961), and that

[166] Turkey's Responses to Panel Questions, paras. 55 n. 148, 55 n. 151; Turkey's First Written Submission, para. 389 n. 940-941.
[167] Turkey's Responses to Panel Questions, paras. 55 n. 148, 55 n. 151; Turkey's First Written Submission, para. 499 n. 1206 (arguing that members of OYAK's board act in their individual, not governmental capacities, and citing CWP Borusan's Case Brief, pp. 13-14 (Exhibit TUR-5)).
[168] On page 13 of Borusan's Case Brief, Borusan argues, "The 'commanders or superiors' are acting in their capacity as members and beneficiaries of the fund and not as part of their job description in the Turkish Armed Forces." Borusan also states, "However, 20 members are elected by the Representative Assembly, and they are contributors to and beneficiaries of the pension fund and are acting in that capacity." Both of these sentences cite the GOT's Supplemental New Subsidy Allegation Response at page 3 of Exhibit 2 (Exhibit TUR-15). A review of this cited page, however, offers nothing in support of Borusan's (and now Turkey's) allegation that these individuals acted in their individual, as opposed to governmental, capacities.
[169] Turkey's Responses to Panel Questions, para. 37.
[170] United States' First Written Submission, para. 98; United States' Responses to Panel Questions, para. 35. *See also* 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).

the text of the statute explicitly stated that OYAK is "an institution related to the Ministry of National Defense."[171] USDOC also considered that 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.[172] OYAK was thus expressly established to provide retirement and social security benefits to members of the country's armed forces. Indeed, Article 20 of Law No. 205 stipulates the benefits provided to members, including retirement, disability, death and housing acquisition benefits.[173] Article 39 further states that in the case of a war in which the Turkish Armed Forces may physically take part, retirement, disability and death benefits shall be suspended as of the beginning of such war.[174]

96. In carrying out its function, USDOC noted that Law No. 205 specifies that OYAK's property "shall enjoy the same rights and privileges as State property"[175] 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.[176]

97. Moreover, as the United States previously explained in detail,[177] USDOC likewise observed that "members of the armed forces must by law contribute part of their salaries to OYAK."[178] 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.[179] Likewise, Article 31 provides that unpaid dues are collected pursuant to a law

[171] United States' First Written Submission, para. 98; United States' Responses to Panel Questions, para. 35. *See also* 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).
[172] United States' First Written Submission, para. 98; United States' Responses to Panel Questions, para. 35. *See also* 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).
[173] United States' Responses to Panel Questions, para. 35. *See also* 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).
[174] United States' Responses to Panel Questions, para. 35. *See also* HWRP Law No. 205, Article 39 (Exhibit TUR-30); OCTG Law No. 205, Article 39 (Exhibit TUR-58); CWP Law No. 205, Article 39 (Exhibit TUR-11); WLP Law No. 205, Article 39 (Exhibit TUR-107).
[175] United States' First Written Submission, para. 98; United States' Responses to Panel Questions, para. 36. *See also* 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); 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).
[176] United States' First Written Submission, para. 98; United States' Responses to Panel Questions, para. 36. *See also* 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); 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).
[177] United States' First Written Submission, para. 98; United States' Responses to Panel Questions, paras. 36, 49-51.
[178] 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).
[179] United States' First Written Submission, para. 98; United States' Responses to Panel Questions, paras. 36, 49-51. *See also* 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); HWRP Law No. 205,

concerning "public debt," with a 10% penalty levied and collected by another government agency, the Ministry of Finance.[180] Therefore, although OYAK does not receive direct funding from the GOT budget, it is ensured funding through mandatory contribution requirements, which it can enforce as a matter of law.

98. USDOC also considered the language of Law No. 205, which established OYAK's leadership structure to overlap in significant part with the Turkish Armed Forces and other government agencies. Indeed, as detailed in previous submissions,[181] USDOC examined Law No. 205 in the four proceedings and observed:[182]

> 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.

99. Thus, by law, the Representative Assembly is composed entirely of (50-100) officials from the Turkish Armed Forces.[183] 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.[184] The General Assembly then elects three members – nominated by the Minister of National Defense and Chief of the General Staff – of OYAK's Board of Directors.[185] The other four members on the Board of Directors are selected

---

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).

[180] United States' Responses to Panel Questions, paras. 36, 49-51. *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).

[181] United States' First Written Submission, para. 99; United States' Responses to Panel Questions, paras. 59-62.

[182] 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).

[183] United States' First Written Submission, para. 99; United States' Responses to Panel Questions, paras. 59-62. *See also* 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).

[184] United States' First Written Submission, para. 99; United States' Responses to Panel Questions, paras. 59-62. *See also* 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 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).

[185] United States' First Written Submission, para. 99; United States' Responses to Panel Questions, paras. 59-62. *See also* OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP

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.[186]

100. Moreover, as previously explained,[187] Article 4 of Law No. 205 details which government officials shall have a seat on OYAK's General Assembly and which government agencies the officials are from. The text of Article 4 is unequivocally clear – the General Assembly "shall be composed" of seventeen government officials from specific government agencies, and three persons appointed by the Minister of National Defense.[188] 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.[189] 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 private sector that are limited to three-year terms of office.[190]

101. In the OCTG Final Determination, 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."[191] 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.

102. In the WLP investigation, as previously explained,[192] USDOC also 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

---

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).

[186] 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).

[187] United States' Responses to Panel Questions, paras. 61-62.

[188] United States' Responses to Panel Questions, paras. 61-62. *See also* 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).

[189] United States' Responses to Panel Questions, paras. 61-62. *See also* 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).

[190] United States' Responses to Panel Questions, paras. 61-62. *See also* 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).

[191] United States' First Written Submission, para. 99; United States' Response to Panel Questions, para. 64. *See also* 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)).

[192] United States' Responses to Panel Questions, para. 52.

statements to which the Panel refers in its question.[193] 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."[194] 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.[195] OYAK also agreed not to reduce Erdemir's workforce to less than 95% within two years.[196] This information was among the evidence that USDOC relied upon in finding that the GOT exercised meaningful control over Erdemir and Isdemir, and that those two entities were therefore public bodies.[197]

103. Turkey has therefore failed to demonstrate that an unbiased and objective investigating authority, when faced with the totality of the record evidence, could not have examined OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir, such that Erdemir and Isdemir could be found to be public bodies within the meaning of Article 1.1(a)(1).[198]

2. The Record Evidence Supports USDOC's Conclusion That the GOT Exercised Meaningful Control Over Erdemir and Isdemir

104. As detailed in previous submissions, USDOC's findings with respect to Erdemir and Isdemir were supported by the record evidence, and are consistent with Article 1.1(a)(1) of the SCM Agreement. Specifically, in finding the two entities to be "public bodies," USDOC examined evidence regarding the functions and conduct of Erdemir and Isdemir, as well as evidence demonstrating the GOT's exercise of meaningful control over the two entities, including through OYAK. This evidence included OYAK's majority ownership of Erdemir and Isdemir; OYAK's majority shareholder voting rights in Erdemir; the Turkish Prime Ministry Privatization Administration's (TPA) veto power over decisions related to closure, sale, merger,

[193] WLP Final I&D Memo, pp. 33-34 (Exhibit TUR-122).
[194] 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). In its response to the Panel's questions, Turkey attempts to call into question the veracity of this news article. Turkey's Responses to Panel Questions, para. 46. However, Turkey ultimately acknowledges that "[i]t is correct that, as a condition of purchase, the TPA required OYAK to commit to completing the restructuring process begun in 1996 by expanding the Erdemir Group's production capacity of flat steel products. This was accomplished in 2008 when Isdemir commenced production at its 3.5 million ton/year capacity Iskenderun plant." Turkey's Responses to Panel Questions, para. 48. Therefore, contrary to Turkey's claim, the record evidence demonstrate that the actions taken by Erdemir as a result of OYAK's instructions were consistent with, and beneficial to Turkish industrial policy, as USDOC ultimately determined.
[195] Maverick's March 10, 2015 Comments, Ex. 4 (Exhibit USA-35).
[196] Maverick's March 10, 2015 Comments, Ex. 4 (Exhibit USA-35).
[197] In its response to the Panel's questions, Turkey argues that USDOC did not rely on the October 2005 news article. Turkey's Responses to Panel Questions, para. 42. However, USDOC explicitly pointed to this particular evidence in its explanation of the parties' arguments, demonstrating that USDOC was aware of, and considered the underlying information. WLP Final I&D Memo, pp. 33-34, n. 186 (Exhibit TUR-122). Moreover, the Appellate Body has previously found that an agency is not required to cite or discuss every piece of supporting record evidence for each fact in the final determination. *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 164.
[198] *US –Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

and liquidation; the presence of OYAK and TPA officials on Erdemir's Board of Directors; and the alignment of Erdemir's stated corporate objectives and conduct, as highlighted in its 2012 and 2013 Annual Reports, with the GOT's macroeconomic policies.[199]

105. Turkey claims that USDOC's public body determinations concerning Erdemir and Isdemir are inconsistent with Article 1.1(a)(1) because USDOC "refused to consider evidence regarding their commercial conduct."[200] Specifically, Turkey points to evidence that Erdemir is a publicly-traded company subject to certain audit and disclosure requirements, with 47.63% of its shares owned by private entities; that "[a]ll of Erdemir's executive officers and senior management are selected based on their professional expertise;" and that Erdemir "has an established corporate governance framework, with guidelines for its board and executive officers to make commercial and investment decisions based on profit-maximizing considerations."[201] Further, Turkey argues that there is no government involvement in Erdemir's decision-making process with regard to pricing of hot-rolled steel.[202]

106. Turkey's evidence is insufficient to support its claims for two reasons. First, Turkey errs in suggesting that evidence of commercial, profit-maximizing behavior precludes a finding that an entity is controlled by the government. To the contrary, while such evidence may be relevant to an investigating authority's determination, nothing in Article 1.1 suggests that, where meaningful control by the government is otherwise demonstrated, a public body cannot also exhibit commercial behavior. Second, Turkey's arguments that the GOT is not involved in financial decision-making is simply not accurate. As explained below, the GOT has a significant presence on the Board of Directors of Erdemir, and approves the selection of senior managers, allowing it to influence, and to participate in, key decision-making processes.

107. First, nothing in Article 1.1(a)(1) suggests that the existence of 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.[203]

108. Turkey argues that "evidence of an entity's corporate governance framework, policies and procedures that make it accountable to shareholders or members and require it to pursue commercial, profit-maximizing strategies, and external audit requirements are highly relevant to whether that entity is a public body."[204] Further, Turkey contends that "evidence of an entity's

[199] United States' First Written Submission, paras. 102-106.
[200] Turkey's Responses to Panel Questions, paras. 62-68.
[201] Turkey's Responses to Panel Questions, para. 67.
[202] Turkey's Responses to Panel Questions, para. 50.
[203] *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.").
[204] Turkey's Responses to Panel Questions, para. 65.

structure, including its organization and internal policies and procedures that govern decision-making, is relevant to this inquiry."[205]

109. The United States agrees that such evidence may be relevant to an investigating authority's analysis. However, as explained in previous submissions,[206] Turkey appears to equate a company exhibiting commercial, profit-maximizing behavior with a company operating independently and/or autonomously from the government.[207] It is not the case, however, that either a government, or a government-controlled entity, cannot act in a commercial manner.

110. In this respect, the United States recalls that the determination of a public body in the context of financial contribution is separate from the determination of whether a specific subsidy may confer a benefit.[208] It is in the context of a benefit analysis that an investigating authority would consider whether the financial contribution in question is provided consistent with market principles.[209] To graft consideration of whether a financial contribution is provided consistent with market principles onto the determination of the existence of a financial contribution would make redundant the provisions of the SCM Agreement governing benefit.[210]

111. Moreover, when viewed in light of the totality of the evidence, as USDOC did, the information cited by Turkey purporting to show "commercial conduct" does not undermine USDOC's finding that GOT meaningfully controlled Erdemir and Isdemir.

112. For instance, Turkey raises the fact that Erdemir is a publicly traded company subject to certain audit and disclosure requirements and that 47.63% of its shares are owned by private entities.[211] However, USDOC also found that OYAK, through its wholly-owned holding company, Ataer Holding A.S., owns a 49.93% stake in Erdemir, making it the majority owner of Erdemir's outstanding shares.[212] With respect to any audit and disclosure requirements, Turkey itself acknowledges that such a fact would not, in and of itself, contradict USDOC's public body finding.[213] And Turkey has provided no additional evidence or explanation to demonstrate that

---

[205] Turkey's Responses to Panel Questions, para. 64.
[206] United States' Responses to Panel Questions, para. 84.
[207] *See, e.g.*, Turkey's First Written Submission, paras. 153-165.
[208] This reasoning is consistent with prior Appellate Body and panel reports, where they have recognized that financial contribution and benefit are independent concepts. *See Korea – Commercial Vessels (Panel)*, para. 7.28; *US – Antidumping and Countervailing Measures (China) (Panel)*, para. 9.29 (citing *Brazil – Aircraft* (*AB*), para. 157)).
[209] For example, Article 14(d) of the SCM Agreement specifies that: "the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to *prevailing market conditions* for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)" (emphasis added).
[210] 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.
[211] Turkey's Responses to Panel Questions, para. 67.
[212] *See* OCTG Final I&D Memo, p. 20 n. 145 (Exhibit TUR-85).
[213] Turkey's Responses to Panel Questions, para. 68.

compliance with the requirements to which Turkey refers somehow reflects behavior free of government influence.

113. In addition, Turkey's claims that "[a]ll of Erdemir's executive officers and senior management are selected based on their professional expertise" is similarly contradicted by other record evidence.[214] In fact, the same evidence on which Turkey relies also makes clear that the "[d]ecision on appointment of senior managers is up to the Board of Directors."[215] As USDOC determined, both OYAK and the TPA are present on Erdemir's Board of Directors,[216] and OYAK "effectively decides the composition of the majority of Erdemir's board through its majority shareholder voting rights in Erdemir."[217] That high-level managers may also be selected based on their "professional expertise" does not rebut these findings.

114. And finally, with respect to Turkey's arguments that Erdemir's corporate governance framework contains guidelines for the Board and executive officers to make commercial and investment decisions based on profit-maximizing considerations,[218] and that Erdemir's pricing, production, and financial decisions are made independently from the GOT,[219] Turkey's evidence again fails to show that Erdemir is "independent" from the government. First, as discussed by the United States in its response to the Panel's questions, Erdemir's Annual Reports include numerous statements that indicate clearly that Erdemir acted pursuant to state-crafted economic policy, *i.e.*, not consistent with the scope of activities typical of a private, profit-maximizing firm.[220] Second, the specific decision-making processes outlined by Turkey in its response to Panel questions again either involve the Board of Directors, or are conducted by senior managers chosen by the Board.[221] As detailed above, Erdemir's Board of Directors includes officials from OYAK and the TPA, and OYAK's majority share-holding allows it to determine the majority of the Board's composition. Erdemir's Articles of Association also provide that its "business and management is governed by the Board of Directors."[222] Accordingly, Turkey also has not demonstrated Erdemir's independence from the GOT based on its financial decision-making processes, including with respect to pricing and production.

115. In contrast, USDOC's determinations that the GOT can impact Erdemir's operations and that Erdemir has acted pursuant to the GOT's policies were firmly grounded in the record

[214] Turkey's Responses to Panel Questions, para. 67.
[215] HWRP GOT Questionnaire Response, Ex. 8, "Input Producer Appendix," p. 11 (Exhibit TUR-26).
[216] 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).
[217] OCTG Final I&D Memo, p. 22 (Exhibit TUR-85).
[218] Turkey's Responses to Panel Questions, para. 67.
[219] Turkey's Responses to Panel Questions, para. 67.
[220] Unites States' Responses to Panel Questions, para. 89.
[221] Turkey's Responses to Panel Questions, para. 67.
[222] Erdemir Articles of Association, Article 10 (Exhibit USA-8).

evidence before USDOC.[223] First, USDOC discussed that "OYAK effectively decides the composition of the majority of Erdemir's board through its majority shareholder voting rights in Erdemir."[224] Specifically, USDOC explained that Erdemir's Annual Report states, "[e]ach shareholder or the representative of the shareholder attending…Ordinary or…Extraordinary General Assembly Meetings shall have one voting right for each share."[225] 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."[226] As a result, USDOC determined that OYAK controls the selection of Erdemir's board.[227] Likewise, in the CWP, HWRP, and WLP determinations,[228] USDOC similarly considered Erdemir's Articles of Association which state that "[e]ach share has only one voting right,"[229] and that the "Board of Directors consists of minimum 5 and maximum 9 members to be selected by the General Assembly of Shareholders."[230]

116. USDOC examined Erdemir's Annual Reports, which state that OYAK and the TPA both maintain members on Erdemir's Board of Directors.[231] 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.[232] 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.[233]

[223] United States' First Written Submission, paras. 100-106; United States' Responses to Panel Questions, paras. 87-89.
[224] United States' First Written Submission, para. 104; OCTG Final I&D Memo, p. 22 (Exhibit TUR-85).
[225] United States' First Written Submission, para. 104; OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).
[226] United States' First Written Submission, para. 104; OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).
[227] United States' First Written Submission, para. 104; OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).
[228] 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).
[229] 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).
[230] 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).
[231] 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).
[232] Erdemir 2012 Annual Report (complete), pp. 54-55 (Exhibit USA-5).
[233] 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)).

117. In each of the challenged determinations, USDOC also cited the TPA's veto power over any decision related to the closure, sale, merger, or liquidation of Erdemir and Isdemir.[234] 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."[235] 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.[236] Although Turkey argues that the TPA never exercised its veto power,[237] as explained above, USDOC determined that Erdemir and Isdemir are structured in a manner that affords the GOT, through the TPA, an ability to determine critical aspects of Erdemir's and Isdemir's operations. Indeed, by the very provisions in their Articles of Association, Erdemir and Isdemir could not transfer their own resources without the GOT's approval.[238]

118. Moreover, as detailed in previous submissions,[239] 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 by this way strengthening macroeconomic stability in stable growth process."[240] 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."[241] In its response to the Panel's questions, the United States excerpted at length examples of language from Erdemir's 2012 and 2013 Annual Reports that demonstrated that Erdemir effectuates governmental interests.[242]

---

[234] 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).
[235] 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).
[236] 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).
[237] Turkey's Responses to Panel Questions, para. 50.
[238] 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).
[239] United States' First Written Submission, paras. 101-103; United States' Responses to Panel Questions, paras. 87-89.
[240] 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).
[241] OCTG Final I&D Memo, p. 21 n. 160 (TUR-85); Medium Term Programme, p.23 (Exhibit USA-6).
[242] United States' Responses to Panel Questions, para. 89.

119. Therefore, Turkey has failed to demonstrate that an objective and unbiased investigating authority, after examining the totality of the record evidence, could not have determined that the GOT exercised meaningful control over Erdemir and Isdemir, such that the two entities are public bodies within the meaning of Article 1.1(a)(1).[243]

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

120. As the United States has explained in its prior submissions,[244] Turkey's challenge under Article 12.7 of the SCM Agreement to USDOC's use of facts available in calculating subsidy rates in the OCTG, WLP, and HWRP investigations must fail. 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 companies' failure to cooperate. We address Turkey's claims with respect to each of these three investigations in turn.

1. USDOC's Application of Facts Available To Determine the Amount of the Benefit in the OCTG Investigation Was Fully Consistent With the SCM Agreement

121. As explained below and in the United States' previous submissions,[245] Turkey's claims with respect to USDOC's application of facts available in the OCTG investigation are without merit. In particular, Turkey asserts that USDOC's selection of facts available is inconsistent with Article 12.7 "because the USDOC failed to take 'due account' of the difficulties Borusan experienced in providing the requested information in drawing adverse inferences."[246] Turkey's argument is not supported by the text of Article 12.7, or the record evidence.

122. As the record shows, USDOC did in fact take into account Borusan's claimed difficulties in gathering data regarding its hot-rolled steel purchases.[247] 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.[248] 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.[249] Therefore, USDOC was

[243] *US –Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.
[244] United States' First Written Submission, Section IV.D; United States' Responses to Panel Questions, paras. 134-157.
[245] United States' First Written Submission, paras. 134-160; United States' Responses to Panel Questions, paras. 134-147; *see also* United States' Oral Statement, paras. 50-54.
[246] Turkey's Responses to Panel Questions, para. 84.
[247] United States' First Written Submission, paras. 148-152.
[248] United States' First Written Submission, paras. 137, 139, 151.
[249] United States' First Written Submission, paras. 151-152.

justified in finding that Borusan failed to cooperate with the investigation despite its claimed difficulties in collecting the necessary information.[250]

123. Due to Borusan's non-cooperation, necessary information pertaining to a subsidization determination was missing from the record. Article 12.7 permits an investigating authority to make determinations based on "facts available" in cases where an interested party "does not provide, necessary information within a reasonable period or significantly impedes the investigation." Moreover, as the Appellate Body has recognized, "non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact."[251] 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.

124. Turkey has suggested in response to the Panel's questions, that "USDOC should have considered whether Borusan's failure to provide requested information was attributable to resource constraints, rather than an intention to not cooperate . . . , and therefore whether it would have been reasonable to use the data which Borusan provided on its hot rolled steel purchases for the Gemlik mill to approximate the missing information or to ask Borusan to provide the missing information in a different form."[252] However, Turkey also has clarified that its claims relate only to USDOC's "selection" of facts available, and do not include either USDOC's decision to resort to the use of facts available or whether the information requested by USDOC was "necessary" within the meaning of Article 12.7.[253] In short, Turkey does not challenge USDOC's determination that Borusan failed to provide "necessary information," that this failure significantly impeded USDOC's investigation, and that the use of facts available was therefore warranted. Thus, it is undisputed that by failing to provide the requested information, Borusan hindered USDOC's ability to calculate the subsidy from the Provision of HRS for LTAR program.

125. And, as previously explained, Turkey has not demonstrated that 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.[254] No evidence on the record contradicted or raised questions about this price and quantity and their 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.

[250] United States' First Written Submission, para. 154.
[251] United States' First Written Submission, para. 154.
[252] Turkey's Responses to Panel Questions, para. 91.
[253] Turkey's Responses to Panel Questions, paras. 83-84.
[254] United States' First Written Submission, para. 155.

126. In support of its claim, Turkey makes a number of allegations and arguments that are unsupported by the record. For example, Turkey asserts that USDOC "did not acknowledge Borusan's explanations of the difficulties it faced in providing the requested information."[255] This is not correct. In requesting additional time to respond to the initial questionnaire, Borusan explained that "compiling a listing of all of its purchases" of HRS was "very time consuming" and "cannot be completed within the current deadline."[256] In response, USDOC determined that, "[g]iven the circumstances described in the request," it would grant a 12-day extension.[257] Thus, USDOC acknowledged Borusan's difficulties in gathering the requested data and made allowance for those difficulties by providing additional time to respond. Yet notwithstanding this additional time, Borusan chose not to provide data for its Halkali and Izmit facilities.[258]

127. Turkey also points to statements by Borusan that "its intention is to fully cooperate with the Department's investigation and to respond to all reasonable requests for information," and that "if the Department insists on full reporting of all [HRS] purchases for every facility then [Borusan] stands ready to provide that information with the understanding that it will require several weeks to do so."[259] The United States notes that Borusan's actions were inconsistent with those statements. USDOC's multiple requests for the HRS purchase data could leave no doubt that USDOC "insist[ed] on full reporting of all [HRS] purchases for every facility." Moreover, Borusan had already had "several weeks" – indeed, over 100 days – from the date of USDOC's initial request in which to compile the requested information, yet still failed to provide it. Finally, if Borusan were truly "ready to provide that information," it could have requested an extension of time in order to do so.

128. In light of the foregoing, Turkey's suggestion that "USDOC should have considered whether Borusan's failure to provide requested information was attributable to resource constraints, . . . and therefore whether it would have been reasonable to use the data which Borusan provided on its hot rolled steel purchases for the Gemlik mill to approximate the missing information or to ask Borusan to provide the missing information in a different form" is perplexing.[260] USDOC did consider Borusan's "resource constraints," including when it granted Borusan's extension of time to respond to the initial questionnaire. In addition, USDOC did use the data Borusan provided on its HRS purchases for the Gemlik mill to approximate the missing information for the Halkali and Izmit mills. In particular, USDOC used a price Borusan actually paid for HRS for the Gemlik mill, as well as the ratio of HRS purchased from Erdemir and Isdemir for the Gemlik mill, to approximate the missing purchase data for the other two facilities.[261] Finally, Turkey's suggestion that USDOC could have asked Borusan to provide the

[255] Turkey's Responses to Panel Questions, para. 89.
[256] Letter from Borusan to USDOC, "Oil Country Tubular Goods from Turkey, Case No. C-489-817: Extension Request" (September 10, 2013) (Exhibit USA-11).
[257] Letter from USDOC to Borusan, "Countervailing Duty Investigation: Certain Oil Country Tubular Goods from the Republic of Turkey" (September 10, 2013) (Exhibit USA-12).
[258] OCTG Borusan Initial Questionnaire Response at Responses, p. 11 (Exhibit TUR-53).
[259] Turkey's Responses to Panel Questions, para. 204.
[260] Turkey's Responses to Panel Questions, para. 91.
[261] United States' First Written Submission, para. 155.

missing information in a different form is pure speculation. Turkey has cited to no evidence that USDOC requested the data in a "form" that was problematic, or that a "different form" would have resolved Borusan's claimed difficulties.

129. Since Borusan "[did] not provide" necessary information "within a reasonable period," USDOC appropriately determined to apply facts available, consistent with Article 12.7.[262] Although Turkey challenges the facts available that USDOC applied, Turkey has failed to demonstrate that USDOC acted inconsistently with Article 12.7.

130. In particular, in its response to Panel questions, Turkey claims that USDOC acted inconsistently with Article 12.7 because it "relied on only a part of the evidence provided by Borusan – *e.g.*, only the lowest price on the record for the Gemlik mill's hot rolled steel purchases from Erdemir and Isdemir."[263] Turkey considers that "even a weighted average" of the prices paid for HRS at the Gemlik mill "might have been a more reasonable replacement" for the price of HRS purchased for the Halkali and Izmit mills."[264] Turkey also suggests that USDOC could have "reasonably estimated the quantity of hot rolled steel purchases of the Halkali and Izmit mills by reference to the quantity of hot rolled steel purchases of the Gemlik mill, for example in relation to each mill's production capacity."[265]

131. However, Turkey has failed to explain, much less provide evidence, that its suggested approaches would provide a more accurate determination of the missing purchase data than the method used by USDOC. As explained in the United States' previous submissions,[266] the price selected by USDOC was a price that Borusan had actually paid for HRS for the Gemlik mill. 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.

132. Likewise, the final quantities of HRS determined by USDOC was based on the actual production capacity of the Halkali and Izmit mills, as well as the ratio of HRS purchased from Erdemir and Isdemir for the Gemlik mill.[267] In fact, USDOC even *reduced* its initial calculation of these HRS quantities in order to arrive at a more accurate determination of the relevant subsidy rates.[268] Thus, the quantities selected were estimated "by reference to the quantity of hot rolled steel purchases of the Gemlik mill" and "in relation to each mill's production capacity," [269] and reflect a reasonable replacement for the data Borusan failed to provide.

[262] SCM Agreement, Art. 12.7.
[263] Turkey's Responses to Panel Questions, para. 94.
[264] Turkey's Responses to Panel Questions, para. 94.
[265] Turkey's Responses to Panel Questions, para. 94.
[266] United States' First Written Submission, para. 155; United States' Responses to Panel Questions, para. 145.
[267] United States' First Written Submission, para. 155.
[268] United States' First Written Submission, paras. 156-157.
[269] Turkey's Responses to Panel Questions, para. 94.

133. As the United States has previously explained, 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.[270] 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.[271]

134. In this case, USDOC selected a reasonable replacement for the missing information by relying on the HRS purchase data that Borusan had provided for its Gemlik facility, as well as data provided by Borusan regarding the respective production capacities of the Halkali and Izmit mills. Moreover, Turkey has pointed to no evidence on the record that contradicted or raised questions about this data or its reasonableness as a replacement for the missing information. Since an "unbiased and objective" investigating authority could have found the chosen HRS price and quantity data to be a reasonable replacement for the missing information, there is no basis for the Panel to overturn that assessment.

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

135. As explained below and in the United States' previous submissions,[272] Turkey's claims with respect to USDOC's application of facts available in the WLP investigation are without merit. In particular, Turkey asserts that USDOC's selection of facts available is inconsistent with Article 12.7 of the SCM Agreement because "USDOC drew adverse inferences to purposefully punish Borusan for its decision to not participate in verification" and because "USDOC failed to ensure that the facts selected were reasonable replacements for the allegedly missing 'necessary information'."[273] Turkey further 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."[274]

136. As discussed in the United States' request for a preliminary ruling, 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.[275] In addition, Turkey opted not to raise any substantive arguments in any of its submissions regarding USDOC's selection of facts available with respect to the Provision of

[270] United States' First Written Submission, paras. 131-132, 154; United States' Responses to Panel Questions, para. 152.
[271] *US –Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.
[272] United States' First Written Submission, paras. 161-181; *see also* United States' Oral Statement, paras. 55-59.
[273] Turkey's Responses to Panel Questions, para. 96.
[274] United States' First Written Submission, para. 175.
[275] United States' First Written Submission, paras. 30-31.

HRS for LTAR program.[276] Therefore, Turkey has not properly raised *any* claims under Article 12.7, and the Panel's analysis may therefore end here.[277]

137. We note that, in response to the Panel's written questions after the first Panel meeting, Turkey has dramatically expanded the scope of its arguments under Article 12.7 with respect to the WLP investigation.[278] While Turkey disputed the total subsidy rate calculated by USDOC for Borusan in its first written submission,[279] Turkey only included argumentation and evidence in that submission for two categories of subsidy programs: (1) programs for which USDOC was unable to identify above-zero rates calculated for the same or similar programs in prior Turkish countervailing proceedings, and (2) income tax reduction or elimination programs.[280] These two categories cover 13 of the programs at issue in the WLP proceeding. Now, Turkey attempts to belatedly challenge 14 of the 17 subsidy programs it failed to address in its first written submission. In particular, in response to Question 49, Turkey sets forth a bullet-point list individually challenging USDOC's application of facts available with respect to 27 of the subsidy programs at issue in the WLP investigation: the original 13 programs that it challenged in its first written submission, as well as 14 additional programs that have never previously been addressed by Turkey under Article 12.7.[281] In addition, Turkey challenges for the first time under Article 12.7 USDOC's application as facts available rates calculated for similar subsidy programs in prior Turkish countervailing duty proceedings with respect to nine of these 14 programs.[282]

---

[276] Turkey's First Written Submission, paras. 322-330; Turkey's First Written Submission, paras. 96-102; see also Turkey's Oral Statement, paras. 64-68.

[277] United States' First Written Submission, para. 161. In the interest of completeness, the United States responded in its First Written Submission to Turkey's arguments regarding (1) programs for which USDOC was unable to identify above-zero rates calculated for the same or similar programs in prior Turkish countervailing proceedings, and (2) income tax reduction or elimination programs. *See* United States' First Written Submission, paras. 178-181. These programs comprise the IEP – Customs Duty Exemption, IEP – VAT Exemption, Large-Scale Investment Incentives – VAT Exemption, Large-Scale Investment Incentives – Customs Duty Exemption, Strategic Investment Incentives – VAT Exemption, Strategic Investment Incentives – Customs Duty Exemption, Deductions from Taxable Income for Export Revenue, Incentives for Research and Development (R&D) Activities – Tax Breaks, Large Scale Investment Incentives – Tax Reductions, Large Scale Investment Incentives – Income Tax Withholdings, Strategic Investment Incentives – Tax Reductions, Strategic Investment Incentives – Income Tax Withholdings, and Law 5084: Withholding of Income Tax on Wage and Salaries.

[278] *Compare* Turkey's Response to Panel Questions, para. 100, *with* Turkey's First Written Submission, para. 327.

[279] Turkey's First Written Submission, paras. 325-326, 328.

[280] Turkey's First Written Submission, para. 327.

[281] Turkey's Responses to Panel Questions, para. 100. These 14 programs comprise the Provision of Land for LTAR, Law 5084: Energy Support, Post-Shipment Rediscount Credit Program, Law 6486: Social Security Premium Incentive, Provision of Lignite for LTAR, Export-Oriented Working Capital Program, Incentives for R&D Activities – Product Development R&D Support-UFT, Pre-Export Credits Program, Large Scale Investment Incentives – Social Security and Interest Support, Large Scale Investment Incentives – Land Allocation, Strategic Investment Incentives – Social Security and Interest Support, Strategic Investment Incentives Land Allocation, Export Insurance Provided by the Turk Eximbank, and Law 5084: Incentive for Employer's Share in Insurance Premiums. *See* WLP Final I&D Memo, pp. 5-6.

[282] Turkey's Responses to Panel Questions, para. 99. These nine programs comprise Export-Oriented Working Capital Program, Incentives for R&D Activities – Product Development R&D Support-UFT, Pre-Export Credits

138. The Panel should reject Turkey's attempt to challenge these 14 subsidy programs for the first time in response to a written question from the Panel.

139. It is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[283] Turkey, as the complaining party, thus bears the burden of demonstrating that USDOC's application of facts available is inconsistent with Article 12.7 of the SCM Agreement. Turkey must establish a *prima facie* case of inconsistency with Article 12.7 before the United States, as the defending party, has the burden of rebutting the claimed inconsistency with that provision.[284]

140. Even if Turkey had properly raised these claims in its panel request, it then failed to make a *prima facie* case either in its first written submission or in its arguments during the first Panel meeting that USDOC's application of facts available with respect to these 14 programs was inconsistent with Article 12.7. Therefore, Turkey should not be permitted to do so now at this late stage of the panel proceedings. Turkey's belated introduction of new arguments and evidence with respect to 14 subsidy programs is contrary to the Panel's Working Procedures and basic procedural fairness as it impairs the United States' ability to defend its interests. Turkey was well aware of these 14 programs at the time it filed its first written submission,[285] and (assuming it had properly raised these claims in its panel request) it could have included a substantive challenge of USDOC's application of facts available with respect to those programs in that submission. Instead, Turkey chose not include *any* argumentation or evidence regarding whether USDOC's application of facts available with respect to these programs was consistent with Article 12.7. In light of Turkey's failure to articulate its claims "promptly and clearly," the Panel should reject Turkey's attempt to bring such claims now.

141. Permitting Turkey to introduce new arguments or evidence with respect to the WTO-consistency of USDOC's determination at this late stage is also contrary to the Working Procedures adopted by the Panel. These procedures provide that "*[b]efore the first substantive meeting* of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and *its arguments*"[286] and that "[e]ach party shall submit *all evidence* to the Panel *no later than during the first substantive meeting*."[287] The first substantive meeting of the Panel is now over. The arguments and evidence Turkey seeks to rely on is not rebuttal evidence, nor evidence that clarifies an issue in response to a question. Nor has Turkey sought leave from the Panel to provide these arguments and evidence, together with an

---

Program, Large Scale Investment Incentives – Social Security and Interest Support, Large Scale Investment Incentives – Land Allocation, Strategic Investment Incentives – Social Security and Interest Support, Strategic Investment Incentives – Land Allocation, Export Insurance Provided By the Turk Eximbank, and Law 5084: Incentive for Employer's Share in Insurance Premiums.

[283] *US – Wool Shirts and Blouses (AB)*, p. 14.

[284] *EC – Hormones (AB)*, para. 109.

[285] Turkey's First Written Submission, para. 97 (challenging the total subsidy rate calculated by USDOC for Borusan, which includes the rates calculated for the 14 subsidy programs).

[286] Working Procedures of the Panel, para. 5.

[287] Working Procedures of the Panel, para. 7.

explanation for the circumstances justifying their late submission. Thus, because Turkey failed to timely submit any arguments or evidence with respect to the 14 subsidy programs prior to its responses to Panel questions *after* the first Panel meeting, Turkey's attempt to present such arguments and evidence at this time is contrary to the working procedures that govern this dispute.

142. Finally, the United States notes that for three of the subsidy programs at issue in the WLP proceeding – including the Provision of HRS for LTAR program – Turkey still has provided *no* substantive argumentation or analysis.[288] Although Turkey asserts that its claims under Article 12.7 with regard to the WLP investigation "relate[] to the USDOC's determination to apply facts available to Borusan in general, not with regard only to specific subsidy programs,"[289] Turkey has also clarified that its claims under Article 12.7 "relate[] specifically to the USDOC's *selection* of facts available"[290] – namely, USDOC's selection of facts available to calculate subsidy rates for each of the programs at issue.[291] Since Turkey's claims relate specifically to USDOC's selection of facts available – a necessarily program-specific determination – Turkey has failed to meet its burden of proof with respect to the three programs for which is has provided *no* substantive arguments regarding how USDOC's determination of a subsidy rate for those programs based on facts available is allegedly inconsistent with Article 12.7.

143. Moreover, as detailed in the United States' Preliminary Ruling Request, Turkey's panel request limited its claims under Article 12.7 with respect to the WLP investigation to the Provision of HRS for LTAR program only.[292] Therefore, any claims raised with respect to other programs examined in the WLP investigation fall outside the Panel's terms of reference. Since Turkey has opted not to raise *any* substantive arguments in any of its submissions with respect to the Provision of HRS for LTAR program, Turkey has not properly raised any claims under Article 12.7, and thus the Panel should not make any findings in relation to these claims.

144. For the foregoing reasons, the Panel should not reach any of Turkey's newly-raised arguments concerning the 14 subsidy programs. In the interest of completeness, however, the United States briefly comments on Turkey's newly-raised arguments and demonstrates that they lack any substantive merit.

145. First, Turkey claims that for those programs where no above zero rates were calculated for the other mandatory respondent, Toscelik, "USDOC selected the *highest* possible rates, *i.e.*, the *worst* information available, for any *similar* programs from prior investigations involving

[288] Turkey's First Written Submission, paras. 322-330; Turkey's Responses to Panel Questions, para. 100. These three programs comprise the Provision of HRS for LTAR program, Rediscount Program, and Exemption from Property Tax. *See* WLP Final I&D Memo, pp. 5-6.
[289] Turkey's Responses to Panel Questions, para. 102.
[290] Turkey's Responses to Panel Questions, para. 96 (emphasis added).
[291] Turkey's First Written Submission, paras. 322-330; Turkey's First Written Submission, paras. 96-102.
[292] *See* Section II.B.1, *supra*.

Turkey or for any programs from which Borusan could *conceivably* have benefited, for the specific purpose of punishing Borusan for its alleged non-cooperation."[293]

146. As an initial matter, the United States notes that Turkey has not identified the specific programs or findings with respect to which this argument is made. Moreover, as the United States has previously explained, 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 a reasonable replacement for missing information.[294] 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.[295]

147. Although Turkey appears to challenge USDOC's use of the "highest" possible rates, it has provided no argumentation or evidence that these rates are not a reasonable replacement for necessary information missing from the record. 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.[296] Moreover, Turkey has pointed to no verified evidence on the record that contradicts or raises questions about the subsidy rates that were applied as facts available.

148. Second, with respect to 27 programs,[297] Turkey claims that "USDOC also made no effort to evaluate the facts available to determine which facts could *reasonably* replace 'necessary information" that was actually missing from the record."[298] In particular, Turkey asserts that "while Borusan declined to participate in verification, the USDOC did verify the Government of Turkey's responses, which confirmed Borusan's own responses regarding its use or non-use of the investigated subsidy programs."[299] Turkey contends that USDOC nonetheless "ignored the facts that were available based on the Government of Turkey's verified responses" and instead applied its standard methodology to all investigated programs, "purposefully selecting the *worst* information available in doing so."[300]

149. Turkey's assertions are again not supported by the record evidence. Because Borusan refused to participate in verification, USDOC did not verify the Government of Turkey's

[293] Turkey's Responses to Panel Questions, para. 99.
[294] United States' First Written Submission, paras. 131-132, 154; United States' Responses to Panel Questions, para. 152.
[295] *US –Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.
[296] United States' Responses to Panel Questions, para. 152.
[297] *See* para. 137, *supra*.
[298] Turkey's Responses to Panel Questions, para. 100.
[299] Turkey's Responses to Panel Questions, para. 100.
[300] Turkey's Responses to Panel Questions, para. 100.

responses with respect to Borusan.[301] USDOC's verification of the Government of Turkey was directed entirely to the administration of the alleged subsidy programs and to the subsidy benefits received by the other mandatory respondent in the proceeding, Toscelik.[302] Thus, there was no verified evidence on the record with respect to Borusan's usage of the investigated subsidy programs and the benefits it had received, and USDOC appropriately turned to facts available – including calculated subsidy rates from the same and prior Turkish countervailing duty proceedings – to replace the information that was missing.

150. Third, Turkey's response to Panel Question 49 includes new, program-specific argumentation regarding USDOC's application of facts available with respect to 27 of the individual subsidy programs at issue in the WLP proceeding.[303] However, Turkey's references mischaracterize the Government of Turkey's questionnaire response regarding certain subsidy programs or fail to mention key pieces of information with respect to USDOC's selection of facts available to replace missing necessary information.

151. For example, with respect to the Income Tax Programs, Turkey argues that "[t]he only one of seven income tax programs that the USDOC preliminarily found Borusan used was the Deduction from Taxable Income for Export Revenue, calculating a 0.20 percent, *i.e.*, *de minimis* rate."[304] In doing so, Turkey appears to suggest that USDOC should have used this rate in its final determination for all seven income tax programs. However, USDOC's preliminary determination was based on Borusan's questionnaire responses.[305] Due to Borusan's refusal to participate in verification, USDOC was unable to verify any of the information Borusan provided in its questionnaire responses, including both the 0.20 percent rate for the Deduction from Taxable Income for Export Revenue and Borusan's claimed non-use of the other six income tax programs.[306] The alleged 0.20 percent rate also could not be confirmed during the verification of the Government of Turkey. When USDOC asked the Government of Turkey to identify all instances in which assistance under the Deduction from Taxable Income for Export Revenue was provided to the respondent companies, the Government of Turkey directed USDOC to obtain the requested information from the respondent companies, because no record was kept by the Government.[307] Thus, in the absence of verified information on the record, USDOC appropriately applied facts available.

152. With respect to five additional programs – Provision of Land for LTAR, Law 5084: Energy Support, Post-Shipment Rediscount Credit Program, Export-Oriented Working Capital Program, and Export Insurance Provided by the Turk Eximbank – the Government of Turkey

[301] Memorandum from USDOC, "Verification of the Questionnaire Responses of the Government of Turkey (GOT)," (June 18, 2015) ("WLP Verification of GOT Questionnaire Responses") (Exhibit USA-46) (containing no references to Borusan).
[302] *See* WLP Verification of GOT Questionnaire Responses (Exhibit USA-46).
[303] Turkey's Responses to Panel Questions, para. 100.
[304] Turkey's Responses to Panel Questions, para. 100.
[305] "Decision Memorandum for the Affirmative Preliminary Determination in the Countervailing Duty Investigation of Welded Line Pipe from the Republic of Turkey," p. 11 (Mar. 16, 2015) (Exhibit USA-47).
[306] WLP Final I&D Memo, p. 4 (Exhibit TUR-122).
[307] WLP GOT Questionnaire Response, at III-75 (Exhibit TUR-167).

indicated that Toscelik received benefits from each program, but did not specifically state that Borusan *did not* benefit from these programs.[308] Thus, even if USDOC had attempted to verify information provided by the Government of Turkey with respect to Borusan, despite Borusan's refusal to participate in verification, there would have been no verified evidence on the record with respect to Borusan's use or non-use of these programs. USDOC therefore appropriately turned to facts available – including subsidy rates calculated for Toscelik for the same programs in the same proceeding – to replace the information that was missing.

153. Fourth, Turkey claims that USDOC's resulting subsidy determination "cannot be described as 'accurate' because there is no connection between the allegedly missing 'necessary information' and the rates selected by the USDOC as 'facts available.'"[309] However, Turkey has pointed to no evidence on the record to suggest that the rates chosen by USDOC were not accurate, or that other information on the record would have been more appropriate for use because it was more accurate. And in fact, for each subsidy program, USDOC's calculation of the subsidy rates was based on information provided by cooperating companies in the same or other Turkish countervailing duty investigations. USDOC looked first to whether an above-zero rate was calculated for the same program for Borusan's fellow respondent in the WLP proceeding, Toscelik.[310] If not, USDOC searched in turn for any above-zero rates calculated for the same or similar program in prior Turkish countervailing duty proceedings.[311] If no such rates could be identified, USDOC finally searched other Turkish countervailing duty proceedings for a subsidy program that Borusan could have conceivably benefited from.[312] The chosen rates reflect the actual subsidy practices of the Turkish government as reflected in the actual experiences of companies in Turkey, including Borusan's fellow respondent in the WLP investigation, and thus serve as a "reasonable replacement" for information that was missing from the record.[313]

154. Turkey has therefore failed to demonstrate that USDOC's application of facts available is inconsistent with Article 12.7.

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

155. As explained below and in the United States' previous submissions,[314] Turkey's claims with respect to USDOC's application of facts available in the HWRP investigation are without merit. In particular, Turkey asserts that USDOC's selection of facts available is inconsistent

[308] WLP GOT Questionnaire Response, at III-27, III-75, III-27, III-92, III-101-102 (Exhibit TUR-167).
[309] Turkey's Responses to Panel Questions, para. 101.
[310] WLP Final I&D Memo, pp. 4-5 (Exhibit TUR-122).
[311] WLP Final I&D Memo, pp. 4, 6 (Exhibit TUR-122).
[312] WLP Final I&D Memo, pp. 4, 7 (Exhibit TUR-122).
[313] *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.
[314] United States' First Written Submission, paras. 188-202; United States' Responses to Panel Questions, paras. 153-158; *see also* United States' Oral Statement, paras. 60-62.

with Article 12.7 of the SCM Agreement because "USDOC drew adverse inferences to purposefully punish MMZ and Ozdemir for failing to report their receipt of certain subsidies" and because "USDOC failed to ensure that the facts selected were reasonable replacements for the allegedly missing 'necessary information'."[315]

156. However, as the United States has previously detailed,[316] Turkey's arguments are unsupported by the evidence and fail to demonstrate an inconsistency with Article 12.7.

157. With respect to USDOC's selection of facts available for the Deduction from Taxable Income for Export Revenue ("Deduction from Taxable Income") program, Turkey alleged in its first written submission that "USDOC selected countervailable subsidy rates for *similar* programs from *other* Turkish countervailing duty proceedings" for the three programs at issue.[317] In fact, the rate USDOC selected for this program is the *same* rate that USDOC calculated for Ozdemir for the *same* program in the *same* proceeding.[318] By "reasonably replac[ing]" information that MMZ had failed to provide with actual data submitted by its fellow respondent in the same investigation, USDOC sought to "arriv[e] at an accurate determination,"[319] consistent with Article 12.7.

158. With respect to the remaining programs – Provision of Electricity for LTAR and Exemption from Property Tax – USDOC was unable to find a rate for the same programs in either the HWRP proceeding or prior proceedings,[320] and therefore turned to "facts available" for similar subsidy programs.[321] Specifically, USDOC matched the Provision of Electricity for LTAR and Exemption from Property Tax programs to similar programs "based on program type and treatment of the benefit" from other Turkish countervailing duty proceedings.[322]

159. Therefore, because the subsidy rate calculated for each of the three HWRP programs challenged by Turkey was on a par with identical or similar subsidy programs, these rates were not punitive, but instead provided a reasonable estimate of the level of subsidization provided by the government, that an objective and unbiased investigative authority could have determined to use, as USDOC did.[323]

E. Turkey's Challenges to USDOC's Specificity Determinations Under Articles 2.1(c) and 2.4 Are Without Merit

[315] Turkey's Responses to Panel Questions, para. 111.
[316] United States' First Written Submission, paras. 188-202; United States' Responses to Panel Questions, paras. 153-158; *see also* United States' Oral Statement, paras. 60-62.
[317] Turkey's First Written Submission, para. 436 (emphasis added).
[318] United States' First Written Submission, para. 201.
[319] United States' First Written Submission, para. 201 (citing *US – Carbon Steel (India) (AB)*, para. 4.426).
[320] United States' First Written Submission, para. 202.
[321] United States' First Written Submission, para. 202.
[322] United States' First Written Submission, para. 202.
[323] *US –Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

160. As explained in the United States' first written submission, in the determinations at issue, USDOC properly determined the HRS for LTAR subsidy program to be *de facto* specific consistent with Articles 2.1(c) and 2.4 of the SCM Agreement.[324] Turkey does not dispute USDOC's finding that the HRS for LTAR subsidy program was "use{d} . . . by a limited number of certain enterprises."[325] Instead, Turkey argues that USDOC did not establish the existence of the HRS for LTAR subsidy program and that it failed to take account of the two factors set out in the final sentence of Article 2.1(c) of the SCM Agreement.[326] These claims, however, continue to be without merit.

161. Article 2.1(c) establishes that, "notwithstanding any appearance of non-specificity" resulting from application of subparagraphs (a) and (b), a subsidy may nevertheless be "in fact" specific. Application of Article 2.1(c) is a fact-driven, context-dependent exercise. In conducting its analysis under Article 2.1(c), an investigating authority "may" consider "other factors" – *i.e.*, the four factors set out in the second sentence of Article 2.1(c): use of a subsidy program by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. An authority need not examine all four factors when conducting its analysis.[327] The third sentence of Article 2.1(c) sets out two additional considerations to be taken into account when conducting a *de facto* specificity analysis: the "extent of diversification of economic activities within the jurisdiction of the granting authority" and the "length of time during which the subsidy programme has been in operation."

162. As the panel observed in *US – Countervailing Measures on Certain Products from China*, Article 2.1(c) "reflects the diversity of facts and circumstances that investigating authorities may be confronted with when analysing subsidies covered by the SCM Agreement."[328] Article 2.1(c) "concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise."[329]

163. The analysis in Article 2.1 is informed by the obligation contained within Article 2.4. Article 2.4 provides that any specificity determination "shall be clearly substantiated on the basis of positive evidence." Therefore, in analyzing Turkey's claim, the Panel should consider "the evidence relied upon, and the conclusion drawn therefrom, by USDOC, as well as the arguments raised both during the investigation and before [it] concerning the evidence."[330]

---

[324] United States' First Written Submission, paras. 220-236.
[325] Article 2.1(c), SCM Agreement.
[326] Turkey's First Written Submission, paras. 216-219, 334-337, 447-450, 548-551.
[327] *US – Softwood Lumber IV (Panel)*, para. 7.123; *see also id.*, para. 7.124.
[328] *US – Countervailing Measures (China) (Panel)*, para. 7.240.
[329] *US – Countervailing Measures (China) (Panel)*, para. 7.252.
[330] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.50.

164. As explained in prior submissions and below,[331] contrary to Turkey's claims, USDOC identified the HRS for LTAR subsidy program, and took into account the extent of diversification of economic activities within Turkey and the length of time during which the HRS for LTAR subsidy program had been in operation, consistent with Article 2.1(c) of the SCM Agreement. Moreover, the United States has also demonstrated that Turkey has failed to establish a *prima facie* case that USDOC's determinations are inconsistent with the final sentence of Article 2.1(c) of the SCM Agreement.[332] As the United States explains below, these conclusions have been made only more apparent since the United States' first written submission.

1. Turkey's Arguments Regarding The Existence Of A Subsidy Program Are Without Merit And Mischaracterize USDOC's Determinations

165. As previously detailed, in the determinations at issue, USDOC established the existence of the HRS for LTAR subsidy program.[333] The HRS for LTAR subsidy program was first identified to USDOC by the U.S. domestic industries in their petitions.[334] USDOC reviewed the accuracy and adequacy of the evidence provided by petitioners to substantiate these claims and determined that the evidence warranted the initiation of an investigation.[335] Thereafter, in each proceeding USDOC identified the program in the preliminary determination,[336] gave all interested parties the opportunity to comment, and ultimately issued a final determination with respect to the program in each proceeding.[337]

166. Specifically, USDOC in each proceeding explained that statements in Erdemir's Annual Report aligned with the GOT's Medium Term Programme, which had a stated objective to "decrease high dependency of production and exports on imports" through "policies and supports

[331] United States' First Written Submission, paras. 220-236; United States' Responses to Panel Questions, paras. 126-133.
[332] United States' First Written Submission, para. 231; United States' Responses to Panel Questions, paras. 120-124.
[333] United States' First Written Submission, paras. 223-230.
[334] United States' First Written Submission, para. 225. *See also* OCTG Petition, Vol. X, p. 11 (Exhibit TUR-74); WLP Petition, Volume III, p. 4-5 (Exhibit USA-9); HWRP Petition, Volume V, p. 5 (Exhibit USA-17); Letter from Petitioner, "Administrative Review of Countervailing Duty Order on Certain Welded Carbon Steel Pipe and Tube from Turkey: New Subsides Allegation" (August 27, 2014) ("CWP New Subsidy Allegation"), pp. 3-4 (Exhibit USA-33)).
[335] United States' First Written Submission, para. 225. *See also* OCTG Initiation Checklist, p. 8 (Exhibit TUR-71); WLP Initiation Checklist, p. 8 (Exhibit TUR-115); HWRP Initiation Checklist, p. 8 (Exhibit TUR-37); CWP New Subsidy Allegation Memorandum, p. 2 (Exhibit USA-21)).
[336] United States' First Written Submission, para. 226. *See also* OCTG Post-Preliminary Analysis Memorandum for Borusan, p. 7 (Exhibit TUR-75); OCTG Post-Preliminary Analysis Memorandum for Toscelik, p. 6. (Exhibit TUR-76).
[337] United States' First Written Submission, para. 226. *See also* OCTG Final I&D Memo, pp. 21-22, 49 (Exhibit TUR-85); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); CWP Final I&D Memo, pp. 9-10 (Exhibit TUR-22); WLP Final I&D Memo, pp.14-15 (Exhibit TUR-122).

enhancing domestic production capacity."[338] USDOC therefore explained that the record evidence established that Erdemir and Isdemir had provided HRS for LTAR in accordance with the GOT's policies promoting export-oriented production.[339] Under this framework, USDOC then examined information submitted by the Turkish respondents, who provided USDOC with a complete transaction-specific accounting of the provision of HRS, that is, *a series of transactions* for the provision of HRS for LTAR.[340] USDOC, in the determinations at issue, thus established the existence of the HRS for LTAR subsidy program by relying on record evidence demonstrating that Erdemir and Isdemir had repeatedly provided HRS for LTAR in accordance with the GOT's policies promoting export-oriented production to find "a systematic series of actions pursuant to which financial contributions that confer a benefit ha[d] been provided to certain enterprises."[341]

167. Turkey has therefore confused the inquiry by claiming that "the United States argues that a 'series of transactions for the provision of [hot rolled steel] for [less than adequate remuneration]' is sufficient to demonstrate a subsidy 'plan' or scheme.'"[342] Turkey also argues that because USDOC relies on a list of transactions, "under the United States' approach, the very existence of a subsidy program could depend entirely on the benchmark price – the higher the benchmark price, the more transactions will fall below it, and therefore the more 'systematic' the transactions will appear."[343]

168. As the United States' previous submissions explain, however, USDOC's determinations were based on *both* the transaction-specific accountings of the provision of HRS for LTAR provided by the respondent parties *and* statements in Erdemir's 2012 and 2013 Annual Reports indicating that its actions furthered the promotion of export-oriented production consistent with GOT policy as set out in Turkey's 2012-2014 Medium Term Programme.[344] It is these two findings *in conjunction* – the repeated provision of HRS for LTAR, and its provision in

[338] United States' First Written Submission, paras. 227-229. *See also* 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); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* Medium Term Programme, p. 12 (Exhibit USA-6).
[339] United States' First Written Submission, paras. 227-229. *See also* OCTG Final I&D Memo, pp. 21-22, 49 (Exhibit TUR-85); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); CWP Final I&D Memo, pp. 9-10 (Exhibit TUR-22); WLP Final I&D Memo, pp.14-15 (Exhibit TUR-122).
[340] United States' First Written Submission, paras. 227-230. *See also* 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 Borusan 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).
[341] *US – Countervailing Measures (China) (AB)*, para. 4.141.
[342] Turkey's Responses to Panel Questions, para. 78.
[343] Turkey's Responses to Panel Questions, para. 82.
[344] United States' First Written Submission, paras. 223-230; United States' Responses to Panel Questions, paras. 130-133.

accordance with stated GOT policy – that form the basis of the USDOC's determinations.[345] Thus, Turkey's arguments that USDOC relied only on a list of transactions to demonstrate the existence of a subsidy program are misplaced.[346]

2. Turkey's Claims Concerning the Specificity Factors In Article 2.1(c) Are Also Without Merit

169. Next, as explained in previous submissions, in the determinations at issue, USDOC took account of the extent of diversification of economic activities within Turkey and the length of time during which the HRS subsidy program had been in operation, consistent with the final sentence of Article 2.1(c) of the SCM Agreement.[347]

170. 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 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.[348] 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.

171. 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."[349] Indeed, panels have upheld determinations by investigating authorities where these factors were taken into account implicitly.[350]

172. As previously explained, in raising a claim under Article 2.1(c), 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.[351] Turkey acknowledges that an investigating authority need not take the factors identified in the final sentence of Article 2.1(c) into account

---

[345] United States' First Written Submission, paras. 225-330; United States' Responses to Panel Questions, paras. 130-133.

[346] Turkey's Responses to Panel Questions, paras. 77-82. In addition, Turkey reliance on the Appellate Body's statement in *US – Countervailing Measures (China)* that "{t}he mere fact that financial contributions have been provide to certain enterprises is not sufficient . . . to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement" is inapposite. *See* Turkey's Responses to Panel Questions, para. 78 (citing *US – Countervailing Measures (China) (AB)*, para. 4.143).

[347] United States' First Written Submission, paras. 232-236; United States' Response to Panel Questions, paras. 126-129.

[348] *US – Countervailing Measures (China) (Panel)*, para. 7.251.

[349] *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).

[350] *US – Softwood Lumber IV (Panel)*, para. 7.124; *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.229.

[351] United States' Responses to Panel Questions, paras. 120-124.

explicitly.[352] However, Turkey points to nothing in the record to support its claims other than the fact that the factors were not specifically addressed in USDOC's determinations. Specifically, in its first written submission, Turkey merely asserts that "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."[353] Beyond this one sentence, Turkey provides nothing further to substantiate this assertion.

173. Turkey has therefore failed to establish a *prima facie* case that USDOC failed to take the factors into account. And as explained in response to the Panel's questions, USDOC's consideration of both factors *is* reflected in its determinations.[354]

174. With respect to the length of time factor, as the United States explained in its previous submission,[355] 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,"[356] as well as evidence that Erdemir has been in existence since 1960 and Isdemir has been in existence since 1970.[357] 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 comparison to data for past years.[358] 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 determinations.

175. With respect to the extent of diversification factor, USDOC took into account this factor when it considered and discussed the Medium Term Programme and Erdemir's 2012 and 2013 Annual Reports, which reflected the publicly known fact of Turkey's highly diversified economy. As previously detailed,[359] the Medium Term Programme discusses the placement of

---

[352] 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).
[353] Turkey's First Written Submission, paras. 219, 337, 450, 551.
[354] United States' Responses to Panel Questions, paras. 126-129 (demonstrating how USDOC implicitly considered these factors).
[355] United States' First Written Submission, para. 234; United States' Responses to Panel Questions, para. 126.
[356] United States' Response to Panel Questions, para. 126. *See also* Erdemir's 2013 Annual Report (complete), p. 5 (Exhibit USA-7).
[357] United States' Responses to Panel Questions, para. 126. *See also* Erdemir's 2013 Annual Report (complete), p. 2 (Exhibit USA-7); Erdemir's 2012 Annual Report (complete), p. 8 (Exhibit USA-8).
[358] United States' Responses to Panel Questions, para. 126. *See also* 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).
[359] United States' Responses to Panel Questions, paras. 127-129.

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."[360] 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."[361] Erdemir's 2012 and 2013 Annual Reports likewise identify Turkey as the eighth largest steel producer in the world, with a production capacity of 35.9 million tons in 2012 and 34.7 million tons in 2013.[362] It also stated that the Turkish economy expanded more than 3% in 2013, despite the global crisis,[363] and that Turkey's manufacturing exports grew by 4.6% in 2013.[364] 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 determinations.

176. The lack of any explicit findings with respect to the two factors is both reasonable and appropriate where, as here, none of the parties to the countervailing duty proceedings ever argued or suggested that the factors had any bearing on the facts at issue.[365] This is also relevant to the Panel's assessment, as it reaffirms the United States' position that there were no facts on the record indicating that the extent of diversification of economic activities within Turkey or the

[360] United States' Responses to Panel Questions, paras. 127-129. *See also* 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).

[361] United States' Responses to Panel Questions, paras. 127-129. *See also* 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).

[362] United States' Responses to Panel Questions, paras. 127-129. *See also* 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).

[363] United States' Responses to Panel Questions, paras. 127-129. *See also* 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).

[364] United States' Responses to Panel Questions, paras. 127-129. *See also* 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).

[365] United States' First Written Submission, para. 233; United States' Responses to Panel Questions, para. 125. *See also 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.").

length of time during which the HRS for LTAR subsidy program had been in operation could call into question the soundness of USDOC's specificity findings.

177. Thus, Turkey has failed to demonstrate that USDOC failed to take into account the extent of diversification of economic activities within Turkey or the length of time during which the HRS for LTAR subsidy program had been in operation, and the Panel should reject Turkey's claims under Article 2.1(c) of the SCM Agreement accordingly.

F. Turkey's Claims Regarding Cumulation in the Context of Original Investigations Under Article 15.3 of the SCM Agreement Must Fail

178. 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.[366] 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.[367]

179. As detailed in the United States' prior submissions, Turkey's claims have no merit.[368] 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's "As Such" Challenge Fails Because It Has Not Established The Existence of a Rule or Norm of General and Prospective Application

180. Turkey has challenged USITC's alleged practice of cumulating dumped and subsidized imports in original investigations as a rule or norm of general and prospective application.[369] 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 party.[370] 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.[371]

181. Turkey's showing with respect to USITC's alleged "practice" in original investigations has fallen far short of its burden. In support of its claim, Turkey's first written submission pointed to the three original injury determinations at issue in this dispute.[372] However, as the United States explained in detail in its previous submissions to the Panel,[373] the fact that USITC

[366] Turkey's First Written Submission, paras. 222, 340, 453.
[367] Turkey's First Written Submission, paras. 222, 340, 453.
[368] United States' First Written Submission, Section IV.F; United States' Responses to Panel Questions, paras. 159-169; *see also* United States' Oral Statement, paras. 63-77.
[369] Turkey's First Written Submission, para. 224; Turkey's Responses to Panel Questions, para. 113.
[370] United States' First Written Submission, para. 242 (citing *US – Zeroing (EC) (AB)*, para. 196).
[371] United States' First Written Submission, para. 242 (citing *US – Zeroing (EC) (AB)*, para. 198).
[372] Turkey's First Written Submission, paras. 223, 343, 456 (citations omitted).
[373] United States' First Written Submission, para. 246; *see also* United States' Oral Statement, para. 31.

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.[374] Moreover, 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."[375]

182. In light of the United States' arguments, Turkey in its responses to Panel questions presents an additional 36 USITC injury determinations which it argues "provide further evidence of the existence of the ITC's cross-cumulation practice in investigations."[376] The Panel should reject Turkey's evidence because it is both untimely and unpersuasive.

183. As the complaining party bringing forward a claim relating to an alleged "practice", Turkey bears the burden of demonstrating that USDOC has such a "practice" of cumulating subsidized imports and non-subsidized imports. Having failed to make out its affirmative case in its first written submission, or even during the first Panel meeting, that such a "practice" exists, Turkey should not be permitted to make such a case now, at this late stage of the panel proceedings.

184. Permitting Turkey to introduce new evidence with respect to the WTO-consistency of USDOC's determination at this late stage is contrary to the Working Procedures adopted by the Panel. These procedures provide that "*[b]efore the first substantive meeting* of the Panel with the parties, each party shall submit a written submission in which its presents *the facts of the case* and its arguments"[377] and that "[e]ach party shall submit *all evidence* to the Panel *no later than during the first substantive meeting*."[378] The first substantive meeting of the Panel is now over. The evidence Turkey seeks to rely on is not rebuttal evidence, nor evidence that clarifies an issue in response to a question. Nor has Turkey sought leave from the Panel to provide this evidence, together with an explanation for the circumstances justifying its late submission. Thus, because Turkey failed to timely submit evidence demonstrating the existence of USITC's alleged "practice," any attempt to present such evidence at this time would be contrary to the working procedures that govern this dispute.

185. Turkey's belated attempt to introduce new evidence it views as essential to its affirmative case is also contrary to procedural fairness and the orderly resolution of this dispute. Turkey could have cited these 36 injury determinations at the time it filed its first written submission.[379] Instead, Turkey chose to cite in its first written submission only the three original investigations at issue in this dispute. Turkey therefore deprived the United States of the opportunities to examine fully and respond to that evidence in the U.S. first written submission and oral presentations at the first Panel meeting. Again, Turkey has presented no reasons why the Panel

[374] United States' First Written Submission, para. 242 (citing *US – Zeroing (EC) (AB)*, para. 198).
[375] United States' First Written Submission, para. 248 (citing *US – Export Restraints (Panel)*, para. 8.126).
[376] Turkey's First Written Submission, para. 114.
[377] Working Procedures of the Panel, para. 5.
[378] Working Procedures of the Panel, para. 7.
[379] Turkey's First Written Submission, para. 97.

should condone this approach, and the Panel should reject Turkey's attempt to introduce new evidence going to its affirmative case at this late stage.[380]

186. Turkey has also tried to bolster its argument in its responses to the Panel's questions. In particular, Turkey notes that the statement it cited from the OCTG investigation was made by USITC in response to the Government of India's argument challenging the cumulation of the effects of "imports from countries subject only to antidumping duty investigations with those of imports subject to countervailing duty investigations."[381] This does not change the substance of USITC's response, however. Namely, USITC referenced a "practice of 'cross-cumulating' imports subject to Commerce's affirmative subsidy determinations with imports subject to Commerce's affirmative dumping determinations"[382] – *not* 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 . . .", as Turkey has claimed.[383]

187. Turkey also cites to statements by USITC and the U.S. Court of Appeals for the Federal Circuit regarding interpretation of a U.S. statute dealing with cumulation and what that statute allegedly requires.[384] This evidence, besides being untimely and therefore not properly subject to examination in this dispute, also fails to support Turkey's allegations. Turkey has not challenged the U.S. statute, which was in any event not identified in Turkey's panel request.[385] It would not be appropriate to examine a measure *not within* the Panel's terms of reference (the statute) to seek to establish the existence of the measure that *is within* the Panel's terms of reference (the alleged "practice") because the latter would then simply be derivative of the former, which was not challenged by Turkey. Statements by USITC in relation to this statute thus cannot in this dispute support an argument as to the existence of an alleged "practice" regarding cumulation.

188. In its responses to Panel questions, Turkey also cites to a statement made by USITC in *Multilayered Wood Flooring from China*: "Cross-cumulation is the cumulation of subsidized imports with dumped imports and includes the situation in which the dumped and subsidized imports are one and the same as well as situations such as this in which they differ to some extent."[386] Turkey argues that this statement shows that "while the ITC's cross-cumulation practice includes the cumulative injury assessment of imports that are subject to both countervailing duty and anti-dumping duty determinations, *i.e.*, where the subsidized and dumped imports are the same, it also includes the cumulative injury assessment of imports that

[380] *Cf. US – Gambling (AB)*, para. 269.
[381] Turkey's First Written Submission, paras. 121-122.
[382] *OCTG from Turkey:* ITC Final Determination, p. 20 (Exhibit TUR-72).
[383] Turkey's Panel Request, paras. 8.(A).5, 8.(B).4, 8.(C).4 (emphasis added); *see also* Turkey's First Written Submission, paras. 222, 340, 453.
[384] Turkey's First Written Submission, para. 224, fn. 526; Turkey's Responses to Panel Questions, para. 117.
[385] United States' First Written Submission, para. 245.
[386] *Multilayered Wood Flooring from China*, USITC Inv. Nos. 701-TA-476 and 731-TA-1179 (2011), at 17 n.101 (Exhibit TUR-206); Turkey's Responses to Panel Questions, para. 380.

are subject to countervailing duty determinations and imports that are subject only to anti-dumping duty determinations, *i.e.*, where the subsidized and dumped imports are *different*."[387]

189. Turkey's argument is based on a misunderstanding of USITC's statement and the requirements of the SCM Agreement. In *Multilayered Wood Flooring from China*, all of the subject imports were from the same country: China. Thus, USITC's reference to "situations such as this in which [the subject imports] differ to some extent" is specifically referring to a situation in which there are some differences among subject imports from the same country. Article 15.3 of the SCM Agreement, however, is directed to the cumulative assessment of injury involving imports "from more than one country."[388] USITC's statement therefore does not provide support for the existence of the "practice" alleged by Turkey.

2. The Cumulation of Dumped and Subsidized Imports Is Not Prohibited By Article 15.3 of the SCM Agreement

190. 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 notes that Turkey has also failed to make its legal case under Article 15.3 of the SCM Agreement.

191. 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."[389] 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. 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.[390]

192. Instead, both in its first written submission and its oral statement, Turkey has simply quoted statements made by the Appellate Body in a previous dispute.[391] 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.[392] It is not for the Panel to supply evidence or arguments necessary to make out a claim for a party.[393] Turkey has

---

[387] Turkey's Responses to Panel Questions, para. 380.
[388] SCM Agreement, Art. 15.3.
[389] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also EC – Selected Customs Matters (AB)*, para. 266.
[390] United States' First Written Submission, para. 255.
[391] Turkey's First Written Submission, paras. 227, 231; Turkey's Oral Statement, paras. 97-99.
[392] 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); *See, e.g.*, *US – Shrimp (Ecuador) (Panel)*, paras. 7.1-7.3; *US – Shrimp (Thailand) (Panel)*, paras. 7.20-7.21; *US – Poultry (China) (Panel)*, paras. 7.445-7.446.
[393] *Japan – Agricultural Products II (AB)*, para. 129; *US – Gambling (AB)*, paras. 140-141.

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.

193. Thus, 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 should find on that basis that Turkey has failed to make out a *prima facie* case in support of its claims.

194. Moreover, 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.[394] Notably, Turkey has provided no rebuttal to this argument, including in its oral statement and responses to Panel questions.

195. 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.[395] 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."[396] Article 15.3 does not address – or set any prohibition against – an investigating authority conducting a cumulative assessment of the effects on the domestic industry of subsidized imports and dumped, non-subsidized imports. Article 15.3 is silent on this issue, and silence cannot be read as a prohibition.

196. 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. 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."[397] In such cases, a country-specific analysis may not "adequately take[] into account" the injurious effects of dumped imports.[398] Likewise, dumped imports and simultaneous subsidized imports will often have cumulative price or volume effects on the

[394] United States' First Written Submission, paras. 258-263.
[395] United States' First Written Submission, paras. 258-259 (citing SCM Agreement, Article 15.3 (emphasis added)).
[396] United States' First Written Submission, paras. 260.
[397] United States' First Written Submission, para. 264 (citing *EC – Tube or Pipe Fittings (AB)*, para. 116). Although the *EC – Tube or Pipe Fittings* dispute involved the injury provisions of the AD Agreement, the cumulation provisions of the SCM and AD Agreements are nearly identical and thus the same rationale would apply to the practice of cumulation under both Agreements. *Compare* AD Agreement, Article 3.3, *with* SCM Agreement, Article 15.3.
[398] United States' First Written Submission, para. 265 (*EC – Tube or Pipe Fittings (AB)*, para. 116); *see also* Japan's Third Party Submission, para. 42.

relevant domestic industry. Indeed, the Appellate Body has recognized that "it may well be the case that the injury [antidumping and countervailing] duties seek to counteract is the same injury to the same industry."[399] This combined effect may not be adequately taken into account if cross-cumulation is prohibited.[400]

197. Article VI of the GATT 1994 provides important context for considering the object and purpose of the SCM Agreement and its relationship with the AD Agreement.[401] Article 15.1 of the SCM Agreement makes clear that the determination of injury with which Article 15 concerns itself is a "determination of injury for purposes of Article VI of GATT 1994." The AD Agreement contains the same language in reference to Article VI. Article VI:6(a) of the GATT 1994, in turn, provides that a Member shall not impose antidumping or countervailing duties "unless it determines that the effect of dumping or subsidization, as the case may be, is such as to cause or threaten to cause material injury to an established domestic industry . . . ." The phrase "as the case may be," as used in Article VI of the GATT 1994, indicates that the Agreement contemplates that an injury investigation may involve an examination of the injurious effects of dumped imports, subsidized imports, or dumped and subsidized imports.[402]

198. In short, both the purpose of the cumulation provisions of the AD and SCM Agreements and relevant context[403] support the proposition that cumulation of dumped and subsidized imports is consistent with the WTO Agreements.

3. The Cumulation of Imports in Sunset Reviews Is Not Inconsistent, Either As Such or As Applied, With Article 15.3 of the SCM Agreement

199. Turkey maintains that USITC has a practice of cross-cumulation in assessing likely material injury in sunset reviews, and argues that this practice is inconsistent "as such" and "as applied" with Article 15.3 of the SCM Agreement.[404] As the United States explained in its first written submission, Turkey's "as such" argument fails because Turkey has not made out its affirmative case through evidence that such a "practice" exists.[405] In addition, Turkey's arguments – both with respect to its "as such" and its "as applied" claims – are unavailing, because Article 15.3 is not applicable to sunset reviews.[406]

---

[399] United States' First Written Submission, para. 265 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 549).
[400] *See* Japan's Third Party Submission, para. 42.
[401] United States' First Written Submission, para. 273.
[402] United States' First Written Submission, paras. 273-274.
[403] See *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 570 ("Members have entered into cumulative obligations under the covered agreements and should thus be mindful of their actions under one agreement when taking action under another.").
[404] Turkey's First Written Submission, paras. 553-562.
[405] United States' First Written Submission, paras. 279-284.
[406] United States' First Written Submission, paras. 285-291.

a. Turkey's "As Such" Challenge Fails Because It Has Not Established The Existence a Rule or Norm of General and Prospective Application

200. As the United States has previously explained, 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.[407]

201. To succeed in an "as such" challenge to any measure, a complainant must also show that the application of the measure necessarily leads to WTO-inconsistent action.[408] Turkey has made no such showing. First, Turkey itself acknowledges that USITC "has discretion in electing whether or not to cumulate in five-year reviews."[409] That is, Turkey does not attempt to argue that USITC is required to cumulate in the context of sunset reviews. Second, 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," Turkey cited to no evidence in its first written submission to support this assertion, other than the sunset determination in the CWP proceeding.[410] However, evidence that USITC has exercised its discretion to cumulate on one occasion does not demonstrate the existence of a measure, much less that the alleged practice necessarily leads to WTO-inconsistent action.

202. In its responses to Panel questions, Turkey now erroneously asserts that "the ITC always cross-cumulates subsidized and non-subsidized imports in reviews, despite its discretion not to do so, if the other conditions for cumulation are satisfied."[411] Turkey also elaborates on what it believes these "conditions for cumulation" to be: "[t]he ITC has exercised its discretion to decline to cumulate imports in reviews because those imports did not otherwise satisfy the requirements for cumulation, namely if the imports were not likely to compete with each other or with the domestic like product in the U.S. market or if the imports were negligible or likely to have no discernible impact on the U.S. industry."[412]

203. Turkey's description of USITC's analytic framework for cumulation in sunset reviews is incomplete. Turkey omits to mention all of the elements examined by USITC in its cumulation analyses in five-year reviews. In addition to examining the conditions for cumulation noted by Turkey, USITC also examines the conditions of competition under which imports from the countries subject to a sunset review are likely to compete in the event of revocation of the orders. This examination of the conditions of competition is a separate, distinct, and additional analytic

---

[407] United States' First Written Submission, paras. 279-284

[408] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172 ("[A]n 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct — not only in a particular instance that has occurred, but in future situations as well — will necessarily be inconsistent with that Member's WTO obligations.").

[409] United States' First Written Submission, paras. 282-283.

[410] United States' First Written Submission, paras. 282-283.

[411] Turkey's Responses to Panel Questions, para. 124.

[412] Turkey's Responses to Panel Questions, para. 125.

step from the question of whether imports are likely to compete with each other or with the domestic like product in the U.S. market.[413]

204. In its response to the Panel's Question 61, the United States provided examples of sunset reviews in which USITC declined to cumulate the effects of subsidized imports and dumped, non-subsidized imports.[414] In each of these sets of reviews USITC decided not to cumulate based on an assessment that imports from some subject countries were likely to compete under different conditions of competition than those from other subject countries.[415]

205. For example, in the *Stainless Steel Sheet and Strip from Germany, Italy, Japan, Korea, Mexico, and Taiwan* sunset reviews, USITC stated:

> The Commission may exercise its discretion to cumulate, however, only if the reviews are initiated on the same day, the Commission determines that the subject imports are likely to compete with each other and the domestic like product in the U.S. market, and imports from each such subject country are not likely to have no discernible adverse impact on the domestic industry in the event of revocation. . . .
>
> In determining whether to exercise our discretion to cumulate the subject imports, we assess whether the subject imports from Germany, Italy, Japan, Korea, Mexico, and Taiwan are likely to compete under similar or different conditions in the U.S. market after revocation of the orders. We find that subject imports from Germany, Italy, and Mexico are likely to compete under conditions of competition that are similar with respect to those countries but

[413] *See 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. 16-22 (July 2011) (Exhibit USA-39); *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. 13-19 (Aug. 2011) (Exhibit USA-40); *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. 15-19 (Aug. 2012) (Exhibit USA-41); and *Lightweight Thermal Paper from China and Germany*, Inv. Nos. 701-TA-451 and 731-TA-1126-1127 (Review), USITC Pub. 4511, pp. 9-11 (Jan. 2015) (Exhibit USA-42).
[414] United States' Responses to Panel Questions, para. 169.
[415] *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. 18-22 (July 2011) (Exhibit USA-39); *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. 16-19 (Aug. 2011) (Exhibit USA-40); *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. 18-19 (Aug. 2012) (Exhibit USA-41); and *Lightweight Thermal Paper from China and Germany*, Inv. Nos. 701-TA-451 and 731-TA-1126-1127 (Review), USITC Pub. 4511, pp. 10-11 (Jan. 2015) (Exhibit USA-42).

> different from conditions that apply to subject imports from Japan, Korea, and Taiwan, as further explained below.[416]

206. In short, there is no merit to Turkey's assertion that "as a matter of practice, the ITC always cross-cumulates subsidized and non-subsidized imports in reviews."[417] In actuality, in sunset reviews, USITC decides on a case-by-case basis whether to cumulate subject imports, largely on the basis of whether or not subject imports compete under similar conditions of competition. Turkey's listing of cases in its response to the Panel's Question 60[418] does not cure Turkey's failure to provide sufficient evidence to demonstrate the content or existence of the alleged "practice" it challenges, or that the "practice" constitutes a rule or norm of general and prospective application. Therefore, Turkey's "as such" claim under Article 15.3 with respect to cross-cumulation in sunset reviews should be rejected.

b. Article 15.3 Is Not Applicable to Sunset Reviews

207. Turkey has also failed to show that Article 15.3 prohibits the cumulation of dumped and subsidized imports in the context of sunset reviews.

208. As the United States explained in its first written submission, sunset review proceedings are governed by Article 21, and not by Article 15.3, of the SCM Agreement.[419] 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.[420] And 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.[421]

209. Nonetheless, in its responses to Panel questions, Turkey argues that "the findings by the panel in *US – Carbon Steel (India)* and, more importantly, the text of Article 15.3, its context and object and purpose of the Agreement, as well as the negotiating history," support a conclusion that "the only correct reading of Article 15.3 is that it prohibits cross-cumulation in any injury determination covered by Article VI of the GATT 1994."[422] Turkey's arguments are unpersuasive.

---

[416] *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, p. 10, 18 (July 2011) (Exhibit USA-39) (footnote omitted).
[417] Turkey's Responses to Panel Questions, para. 124.
[418] Turkey's Responses to Panel Questions, para. 124.
[419] United States' First Written Submission, paras. 285-291.
[420] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 286-294; *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, paras. 167-173.
[421] United States' First Written Submission, para. 286 (citing *US – Carbon Steel (India) (Panel)*, paras. 7.388-7.392).
[422] Turkey's Responses to Panel Questions, para. 127.

210. As an initial matter, Turkey is simply incorrect that the findings of the panel in *US – Carbon Steel (India)* support its contention that Article 15.3 prohibits cross-cumulation in sunset reviews. Turkey states that "the panel in *US – Carbon Steel (India)* did not expressly find that Article 15.3 of the SCM Agreement does not prohibit cross-cumulation in reviews."[423] In fact, the *US – Carbon Steel (India)* panel found that:

> for the "review" of a determination of injury that has already been established in accordance with Article 15, Article 21.3 does not require that injury again be determined in accordance with Article 15, and consequently investigating authorities are not mandated to follow the provisions of Article 15 when making a likelihood-of-injury determination under Article 21.3.[424]

211. This was the same conclusion reached by the Appellate Body in *US – Oil Country Tubular Goods Sunset Review* in the context of the AD Agreement, in light of the different nature and purpose of original investigations and sunset reviews, and given the absence of textual cross-references between Article 3 and Article 11.3.[425] As the Appellate Body explained, the AD Agreement distinguishes between *determinations of injury*, under Article 3, and *determinations of likelihood of continuation or recurrence of injury*, under Article 11.3.[426] The Appellate Body thus found that investigating authorities are not mandated to follow the provisions of Article 3 when making a likelihood-of-injury determination under Article 11.3.[427]

212. Although Turkey argues that the Appellate Body's reasoning in *US – Oil Country Tubular Goods Sunset Reviews* is not directly relevant to the question of whether cross-cumulation is permissible in sunset reviews,[428] the Appellate Body's reasoning on the question of the relevance of the provisions of Article 3 of the AD Agreement for sunset reviews under Article 11.3 of the AD Agreement *is* persuasive and relevant to the question of the relevance of Article 15.3 of the SCM Agreement for sunset reviews under Article 21.3 of the SCM Agreement, given the substantially identical nature of the AD Agreement and SCM Agreement provisions.[429] The *US – Carbon Steel (India)* panel reached the same conclusion in agreeing with the Appellate Body's rationale in that dispute, when it found that investigating authorities are not mandated to follow the provisions of Article 15 when making a likelihood-of-injury determination under Article 21.3.[430] It follows that, if authorities are not mandated to follow the provisions of Article 15 in a sunset review, then Article 15 cannot prohibit cross-cumulation in sunset reviews.

---

[423] Turkey's Responses to Panel Questions, para. 143.
[424] *US – Carbon Steel (India) (Panel)*, para. 7.389 (emphasis omitted).
[425] *US – Oil Country Tubular Goods Sunset Review (AB)*, para. 279.
[426] *US – Oil Country Tubular Goods Sunset Review (AB)*, para. 278.
[427] *US – Oil Country Tubular Goods Sunset Review (AB)*, para. 280.
[428] Turkey's Responses to Panel Questions, paras. 141-142.
[429] *Compare* AD Agreement, Arts. 3.3, 11.3, *with* SCM Agreement, Arts. 15.3, 21.3.
[430] *US – Oil Country Tubular Goods Sunset Review (AB)*, para. 280.

213. The United States also recalls that past reports have rejected similar attempts to "import" the provisions governing original investigations into the sunset review context:

> [A] finding on our part that the *de minimis* standard of Article 11.9 is implied in sunset reviews under Article 21.3 would upset the delicate balance of rights and obligations attained by the parties to the negotiations, as embodied in the final text of Article 21.3. Such a finding would be contrary to the requirement of Article 3.2, repeated in Article 19.2 of the DSU, that our findings and recommendations "cannot add to or diminish the rights and obligations provided in the covered agreements".[431]

In the same way, applying Article 15 to sunset reviews would "upset the delicate balance of rights and obligations attained by the parties to the negotiations, as embodied in the final text of Article 21.3."

214. For its part, Turkey offers no textual support for its position that Article 15.3 prohibits cross-cumulation in sunset reviews. Instead, it attempts to graft Article 15 obligations onto Article 21 by arguing that "Article 15.3 should also be interpreted in the context of Article 15.1," which refers to injury determinations "for purposes of Article VI of GATT 1994."[432] There is no basis, however, for Turkey's leap from this observation to the conclusion that "this context indicates that Article 15 of the SCM Agreement applies with regard to any determination of injury for purposes of Article VI of the GATT 1994."[433] As discussed above, such an argument is belied by the texts of the respective provisions. And again, the case relied on by Turkey to support its contention in fact supports the opposite conclusion: that a sunset review under Article 21.3 does not involve a "determination of injury."[434]

215. Turkey's reliance on the object and purpose of the SCM Agreement, and its contention that cross-cumulation, whether in investigations or reviews, is inconsistent with this object and purpose, fares no better.[435] The object and purpose of an agreement cannot have the effect of changing the text of that agreement. As discussed above, the text of the SCM Agreement makes clear that the requirements of Article 15 do not apply with respect to sunset reviews under Article 21.

216. Turkey also relies on the negotiating history of the SCM Agreement to support its argument that cross-cumulation is prohibited in reviews.[436] As an initial matter, recourse to supplementary means of interpretation is not warranted, since the meaning of Articles 15 and 21

---

[431] *US – Carbon Steel (AB),* para. 91.
[432] Turkey's Responses to Panel Questions, para. 129.
[433] Turkey's Responses to Panel Questions, para. 129.
[434] *US – Carbon Steel (India) (Panel)*, para. 7.389; *see also US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 280.
[435] Turkey's Responses to Panel Questions, paras. 133-135.
[436] Turkey's Responses to Panel Questions, paras. 136-140.

is clear.[437] Again, as discussed above, the text of the SCM Agreement makes clear that the requirements of Article 15 apply only to original investigations, not to sunset reviews under Article 21. However, even if the use of supplementary means of interpretation were warranted, the negotiating history of the SCM Agreement does not support Turkey's position. In particular, Turkey has not pointed to any mention at all in the negotiating history of the issue here – cumulation in the context of sunset reviews[438] – and therefore Turkey's entire discussion is inapposite. Thus, there is no merit to Turkey's assertion that the negotiating history of the SCM Agreement supports its argument that cross-cumulation is prohibited in sunset reviews.

217. In sum, Turkey has failed to establish that Article 15.3 of the SCM Agreement prohibits the cumulation of subsidized and non-subsidized imports in sunset reviews. Therefore, Turkey's "as such" and "as applied" claims under Article 15.3 with respect to cross-cumulation in sunset reviews should be rejected.

G. Turkey's Newly-Added Claims Under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 Are Without Merit

218. In response to Panel Question 63, Turkey claims that "in any instance in which the Panel finds a violation of Articles 1.1(a)(1), 1.1(b), 2.1(c), 14(d), or 15.3 of the SCM Agreement that resulted in the application of countervailing duties where no subsidy exists, the Panel should also find a violation of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994."[439] Turkey further asserts that, "for example, if the Panel finds that the USDOC's public body determinations regarding OYAK or Erdemir are inconsistent with Article 1.1(a)(1), it should also find a violation of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, because if OYAK and Erdemir are not public bodies, no subsidy for the provision of hot rolled steel can exist."[440]

219. The Panel should reject Turkey's claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 because they are both untimely and unpersuasive.

220. As an initial matter, the United States notes that Turkey only argued in its first written submission that the United States 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.[441] Thus, as the United

---

[437] Article 32 of the Vienna Convention on the Law of Treaties, which is entitled "Supplementary Means of Interpretation," provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> *(a)* Leaves the meaning ambiguous or obscure; or
> *(b)* Leads to a result which is manifestly absurd or unreasonable.

[438] Turkey's Responses to Panel Questions, paras. 136-140.
[439] Turkey's Responses to Panel Questions, para. 145.
[440] Turkey's Responses to Panel Questions, para. 145.
[441] United States' Responses to Panel Questions, para. 19.

States explained in its responses to Panel questions, 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 results in a breach of Article 19.4 and Article VI:3 does not arise in this dispute.[442]

221. Having failed to make a *prima facie* case either in its first written submission or in its arguments during the first Panel meeting that a breach of Articles 1.1(a)(1), 1.1.(b), 2.1(c), 14(d), and 15.3 of the SCM Agreement results in a breach of Article 19.4 and Article VI:3, Turkey should not be permitted to do so now at this late stage of the panel proceedings. In particular, Turkey's belated introduction of a new substantive argument – that if USDOC's public body determinations are found to be inconsistent with Article 1.1(a)(1), then a breach of Articles 19.4 and VI:3 should also be found because no subsidy for the provision of HRS can exist if OYAK and Erdemir are not public bodies – is contrary to procedural fairness and the orderly resolution of this dispute and should not be allowed.

222. Turkey has also confused the inquiry. A panel's finding that an investigating authority's determination with respect to one prong of a subsidy is WTO-inconsistent, does not automatically diminish the finding that a subsidy as a whole exists. Rather, it is a question left for the investigating authority on compliance. In the event that the Panel determines that USDOC's public body determinations, or any other of USDOC's findings, are inconsistent with the SCM Agreement, it is a matter for the investigating authority to determine how best to comply with the Panel's finding of inconsistency. Therefore, contrary to Turkey's argument, a Panel's finding of inconsistency under one provision of the SCM Agreement does not automatically create a breach of Article 19.4 of the SCM Agreement or Article VI:3 of the GATT 1994.

IV. CONCLUSION

223. For the foregoing reasons, and those set forth in previous U.S. submissions and statements, the United States respectfully requests that the Panel reject all of Turkey's claims.

[442] United States' Responses to Panel Questions, para. 19.