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

(DS523)

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China – Autos (US) (Panel)	Panel Report, China – *Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014
China – Broiler Products	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
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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 – 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

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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
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 – 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

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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
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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
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US – Lamb (AB)	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Large Civil Aircraft (Second Complaint) (Panel)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R
US – Lead and Bismuth II (Panel)	Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report WT/DS138/AB/R
US – 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
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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 – Shrimp II (Viet Nam) (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Viet Nam*, WT/DS429/AB/R, adopted 22 April 2015
US – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
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US – Steel Safeguards (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003
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

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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*
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.
USITC	United States International Trade Commission
WLP	Welded Line Pipe
WTO	World Trade Organization

TABLE OF EXHIBITS

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USA-1	Final Results of Remand Redetermination, Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States, Consol. Ct. No. 14-00229 (August 31, 2015). ("OCTG Remand Redetermination").
USA-2	*Maverick Tube Corp. v. United States*, Consol. Court No. 14-00229, Slip Op. 2016-16 (February 22, 2016).
USA-3	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 (USDOC March 10, 2016) ("Amended OCTG Final Determination").
USA-4	TESEV Publications, "Military-Economic Structure in Turkey: Present Situation, Problems, and Solutions.
USA-5	OCTG Erdemir 2012 Annual Report (complete).
USA-6	Medium Term Programme (2012-2014) (as submitted in OCTG, WLP, and CWP) ("Medium Term Programme").
USA-7	Erdemir 2013 Annual Report (complete) (as submitted in WLP, CWP, and HWRP).
USA-8	Erdemir's Articles of Association (as submitted in WLP, CWP, HWRP, and OCTG).
USA-9	WLP Petition, Volume III (October 16, 2014).
USA-10	Letter from USDOC to the Government of Turkey, "Countervailing Duty Investigation; Certain Oil Country Tubular Goods from the Republic of Turkey" (August 27, 2013), Section I ("OCTG Initial Questionnaire").
USA-11	Letter from Borusan to USDOC, "Oil Country Tubular Goods from Turkey, Case No. C-489-817: Extension Request" (September 10, 2013).
USA-12	Letter USDOC to Borusan, "Countervailing Duty Investigation: Certain Oil Country Tubular Goods from the Republic of Turkey" (September 10, 2013).

Exhibit No.	Description
USA-13	Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Shutdown of the Federal Government" (October 18, 2013).
USA-14	OCTG Borusan Questionnaire Response, Exhibit 9B, "BMB Purchases of Hot-Rolled Steel and Benchmark" (October 31, 2013) ("OCTG Borusan Questionnaire Response, Exhibit 9B").
USA-15	Letter from Borusan, "Welded API Line Pipe from Turkey, Case No. C-489-982: Response to Initial Countervailing Duty Questionnaire" (January 22, 2015) ("WLP Borusan Initial Questionnaire Response").
USA-16	OCTG Toscelik Questionnaire Response, Exhibit 22, "Coil Purchases" (November 12, 2013) ("OCTG Toscelik Questionnaire Response, Exhibit 22").
USA-17	HWRP Petition, Volume V (July 21, 2015).
USA-18	Letter from Tosçelik, "Welded Line Pipe: Toscelik Questionnaire Response" (January 21, 2015) ("WLP Tosçelik Questionnaire Response").
USA-19	CWP Borusan Supplemental New Subsidy Allegations Questionnaire Response
USA-20	Letter from USDOC to Borusan, "Countervailing Duty Investigation: Welded Line Pipe from the Republic of Turkey" (April 28, 2015).
USA-21	CWP New Subsidy Allegation Memorandum (November 6, 2014).
USA-22	U.S. Customs and Border Protection (CBP) Instructions, "Countervailing duty order on welded line pipe from Turkey (C-489-823)" (December 2, 2015).
USA-23	Letter from USDOC to the Government of Turkey, "Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Countervailing Duty Questionnaire," Section II (September 9, 2015) (complete) ("HWRP Initial Questionnaire Section II (complete)").
USA-24	Letter from MMZ to USDOC, "Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: MMZ ONUR BORU PROFIL URETIM SANAYi VE TiC A.S. (MMZ) Response to the Department's Section III (CVD) Questionnaire (October 30, 2015) ("HWRP MMZ Initial Questionnaire Response").

Exhibit No.	Description
USA-25	Letter from Ozdemir to USDOC, "Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey; Response to questionnaire" (October 30, 2015) ("HWRP Ozdemir Initial Questionnaire Response").
USA-26	Memorandum from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Countervailing Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Decision Memorandum for the Preliminary Determination" (December 18, 2015) (complete) ("HWRP Preliminary Decision Memo (complete)").
USA-27	U.S. CBP Instructions, "Countervailing duty order and amended final determination on heavy walled rectangular welded carbon steel pipes and tubes from the Republic of Turkey (C-489-825)" (September 13, 2016).
USA-28	Memorandum from USDOC, "Verification of the Questionnaire Responses of MMZ Onur Boru Profil uretim San Ve Tic. A.S." (March 10, 2016) ("HWRP Verification of MMZ Questionnaire Responses").
USA-29	Letter from USDOC, "Countervailing Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey; Verification of MMZ ONUR BORU PROFIL URETIM SANAYi VE TiC A.S.'s Questionnaire Responses" (January 19, 2016) ("HWRP MMZ Verification Agenda").
USA-30	Letter from USDOC, "Countervailing Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey; Verification of Ozdemir Boru Profil San ve Tic. Ltd Sti .'s Questionnaire Responses" (January 19, 2016) ("HWRP Ozdemir Verification Agenda").
USA-31	Memorandum from USDOC, "Verification of the Questionnaire Responses of Ozdemir Boru Profil San ve Tic. Ltd Sti." (March 10, 2016) ("HWRP Verification of Ozdemir Questionnaire Responses").
USA-32	Memorandum from USDOC re Ministerial Error Allegations in the Final Determination (August 19, 2016) ("HWRP Ministerial Error Memo").

Exhibit No.	Description
USA-33	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").
USA-34	Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam, Inv. Nos. 731-TA-1063-1064 and 1066-1068 (Second Review), USITC Pub. 4688 (May 2017).

I. INTRODUCTION

1. The *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") represents a balance between "disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies."[1] Applying U.S. laws and regulations consistent with the SCM Agreement, the U.S. Department of Commerce ("USDOC") determined that the Turkish government provided a wide range of subsidies to Turkish manufacturers of certain pipe and tube products. The U.S. International Trade Commission ("USITC") further determined that those subsidies resulted in material injury to the industry of the United States.

2. Turkey claims that these determinations, and in some cases, the laws and regulations on which they were based, are inconsistent with the SCM Agreement. The United States will demonstrate in this submission and over the course of the proceedings before the Panel that Turkey is incorrect. The United States demonstrates that Turkey's claims are without merit and that the Panel should find that the challenged U.S. laws, regulations, and determinations are not inconsistent with the covered agreements. Turkey also challenges what it labels "practices" or "rules or norms" but these claims are either outside the Panel's terms of reference or Turkey has failed to establish the existence of any measure on which the Panel could make findings.

3. This submission is organized as follows: after a discussion of the rules related to interpretation, standard of review, and burden of proof in section II, section III contains a request for a preliminary ruling that certain claims and measures were not the subject of consultations or fall outside the Panel's terms of reference. We respond to Turkey's claims related to the challenged countervailing duty determinations and injury determinations in section IV.

II. RULES OF INTERPRETATION, STANDARD OF REVIEW, AND BURDEN OF PROOF

4. As set out in Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the Panel is "to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements" by "mak[ing] 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[.]" In assessing the "applicability of and conformity with the covered agreements," Article 3.2 of the DSU indicates that the Panel (and other adjudicators) are to apply the "customary rules of interpretation of public international law." Previous WTO reports have recognized that Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") reflects such customary rules.[2] Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A corollary of this customary rule of

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[1] *US – Softwood Lumber IV (AB)*, para. 95.
[2] *See, e.g.*, *US – Gasoline (AB)*, p. 17.

interpretation is that an "interpretation must give meaning and effect to all the terms of the treaty."[3]

5. In accordance with these standards, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination."[4] A panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action," and not as "*initial trier of fact*."[5] In one instance, a panel breached Article 11 of the DSU where that panel went beyond its role as reviewer and instead substituted its own assessment of the evidence and judgment for that of the investigating authority.[6] At the same time, however, this does not mean that a panel "must simply *accept* the conclusions of the competent authorities."[7] Examination of the authority's conclusions should be "in-depth" and "critical and searching[.]"[8]

6. Finally, 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."[9] Accordingly, Turkey, as the complaining party, bears the burden of demonstrating that the U.S. countervailing measures within the Panel's terms of reference are inconsistent with a claimed provision of the SCM Agreement or the GATT 1994. Turkey must establish a *prima facie* case of inconsistency with a provision of a WTO covered agreement before the United States, as the defending party, has the burden of rebutting the claimed inconsistency with that provision.[10]

III. PRELIMINARY RULING REQUEST

7. Pursuant to paragraph 7 of the Panel's Working Procedures, the United States requests a preliminary ruling with respect to (1) the inclusion in Turkey's request for the establishment of a panel ("panel request") of claims that were not the subject of Turkey's consultations request; (2) the raising of claims in Turkey's first written submission that were not identified in Turkey's panel request and thus are outside the Panel's terms of reference; and (3) a measure that had already expired at the time the Dispute Settlement Body ("DSB") established the Panel and referred the matter to it.

[3] *US – Gasoline (AB)*, p. 23.
[4] *China – Broiler Products (Panel)*, para. 7.4 (*citing US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103).
[5] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis in original).
[6] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-190.
[7] *US – Cotton Yarn (AB)*, para. 69, note 42 (emphasis in original) (quoting *US – Lamb (AB)*, para. 106).
[8] *China – Broiler Products (Panel)*, para. 7.5 (quoting *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93).
[9] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also China – Autos (US) (Panel)*, para. 7.6.
[10] *EC – Hormones (AB)*, para. 109; *see also US – Wool Shirts and Blouses (AB)*, pp. 14-17; *China – Broiler Products (Panel)*, para. 7.6.

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

8. Turkey includes in its panel request claims that were not among the claims set forth in its consultations request. Turkey's panel request both expanded the scope and changed the essence of its consultations request by including legal claims that were not the subject of its consultations request. The Panel should accordingly reject Turkey's attempt to include within the Panel's terms of reference matters on which there were no consultations.

9. Consultations play an important role in helping to resolve a dispute. As a prerequisite to panel proceedings, consultations "serve the purpose of, *inter alia*, allowing parties to reach a mutually agreed solution, and where no solution is reached, providing the parties an opportunity to 'define and delimit' the scope of the dispute between them."[11] Members agreed in the DSU that a measure must be the subject of consultations prior to requesting a panel to review that measure.[12] Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute[.]" Article 4.4 of the DSU further provides that a request for consultations must state the reasons for the request, "including identification of the measures at issue and an indication of the legal basis for the complaint." As the Appellate Body stated in *Brazil – Aircraft*:

> Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.[13]

10. Under DSU Article 6.2, a panel request must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint[.]" The Appellate Body has noted that the panel request may neither "expand the scope"[14] nor change the essence of a consultations request.[15] Accordingly, in determining the matter before it, the Appellate Body has explained that a panel should "compare the respective parameters of the consultations request and the panel request to determine whether an expansion of the scope or change in the essence of the dispute occurred through the addition of instruments in the panel request that were not identified in the consultations request."[16]

11. This reasoning applies equally with respect to determining the legal basis of the panel request. By comparing the consultations request and the panel request, a panel can determine whether the scope of the dispute has improperly been expanded through the addition of

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[11] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293.
[12] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293.
[13] *Brazil – Aircraft (AB),* para. 131.
[14] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (emphasis omitted) (quoting *US – Upland Cotton (AB)*, para. 293).
[15] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (emphasis omitted) (citing *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 137 (other citations omitted)).
[16] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 294.

previously unidentified measures and claims in the panel request.[17] The purpose of consultations is frustrated where the complaining party introduces new measures and legal claims in its panel request that were not identified in the consultations request.

12. A comparison of the respective parameters of Turkey's consultations request and its panel request shows that Turkey's panel request both expanded the scope and changed the essence of its consultations request by including measures and legal claims that were not the subject of its consultations request.

1. Turkey's Panel Request Adds Measures and Claims Regarding Alleged Injury Determination "Practices" That Were Not the Subject of Consultations

13. In its panel request, Turkey adds a new measure — an alleged "practice" of cumulating imports — and a new claim — an "as such" challenge to such "practice" — that were not identified in its consultations request. In its consultations request, Turkey challenged the United States' "Injury Determination[s]" with respect to specific "measures and underlying administrative proceedings."[18] These measures and underlying proceedings are identified in the first subsection of the consultations request: "Specific Measures at Issue."[19] In this subsection, Turkey identifies the specific measures at issue as the "preliminary and final countervailing duty measures imposed by the United States on Turkish imports of Certain Oil Country Tubular Goods ('OCTG'); Welded Line Pipe [WLP]; Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes [HWRP]; and Circular Welded Carbon Steel Pipes and Tubes [CWP]."[20]

14. Turkey then lays out the "Legal Basis of the Complaint" in the second subsection of its request.[21] In particular, it claims that "the measures *identified above* [in the first subsection] … are inconsistent with the United States' obligations under the WTO Agreements."[22] As just discussed, the measures identified in the first subsection of Turkey's request are the United States' preliminary and final determinations in the OCTG, WLP, HWRP, and CWP proceedings.[23]

15. Turkey identifies five aspects of these specific "measures and underlying administrative proceedings" that it claims are WTO-inconsistent.[24] The final aspect, listed under the subheading "Injury Determination," is that "[t]he United States' determination of injury based on cumulated imports, including imports from countries not subject to countervailing duty investigations or reviews, … is inconsistent with Article 15.3 of the SCM Agreement."[25]

[17] *See US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 294.
[18] Consultations Request, section B.
[19] Consultations Request, section A.
[20] Consultations Request, section A.
[21] Consultations Request, section B.
[22] Consultations Request, section B.
[23] Consultations Request, section A.
[24] Consultations Request, section B.
[25] Consultations Request, section B.

Turkey's legal claims are thus limited to the injury determinations made in the United States' preliminary and final determinations in the specific countervailing duty proceedings identified in the first subsection of Turkey's request. Specifically, the legal basis for Turkey's complaint, as set out in its consultations request, is that USITC's "determination of injury based on cumulated imports" in the OCTG, WLP, HWRP, and CWP proceedings is inconsistent with Article 15.3 of the SCM Agreement.[26]

16. Despite expressly limiting its consultations request to the United States' preliminary and final injury determinations in specific countervailing duty proceedings, Turkey has attempted to expand the scope of this dispute by improperly introducing in its panel request new measures and claims, specifically, an "as such" challenge with respect to an alleged "practice" related to injury. In particular, Turkey's panel request challenges USITC's "practice of 'cross-cumulating' subsidized and non-subsidized imports" as being inconsistent with Article 15.3 of the SCM Agreement "both '*as such*,' as a practice and as applied" in the OCTG, WLP, HWRP, and CWP proceedings.[27] Turkey had identified no "practice" of cross-cumulating in its consultation request; rather, it identified as the challenged measures the determination of injury based on cumulated imports in certain preliminary and final determinations. Moreover, Turkey failed to request consultations on this alleged practice "as such," instead limiting its claims to the injury determinations made in the specific investigations identified in its consultations request (i.e., the OCTG, WLP, HWRP, and CWP proceedings). Thus, Turkey's newly added "as such" legal claims are not within the Panel's terms of reference.

17. For the foregoing reasons, the United States respectfully requests that the Panel issue a preliminary ruling that Turkey's challenge to a "practice" of cross-cumulating and its "as such" claims with respect to that practice are outside the Panel's terms of reference.

2. Turkey's Measures and Claims Regarding Alleged Benefit "Practices" Were Not the Subject of Consultations

18. In its consultations request, Turkey challenged the United States' "Benefit Determination" with respect to specific "measures and underlying administrative proceedings."[28] These measures and underlying proceedings are identified in the first subsection of the consultations request: "Specific Measures at Issue."[29] In this subsection, Turkey identifies the specific measures at issue as the "preliminary and final countervailing duty measures imposed by the United States on Turkish imports of Certain Oil Country Tubular Goods ('OCTG'); Welded Line Pipe [WLP]; Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes [HWRP]; and Circular Welded Carbon Steel Pipes and Tubes [CWP]."[30]

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[26] Consultations Request, sections A-B.
[27] Panel Request, paras. 8.(A).5.b, 8.(B).4.b, 8.(C).4.b, 8.(D).3.b (emphasis added).
[28] Consultations Request, section B.
[29] Consultations Request, section A.
[30] Consultations Request, section A.

19. Turkey then lays out the "Legal Basis of the Complaint" in the second subsection of its request.[31] In particular, it claims that "the measures *identified above* [in the first subsection] … are inconsistent with the United States' obligations under the WTO Agreements."[32] As just discussed, the measures identified in the first subsection of Turkey's request are the United States' preliminary and final determinations in the OCTG, WLP, HWRP, and CWP investigations.[33]

20. Turkey identifies five aspects of these specific "measures and underlying administrative proceedings" that it claims are WTO-inconsistent.[34] The second aspect, listed under the subheading "Benefit Determination," focuses on "[t]he United States' determination that sales of hot rolled steel conferred a benefit, within the meaning of Article 1.1(b), and were made for less than adequate remuneration, within the meaning of 14(d) of the SCM Agreement, including the Department's improper rejection of in-country prices for hot rolled steel as a benchmark for less than adequate remuneration"[35] Turkey's claim with respect to USDOC's benefit determination is not only limited to the specific countervailing duty proceedings identified in the first subsection of Turkey's request, but is further restricted to a single countervailing duty proceeding: footnote 5 to the consultations request states that Turkey's claim regarding USDOC's benefit determination "*is limited to* the countervailing duty determinations related to OCTG (C-489-817)."[36] Thus, the legal basis for Turkey's complaint is that USDOC's "improper rejection of in-country prices for hot rolled steel as a benchmark for less than adequate remuneration" in the OCTG proceeding is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

21. Despite expressly limiting its consultations request to the United States' preliminary and final benefit determination in the OCTG proceeding, Turkey has attempted to expand the scope of this dispute by improperly introducing in its panel request new measures and claims with respect to the United States' "practice[s]" related to benefit. In particular, Turkey in its panel request claims that USDOC has a practice of rejecting in-country prices as a benchmark "based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good," and asserts that this practice is inconsistent with Article 14(d) of the SCM Agreement "both '*as such*', as a practice, and as applied in [the OCTG] proceeding."[37]

22. Turkey failed to request consultations on this alleged "practice" of rejecting in-country prices as a benchmark. A measure on which Turkey failed to consult cannot be included in its panel request and falls outside the Panel's terms of reference.[38] In addition, Turkey's panel request challenges this alleged practice "as such," but this claim was not included in its consultation request. Because the consultation request was limited to claims concerning the

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[31] Consultations Request, section B.
[32] Consultations Request, section B.
[33] Consultations Request, section A.
[34] Consultations Request, section B.
[35] Consultations Request, section B.
[36] Consultations Request, section B, n. 5 (italics added).
[37] Panel Request, paras. 8.(A).5.b, 8.(B).4.b, 8.(C).4.b, 8.(D).3.b (emphasis added).
[38] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 294.

benefit determination made in the OCTG proceeding, Turkey's newly added legal claims are not within the Panel's terms of reference.

23. Turkey's challenge to USDOC's alleged "practice" regarding benefit determinations — and particularly its inclusion of an "as such" claim — makes its panel request significantly broader than its consultations request. Turkey's expansion of the nature of its challenge from a challenge solely to the OCTG proceeding to a challenge against USDOC's alleged "practice" denied the United States the opportunity to consult on this measure, an important element of the dispute settlement system. "'[A]s such' challenges are serious" and "the implications of such challenges are obviously more far-reaching than 'as applied' claims."[39] The failure to include this measure in Turkey's consultations request deprived the parties of an opportunity to clarify the measure and the facts surrounding it as well as the opportunity to resolve any concerns over the measure.[40]

24. For the foregoing reasons, the United States respectfully requests that the Panel issue a preliminary ruling that Turkey's challenge to an alleged "practice" relating to benefits (benchmark) determinations and its "as such" claim with respect to this alleged practice are 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

25. Article 6.2 of the DSU "serves a pivotal function in WTO dispute settlement."[41] It provides in relevant part:

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

26. Article 6.2 thus requires two elements to be included in a panel request, namely: (a) identification of the specific measures at issue; and (b) a brief summary of the legal basis of the complaint.[42] These elements comprise the "matter referred to the DSB," which is the basis for a panel's terms of reference under Article 7.1 of the DSU.[43] "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."[44]

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[39] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.
[40] Article 4.3 of the SCM Agreement; *see also Brazil – Aircraft (AB)*, para. 131.
[41] *Australia – Apples (AB)*, para. 416.
[42] *Australia – Apples (AB)*, para. 416. *See also China – Raw Materials (AB)*, para. 219; *EC – Large Civil Aircraft (AB)*, para. 786; *US – Carbon Steel (AB)*, para. 125.
[43] *Australia – Apples (AB)*, para. 416 (emphasis omitted).
[44] *Australia – Apples (AB)*, para. 416.

27. The Appellate Body has explained that "the terms of reference of a panel define the scope of the dispute and that the claims identified in the request for the establishment of a panel establish the panel's terms of reference under Article 7 of the DSU."[45] The Appellate Body further 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."[46]

28. The Appellate Body has stressed that "it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."[47] Such an examination "must be objectively determined on the basis of the panel request as it existed at the time of filing" and be "demonstrated on the face" of the panel request.[48]

29. In its first written submission, Turkey has raised claims with respect to (1) certain subsidy programs in the WLP investigation, and (2) Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. These claims were not included in its panel request and thus are outside the Panel's terms of reference.

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

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

> In connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration: . . .
>
> 2. Article 12.7 of the SCM Agreement
>
> a. The USDOC drew adverse inferences in selecting among the facts available for the purpose of punishing Borusan for its alleged failure to cooperate.[49]

31. Turkey's claim with respect to Article 12.7 of the SCM Agreement in the WLP investigation is thus expressly limited to the application of facts available by USDOC "[i]n connection with the alleged Provision of Hot Rolled Steel [HRS] for Less Than Adequate

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[45] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 152 (citing *EC – Bananas III (AB)*, para. 141).
[46] *EC – Bananas III (AB)*, para. 143 (emphasis omitted).
[47] *EC – Bananas III (AB)*, para. 142.
[48] *US – Carbon Steel (AB)*, para. 127.
[49] Panel Request, para. 8.(B).2.a.

Remuneration [LTAR].” Notably, the provision of HRS for LTAR is only one out of 30 individual subsidy programs investigated by USDOC during the WLP proceeding.[50] The other 29 subsidy programs are not the subject of any claims in Turkey’s panel request, including any claims under Article 12.7, and are thus outside the Panel’s terms of reference.[51]

32. In its first written submission, however, Turkey has dramatically expanded its arguments under Article 12.7 with respect to the WLP investigation. Instead of limiting its claims to the provision of HRS for LTAR subsidy program, Turkey argues: “In its investigation of *WLP from Turkey:* the USDOC relied upon facts available and drew an adverse inference in selecting subsidy rates for *all investigated programs for Borusan*.”[52] Turkey then cites as “examples of inaccurate determinations” the subsidy amounts established for seven income tax-related subsidy programs, and customs duty and VAT exemption available under three other subsidy programs.[53] That is, in addition to the application of facts available with respect to the provision of HRS, Turkey challenges its application for all 30 subsidy programs at issue in the WLP investigation.[54] However, Turkey limited its claims under Article 12.7 in relation to facts available to the HRS for LTAR subsidy program; the other 29 programs were not included in the claim in Turkey’s panel request and thus do not fall within the Panel’s terms of reference. Having failed to raise claims regarding these 29 programs in either its consultations request or panel request, Turkey may not argue for the first time in its first written submission that the applications of facts available for these programs are inconsistent with Article 12.7.

33. For the foregoing reasons, the United States respectfully requests that the Panel issue a preliminary ruling that claims under Article 12.7 of the SCM Agreement with respect to the 29 non-HRS for LTAR subsidy programs addressed in the WLP investigation are outside of the Panel’s terms of reference.

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

34. In its request for establishment of a panel, Turkey includes claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 that are expressly dependent on the Panel finding that the United States’ practices are inconsistent with other provisions of the SCM Agreement. Specifically, Turkey states:

> To the extent that the United States' practices described above are inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 12.7, 14(d) and 15.3 of the SCM Agreement, the United States is also in violation

[50] *See* WLP Final I&D Memo, pp. 8-9 (Exhibit TUR-122).
[51] *See* Panel Request, para. 8(B).
[52] Turkey’s First Written Submission, para. 323 (emphasis added).
[53] Turkey’s First Written Submission, para. 327.
[54] *See* WLP Final I&D Memo, pp. 7-9 (Exhibit TUR-122).

of its obligations under Article VI:3 of the GATT 1994 and Articles 10, 19.4, and 32.1 of the SCM Agreement.[55]

35. Turkey now attempts to raise independent arguments with respect to Article 19.4 and Article VI:3 in its first written submission. With respect to the WLP and HWRP proceedings, Turkey claims that the "United States has acted contrary to its obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by applying countervailing duty measures in excess of the amount of subsidization attributable to" the product at issue.[56] For example, under these provisions, Turkey challenges USDOC's application of countervailing duty rates calculated for "similar" subsidy programs to certain programs at issue in the WLP proceeding.[57] However, Turkey has *not* raised this argument with respect to SCM Article 12.7, the provision on which Turkey's claims with respect to "facts available" under Article 19.4 and Article VI:3 depend.[58] Since the only claims Turkey included in its panel request under Article 19.4 and Article VI:3 were expressly contingent on the Panel finding a violation of Articles 1.1(a)(1), 1.1(b), 2.1(c), 12.7, 14(d) and/or 15.3 of the SCM Agreement, these new, independent claims under Articles 19.4 and Article VI:3 are not within the Panel's terms of reference.

36. For the foregoing reasons, the United States respectfully requests that the Panel issue a preliminary ruling that Turkey's arguments under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 with respect to WLP and HWRP investigations are outside of the Panel's terms of reference.

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

37. With respect to its Articles 1.1(b) and 14(d) claims, Turkey challenges an aspect of USDOC's benefit determination in the OCTG investigation. Specifically, Turkey challenges USDOC's rejection of in-country benchmarks to determine whether HRS was provided to the Turkish respondents for LTAR. However, this aspect of the OCTG determination was superseded and ceased to have any legal effect prior to the establishment of the Panel. Accordingly, it is thus outside its terms of reference.

38. The final OCTG benchmarks determination was successfully challenged in U.S. domestic court, remanded to USDOC, and was subsequently reversed by USDOC in the OCTG remand determination prior to the establishment of this Panel, as explained below. Therefore, the benchmarks determination for the OCTG investigation at the time of the Panel's establishment is that set out in the OCTG remand determination, and not the OCTG final determination. That is, Turkey challenges an aspect of the determination that has been superseded and was without legal effect at the time the DSB established this Panel.

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[55] Panel Request, para. 9.
[56] Turkey's First Written Submission, paras. 329, 441.
[57] Turkey's First Written Submission, para. 329.
[58] Turkey's First Written Submission, paras. 322-330.

39. When the DSB establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request.[59] Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."[60] As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[61]

40. In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the question of what legal situation a panel is called upon to examine under Article 7.1 of the DSU. The panel and Appellate Body both concluded that, under the DSU, the task of a panel is to determine whether the measure at issue is consistent with the relevant obligations "*at the time of establishment of the Panel.*"[62] It is thus the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel must make findings.[63]

41. In its panel request, Turkey claims that USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in OCTG from Turkey because:

> The USDOC failed to conduct a proper analysis of whether in-country prices for hot rolled steel are market determined, and therefore improperly rejected in-country prices as the benchmark for less than adequate remuneration under Article 14(d).
>
> The USDOC failed to establish that the provision of hot rolled steel by Erdemir and Isdemir conferred a benefit within the meaning of Article 1.1(b).[64]

42. However, the measure challenged by Turkey in this dispute—USDOC's rejection of in-country benchmarks to determine whether HRS was provided to the Turkish respondents for LTAR—was no longer the legal basis for USDOC's benefit determination at the time of establishment of the Panel in this case. Rather, the benchmarks determination supporting the CVD order at the time of panel establishment was reflected in the OCTG remand determination,

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[59] DSU, Art. 7.1.
[60] DSU, Art. 6.2; *see US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.
[61] *EC – Chicken Cuts (AB)*, para. 156.
[62] *See, e.g.*, *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel"); *id.*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel"); *see also EC – Approval and Marketing of Biotech Products (Panel)*, para. 7.456.
[63] *See, e.g., China – Raw Materials (AB),* para. 254*; China – Raw Materials (Panel),* para. 7.19.
[64] Turkey's Panel Request, p. 4.

issued on remand pursuant to domestic litigation, which superseded USDOC's benchmark determination in the OCTG final determination.

43. Specifically, in the OCTG final determination, USDOC used out-of-country prices as a benchmark to measure the adequacy of remuneration of hot-rolled steel after determining that it could not rely upon in-country prices.[65] Subsequently, however, the final determination was appealed by both the Turkish respondents and the U.S. industry to the United States Court of International Trade (USCIT).[66] The court determined that USDOC had acted inconsistently with its domestic legal obligations in using out-of-country prices as a benchmark, and remanded the OCTG final determination back to USDOC to reconsider the benchmark issue.[67] On remand, USDOC re-examined whether in-country prices could be used as a benchmark for LTAR, and, on August 31, 2015, USDOC issued the OCTG final remand determination where it reversed its determination and instead *used in-country prices as a benchmark*.[68]

44. Specifically, in the OCTG remand determination, USDOC concluded:

> [W]e are reversing our determination that actual transaction prices in Turkey are not appropriate to use as a benchmark for the HRS purchased by respondents during the POI. Accordingly, we find that HRS prices stemming from transactions within Turkey – including domestic purchases and imports into the country (*i.e.*, tier one prices) – may be considered appropriate, pursuant to the statutory and regulatory requirements, to use as benchmarks for the purposes of this remand redetermination. On this basis, we have recalculated the benefit to [the Turkish respondents] from their purchases of HRS produced by Erdemir and Isdemir.[69]

45. On February 22, 2016, the USCIT sustained the OCTG remand determination.[70] On March 10, 2016, USDOC published notice of its OCTG amended final determination, which effectuated USDOC's new benchmark and benefit determination reflected in the OCTG remand determination.[71] Specifically, in the OCTG amended final determination, USDOC stated that it:

> conducted a new HRS market analysis consistent with the Court's remand order, determined that under that specific analysis the HRS

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[65] OCTG Final I&D Memo, pp. 36-39 (Exhibit TUR-85).
[66] *See* Final Results of Remand Redetermination, Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States, Consol. Ct. No. 14-00229 (August 31, 2015) (OCTG Remand Redetermination), pp. 9-11 (Exhibit USA-1).
[67] *See* OCTG Remand Redetermination, pp. 9-11 (Exhibit USA-1).
[68] *See* OCTG Remand Redetermination, pp. 9-11 (Exhibit USA-1).
[69] *See* OCTG Remand Redetermination, p. 18 (Exhibit USA-1).
[70] *See Maverick Tube Corp. v. United States*, Consol. Court No. 14-00229, Slip Op. 2016-16 (February 22, 2016) (Exhibit USA-2).
[71] 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 (USDOC March 10, 2016) (Amended OCTG Final Determination) (Exhibit USA-3).

> market was not distorted in Turkey, and … determined to use transaction prices in Turkey as a benchmark to calculate the benefit from the provision of HRS to Borusan and Toscelik during the period of investigation.[72]

46. Therefore, when the OCTG amended final determination was published on March 10, 2016, USDOC's determination to use of out-of-country benchmarks ceased to have any legal effect, and was replaced by USDOC's remand determination, in which it determined to use in-country benchmarks. Likewise, because USDOC changed the benchmark to measure the adequacy of remuneration for HRS, the benefit calculation in the OCTG final determination also ceased to have any legal effect and was replaced by USDOC's new benefit calculation set out in the OCTG remand determination. [73]

47. One year later, Turkey requested consultations in this dispute on March 7, 2017.[74] The Panel subsequently was established on June 19, 2017.[75] Because the task of a panel is to determine whether the measure at issue is consistent with the relevant obligations *at the time of establishment of the Panel*,[76] Turkey's challenge to the benchmark and benefit determination in the OCTG final determination falls outside the Panel's terms of reference.

48. Moreover, Turkey's panel request appears to recognize that USDOC's benchmark and benefit determination in the OCTG final determination was amended and replaced by USDOC's OCTG remand determination. In Annex I of its panel request, Turkey states that OCTG from Turkey includes USDOC's final affirmative countervailing duty determination,[77] as well as USDOC's Final Results of Remand Redetermination.[78] Turkey has not, however, raised any claims against the OCTG remand determination that superseded the final determination's benchmark and benefits findings.

49. Therefore, because the USDOC benchmark and benefit determination set out in the OCTG final determination ceased to have any legal effect as of March 10, 2016, the United States respectfully requests for the Panel to issue a preliminary ruling that Turkey's claims under Articles 1.1(b) and 14(d) of the SCM Agreement on these aspects of the challenged measures are not within the Panel's terms of reference.

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[72] Amended OCTG Final Determination, 81 Fed. Reg. at 12,691-92 (Exhibit USA-3).
[73] In the OCTG amended final determination, USDOC also stated that it was amending the rates of Turkish respondents and the all others rate to effectuate the OCTG remand determination. Amended OCTG Final Determination, 81 Fed. Reg. at 12,691 (Exhibit USA-3).
[74] Consultations Request, p. 1.
[75] *See* WT/DSB/M/398 (June 19, 2017).
[76] *See, e.g.*, *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel"); *see also EC – Approval and Marketing of Biotech Products (Panel)*, para. 7.456.
[77] Panel Request, p. 11 (identifying OCTG Final I&D Memo (Exhibit TUR-85)).
[78] Panel Request, p. 12 (identifying OCTG Remand Redetermination (Exhibit USA-1)*; Maverick Tube Corporation v. United States* (Exhibit USA-2)).

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

A. Turkey's "As Such" Challenge Under Article 1.1(b) and 14(d) of the SCM Agreement Fails Because It Has Not Established A Rule Or Norm Of General And Prospective Application

50. As explained above, Turkey's "as such" claim with respect to the benchmark determination is not within the Panel's terms of reference. For completeness, the United States notes that Turkey's challenge also fails on the merits, for at least two reasons. First, Turkey has failed to establish the benchmarks "practice" is a rule or norm of prospective and general application. Second, Turkey has not established that the alleged measure "necessarily" results in a breach of Article 14(d) of the SCM Agreement and thus could be found "as such" inconsistent.

51. Turkey alleges that "[t]he USDOC has a practice, in assessing whether a good is provided for less than adequate remuneration thereby conferring a benefit, of rejecting in-country prices as a benchmark based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good, with no consideration of whether in-country prices are distorted."[79] Specifically, Turkey claims that "this practice has been articulated and applied systematically by USDOC in both prior and subsequent countervailing duty proceedings, and thus should be considered a rule of 'general and prospective application.'"[80] But Turkey fails to substantiate its allegations and does not carry its burden as the complaining party to demonstrate the existence and content of the challenged measure.

52. It is important to emphasize at the outset that Turkey is not challenging a written measure. In instances of written measures, there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged. But Turkey concedes that "the [U.S. benchmark] regulation, on its face, is consistent" with Article 14(d) of the SCM Agreement.[81] To challenge an unwritten measure, as the Appellate Body has recognized, "[t]he situation is different…. In such cases, the very existence of the challenged 'rule or norm' may be uncertain."[82]

53. With respect to rules of general and prospective application, which Turkey alleges here, 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."[83] The Appellate Body further explained that:

> In our view, when bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective

[79] Turkey's First Written Submission, para. 172.
[80] Turkey's First Written Submission, para. 175.
[81] Turkey's First Written Submission, para. 176
[82] *US – Zeroing (EC) (AB)*, para. 197.
[83] *US – Zeroing (EC) (AB)*, para. 196.

> application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this *high threshold*, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such. This evidence may include proof of the systematic application of the challenged "rule or norm".[84]

54. In finding the existence of a rule or norm of general and prospective application in *US – Zeroing (EC)*, the evidence relied on by the Appellate Body included 15 investigations and 16 administrative reviews in which the methodology had been applied, expert opinions regarding the use and content of the methodology, and "the United States' recognition that it had been 'unable to identify any instance where {the} USDOC had given a credit for non-dumped sales.'"[85] The Appellate Body noted that "{t}his evidence consisted of considerably more than a string of cases, or repeated action, based on which the Panel would simply have divined the existence of a measure in the abstract."[86]

55. In an "as such" challenge to a rule or norm, a complaining party must also demonstrate that the challenged measure will "necessarily" result in WTO-inconsistent application.[87] As the Appellate Body explained in *US – Oil Country Tubular Goods Sunset Reviews*, a party making an "as such" claim is "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."[88] In that proceeding, the Appellate Body found that the United States did not breach the AD Agreement because the measure in question did not "preclude" USDOC from considering relevant evidence under Article 11.3 of the AD Agreement.[89] The panel in *EC – IT Products* agreed that "measures challenged 'as such' should…'necessarily' result in a breach of WTO obligations."[90] In other words, the complainant must demonstrate that application of the challenged measure necessarily will result in an inconsistency with a covered agreement in certain circumstances.

56. Turkey's showing with respect to USDOC's alleged rule falls far short of its burden. In support of its claim, Turkey points only to a statement in the final benchmark determination for

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[84] *US – Zeroing (EC) (AB)*, paras. 197-198.
[85] *US – Zeroing (EC) (AB)*, para. 201 (citations omitted).
[86] *US – Zeroing (EC) (AB)*, para. 204.
[87] *US – Carbon Steel (India) (AB)*, para. 4.477 (finding that "it is insufficient for an appellant simply to disagree with a statement or to assert that it is not supported by evidence"); *see also US – Shrimp II (Viet Nam) (AB)*, para. 4.39; *EC – IT Products (Panel)*, para. 7.116; *China – Auto Parts (Panel)*, para. 7.540; *Argentina – Textiles and Apparel (AB)*, para. 62.
[88] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.
[89] *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (AB)*, para. 121.
[90] *EC – IT Products (Panel)*, para. 7.154.

OCTG – which, as explained above in Section III.C, 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.

57. Specifically, Turkey recites the following statement in the OCTG final determination:

> Notwithstanding the regulatory preference [in 19 CFR 351.511(a)(2)] for the use of prices stemming from actual sales transactions in the country, where the Department finds that the government owns or controls the majority or a substantial portion of the market for the good or service, the Department will consider such prices to be significantly distorted and not an appropriate basis of comparison for determining whether there is a benefit.[91]

Turkey claims this statement "reflects the USDOC's longstanding practice, dating to the first issuance of regulations pursuant to the Uruguay Round Agreements Act."[92] But, in support of this assertion, Turkey refers only to the preamble of the USDOC regulation and, in a footnote, to four preliminary CVD determinations.[93]

58. This evidence is patently insufficient to support the existence of an unwritten measure. As already explained, the USDOC determination to use out-of-country benchmarks in the OCTG final determination, on which Turkey principally relies for its claim, was successfully challenged in U.S. domestic court by the Turkish respondents. The court found that USDOC's finding of distortion was inconsistent with U.S. law, and remanded the determination back to USDOC. On remand, USDOC reversed its benchmark determination, and instead used in-country, Turkish prices to establish a benchmark, stating:

> [W]e are reversing our determination that actual transaction prices in Turkey are not appropriate to use as a benchmark for the HRS purchased by respondents during the POI. Accordingly, we find that HRS prices stemming from transactions within Turkey – including domestic purchases and imports into the country (*i.e.*, tier one prices) – may be considered appropriate, pursuant to the statutory and regulatory requirements, to use as benchmarks for the purposes of this remand redetermination. On this basis, we have recalculated the benefit to [the Turkish respondents] from their purchases of HRS produced by Erdemir and Isdemir.[94]

In the OCTG remand determination, USDOC thus used in-country benchmarks. Therefore, the OCTG investigation does not demonstrate that USDOC has a rule or norm of rejecting in-

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[91] Turkey's First Written Submission, para. 177 (*citing* OCTG Final I&D Memo, p. 23 (Exhibit TUR-85)).
[92] Turkey's First Written Submission, para. 178.
[93] Turkey's First Written Submission, paras.178-180.
[94] OCTG Remand Redetermination, p. 18 (Exhibit USA-1).

country prices based solely on evidence of government ownership or control of domestic producers.

59. These events took place over a year before Turkey requested consultations with the United States in this dispute. Therefore, Turkey cannot rely on the OCTG finding cited to demonstrate the existence of a rule or norm in existence at the time of the panel request. Instead, this evidence shows that, in fact, USDOC does not have a practice requiring it to use out-of-country in the circumstances Turkey identifies.

60. Turkey attempts to support its claim by citing to language in the preamble of USDOC's regulations;[95] however, Turkey concedes just two paragraphs prior in its submission that the USDOC regulation is consistent with Article 14(d) of the SCM Agreement.[96] Here, Turkey appears to cite this preambular language only to suggest that the determination in the OCTG investigation was inconsistent with it. However, as discussed in Section III.C., Turkey appears to recognize that the OCTG remand determination amended and replaced USDOC's benefit determination from the OCTG final determination,[97] so Turkey has failed to demonstrate that the preamble establishes a rule or norm of general and prospective application.

61. Indeed, 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. For example, in the CWP 2013 Final Results, USDOC found that "the record of this review does not contain evidence of the GOT's direct or indirect involvement resulting in the distortion of the Turkish HRS market during the POR sufficient to warrant using an out-of-country benchmark."[98] USDOC went on to state, that,

> [f]or example, the record does not contain evidence of GOT export restraints on HRS and the share of imports into the domestic market is higher than in certain past cases where the Department pointed to low import levels as relevant information in rejecting tier one prices. The record information regarding any policies that the GOT may have with respect to the steel industry does not indicate that the GOT's pursuit of those policies results in a significant distortion of the Turkish HRS market. There is no indication otherwise that government involvement significantly distorts this market. Thus, the record of this investigation is absent additional facts present in other cases in which the agency found government distortion even where record evidence did not show

[95] Turkey's First Written Submission, para. 178-179.
[96] Turkey's First Written Submission, para. 176.
[97] *See also* Panel Request, p. 12 (identifying OCTG Remand Redetermination (Exhibit USA-1)).
[98] CWP Final I&D Memo, p. 19 (Exhibit TUR-22).

> that government-controlled producers accounted for a majority of the market for the good.[99]

62. Thus, in the CWP 2013 Final Results, USDOC determined "that the Borusan Companies' domestic and import prices for HRS can serve as a tier one benchmark in this review," and, thus, it "used the Borusan Companies' actual domestic and import prices for HRS to calculate the benefit from the Borusan Companies' purchases of HRS from Erdemir and Isdemir during the POR."[100] The CWP 2013 Final Results thus do not demonstrate that USDOC has a practice of rejecting in-country benchmarks when there is substantial government ownership of the relevant market.

63. Additionally, in the WLP Final Determination, USDOC found that "Erdemir's and Isdemir's collective share of the domestic supply of HRS during 2011, 2012, and 2013 accounted for 49.7 percent, 47.2 percent, and 46.5 percent, respectively, of the total domestic supply of HRS (inclusive of imports and internally-consumed production) in Turkey," and, thus, their production "accounted for a substantial portion of the domestic supply" in the years before, and during, the period of investigation.[101] Notwithstanding that determination, USDOC concluded that "record evidence does not support a finding that the Turkish HRS market is so distorted that it cannot serve as an appropriate benchmark," and, as a result, USDOC "used Toscelik's actual domestic and import prices for HRS to calculate the benefit from Toscelik's purchases of HRS from Erdemir and Isdemir during the [period of investigation]."[102]

64. Similarly, in the HWRP Final Determination, USDOC concluded that "the record evidence in this investigation does not support a finding that the Turkish HRS market is so distorted that it cannot serve as a source for an appropriate benchmark," notwithstanding its simultaneous finding that, during the years immediately prior to and during the period of investigation, Erdemir's and Isdemir's collective share of the Turkish HRS market was between 40 and 45 percent, inclusive of imports and internally-consumed production.[103]

65. Accordingly, in none of the four cases did USDOC "reject[] in-country prices as a benchmark based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good, with no consideration of whether in-country prices are distorted," as alleged by Turkey.[104] Rather, as demonstrated, in each case, USDOC discussed and considered evidence relevant to the distortion of in-country prices, in addition to the government's market share, to determine whether in-country prices are an appropriate benchmark. In all four cases, USDOC determined to use in-country prices.

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[99] CWP Final I&D Memo, p. 19 (Exhibit TUR-22).
[100] CWP Final I&D Memo, p. 19 (Exhibit TUR-22).
[101] WLP Final I&D Memo, p. 16 (Exhibit TUR-122).
[102] WLP Final I&D Memo, p. 16 (Exhibit TUR-122).
[103] HWRP Final I&D Memo, p. 13 (Exhibit TUR-46).
[104] Turkey's First Written Submission, para. 172.

66. Turkey's attempt to support its contention that USDOC has a practice of rejecting in-country benchmark prices based solely on a finding of majority or substantial government ownership or control of domestic suppliers by referencing four preliminary determinations in which USDOC determined to go out-of-country to choose a benchmark is equally unavailing.[105] For example, although Turkey cites to the CWP 2013 Preliminary Results,[106] as discussed above, in the CWP 2013 Final Results, USDOC subsequently reversed its determination, and found that "the record of this review does not contain evidence of the GOT's direct or indirect involvement resulting in the distortion of the Turkish HRS market during the POR sufficient to warrant using an out-of-country benchmark."[107] The benchmark determination in the CWP 2013 Preliminary Results was therefore reversed and replaced by the CWP 2013 Final Results, and thus does not demonstrate that USDOC has a practice of rejecting in-country benchmarks.

67. Turkey also cites to the preliminary determinations in Certain Steel Wheels from the People's Republic of China, Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China, and Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China.[108] However, Turkey has not explained how these determinations support its claim, only merely citing to conclusory sentences from the determinations.[109] USDOC reached its determination regarding the appropriate benchmark in these three determinations after weighing the evidence relevant to the distortion of private prices in the market in question. Moreover, each of these determinations were issued prior to the Turkish cases challenged in this dispute and discussed above.

68. Therefore, none of the evidence cited by Turkey, including the determinations at issue in this dispute, demonstrates that USDOC has a "practice" of rejecting in-country prices as benchmarks to determine adequacy of remuneration based solely on evidence of government ownership or control of domestic producers.

69. Three instances of the use of out-of-country benchmarks not only fails to demonstrate the nature and content of the alleged "practice" challenged by Turkey, it in no way reflects proof of systemic application. And, of those three determinations cited by Turkey in support of its contention, all three are older than the other determinations challenged in this case, which universally applied in-country benchmarks after a U.S. court reversed the earlier use of an out-of-country benchmark. Therefore, Turkey's evidence demonstrates that the use of out-of-country benchmarks as described in Turkey's challenge was decidedly not a "practice" at the time of the Panel's establishment.

70. Thus, the evidence that Turkey cites as to the existence of a measure contrasts sharply with the evidence put before the panel in *US – Zeroing (EC)*. Far from proof of "systemic application," Turkey cites to a handful of USDOC determinations, one of which the Turkish respondents themselves successfully challenged in U.S. court, resulting in a reversal of the

[105] Turkey's First Written Submission, para. 179, n. 437.
[106] Turkey's First Written Submission, para. 180, n. 437.
[107] CWP Final I&D Memo, p. 19 (Exhibit TUR-22).
[108] Turkey's First Written Submission, para. 180, n. 437.
[109] Turkey's First Written Submission, para. 180, n. 437.

benchmarks determinations prior to even to Turkey's request for consultations in this dispute. Therefore, Turkey has failed to demonstrate the existence of a "practice" that is a rule or norm of general and prospective application. Its claim therefore fails on this basis alone.

71. Turkey's claim also fails because it has not shown that the alleged practice "necessarily" results in a WTO-inconsistency in any identified circumstance. That is, much for the same reason Turkey has failed to show a rule or norm of general and prospective application, the evidence reviewed shows no circumstance in which any rule or norm necessarily resulted in a benchmark finding that breaches the SCM Agreement. As the Appellate Body has found, an "as such" challenge is a serious one; such a claim cannot be substantiated based on such scant and contradictory evidence.[110]

72. Therefore, the United States respectfully requests that the Panel reject Turkey's "as such" claim because Turkey has not met the "high" evidentiary burden in these circumstances to establish a rule or norm of general and prospective application.

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

73. Turkey challenges all four countervailing duty determinations under Article 1.1(a)(1) of the SCM Agreement. Turkey claims, "[t]he USDOC's determinations that OYAK, Erdemir, and Isdemir are public bodies is inconsistent with Article 1.1(a)(1)."[111] Specifically, Turkey claims that USDOC failed to adhere to the appropriate legal standard concerning public bodies, and did not examine whether OYAK, Erdemir, and Isdemir possess, exercise, or are vested with governmental authority.[112] In addition, Turkey argues that USDOC failed to provide a reasoned and adequate explanation for its determinations because the evidence cited by USDOC did not support its findings, and USDOC failed to consider evidence which contradicted its findings.[113] Turkey lastly claims that because USDOC's determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement, the United States is also in violation of its obligations under Articles 10 and 32.1 of the SCM Agreement.[114]

74. In each of the challenged determinations, USDOC evaluated whether countervailable subsidies were bestowed through the provision of hot-rolled steel (HRS) for less than adequate remuneration (LTAR) by Eregli Demir ve Celik Fabrikalari T.A.S. ("Erdemir") and its subsidiary Iskenderun Iron & Steel Works Co ("Isdemir") to the Turkish respondents under examination. Consistent with Article 1.1(a)(1) of the SCM Agreement, USDOC examined the role of Erdemir and Isdemir, and determined, based on numerous considerations, including the involvement of Ordu Yardımlaşma Kurumu's ("OYAK") (the pension fund of the Turkish military) in Erdemir, that both Erdemir and Isdemir are in fact public bodies.

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[110] *US – Zeroing (EC) (AB)*, paras. 197-198.
[111] Turkey's First Written Submission, paras. 94, 244, 357, 468.
[112] Turkey's First Written Submission, paras. 94, 244, 357, 468.
[113] Turkey's First Written Submission, paras. 101, 251, 364, 475.
[114] Turkey's First Written Submission, paras. 169-170, 320-321, 430-431, 541-542.

75. In this section (Section IV.B), we explain that because USDOC never attributed a financial contribution to OYAK, USDOC never made a finding that OYAK was public body. Therefore, Turkey's claims with respect to OYAK under Article 1.1(a)(1) must fail. In Section IV.C, we then turn to the public body findings that USDOC made with respect to Erdemir and Isdemir.

76. Turkey argues that USDOC's alleged determination with respect to OYAK as a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement because USDOC failed to adhere to the appropriate legal standard concerning public bodies.[115] In addition, Turkey claims that USDOC failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its alleged determination that OYAK is a public body.[116]

77. However, these arguments demonstrate a fundamental misunderstanding of the challenged determinations. As further explained below, Turkey's claims fail because the requirements of Article 1.1(a)(1) of the SCM Agreement do not apply to USDOC's analysis of OYAK.

78. Article 1.1(a)(1) of the SCM Agreement provides, in relevant part, that "a subsidy shall be deemed to exist if . . . *there is a financial contribution* by a government or any public body within the territory of a Member (referred to in this Agreement as "government")."[117] Thus, the first question in any subsidy analysis is whether there is, in fact, a financial contribution by a government or a public body.

79. Contrary to Turkey's claims, USDOC did not find, in any of the determinations, that OYAK provided a financial contribution, and thus did not find OYAK to be a public body for purposes of Article 1.1(a)(1). Such a finding was neither necessary, nor appropriate, because USDOC did not find that OYAK provided a countervailable subsidy.[118] Rather, in determining that HRS was provided for LTAR, USDOC found Erdemir and Isdemir to be public bodies. While USDOC found that the provision of HRS for LTAR by Erdemir and Isdemir was a financial contribution, USDOC did not attribute a financial contribution finding to OYAK. Indeed, as discussed further in Section IV.C, because of OYAK's relationship with Erdemir, USDOC's examination of OYAK was for the purposes of discussing the GOT's meaningful control over Erdemir and Isdemir and the financial contribution provided by *those* two entities.[119] It was in the context of this analysis that USDOC discussed OYAK itself.

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[115] Turkey's First Written Submission, paras. 102-107, 252-257, 365-370, 476-481.
[116] Turkey's First Written Submissions, paras. 108-135, 258-285, 371-397, 482-508.
[117] SCM Agreement, Article 1.1(a)(1) (emphasis added).
[118] 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).
[119] OCTG Final I&D Memo, p. 35 ("[W]e find Erdemir and Isdemir to be public bodies, and hence 'authorities," . . . Consequently, we find that the HRS Erdemir and Isdemir supplied to Borusan and Toscelik is a financial contribution in the form of a governmental provision of a good . . . .") (Exhibit TUR-85); HWRP Final I&D Memo, p.23 ("[W]e continue to find Erdemir and Isdemir to be public bodies, and hence 'authorities," . . . . Consequently, we find that the HRS Erdemir and Isdemir supplied to the respondents is a financial contribution in the form of a

80. Therefore, because USDOC did not find a countervailable subsidy with respect to OYAK, and thus did not find that OYAK provided a financial contribution, Turkey's claim must fail because the requirements of Article 1.1(a)(1) of the SCM Agreement do not apply to USDOC's analysis of OYAK. As a consequence, Turkey's claims under Articles 10 and 32.1 must also fail.

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

81. In the challenged determinations, USDOC found that Erdemir and Isdemir are public bodies that provided a financial contribution in the form of HRS for LTAR to the Turkish respondents.[120] USDOC determined Erdemir and Isdemir to be public bodies, based on numerous considerations, including the involvement of OYAK in Erdemir.

82. Turkey claims that USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) in finding Erdemir and Isdemir to be public bodies.[121] Specifically, Turkey argues that "the USDOC conducted no analysis of the GOT's relationship with Erdemir [and Isdemir] within the overall Turkish legal order or whether the GOT has, in fact, meaningfully exercised its alleged ability to control Erdemir [and Isdemir]."[122] Contrary to its claims, however, Turkey has not demonstrated that USDOC acted inconsistently with the SCM Agreement in making these findings.

83. As an initial matter, we recall that Turkey begins its first written submission by presenting an extensive overview of occupational pension funds around the world.[123] This discussion has no bearing on the Panel's review of USDOC's determinations because the

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governmental provision of a good . . . .") (Exhibit TUR-46); CWP Final I&D Memo, p. 30 ("[W]e continue to find Erdemir and Isdemir to be public bodies, and hence 'authorities," . . . . Consequently, we find that the HRS Erdemir and Isdemir supplied to the Borusan Companies is a financial contribution in the form of a governmental provision of a good . . . .") (Exhibit TUR-22); WLP Final I&D Memo, p. 36 ("[W]e continue to find Erdemir and Isdemir to be public bodies, and hence 'authorities," . . . . Consequently, we find that the HRS Erdemir and Isdemir supplied to Toscelik is a financial contribution in the form of a governmental provision of a good . . . .") (Exhibit TUR-122).

[120] OCTG Final I&D Memo, p. 35 ("[W]e find Erdemir and Isdemir to be public bodies, and hence 'authorities," . . . Consequently, we find that the HRS Erdemir and Isdemir supplied to Borusan and Toscelik is a financial contribution in the form of a governmental provision of a good . . . .") (Exhibit TUR-85); HWRP Final I&D Memo, p.23 ("[W]e continue to find Erdemir and Isdemir to be public bodies, and hence 'authorities," . . . . Consequently, we find that the HRS Erdemir and Isdemir supplied to the respondents is a financial contribution in the form of a governmental provision of a good . . . .") (Exhibit TUR-46); CWP Final I&D Memo, p. 30 ("[W]e continue to find Erdemir and Isdemir to be public bodies, and hence 'authorities," . . . . Consequently, we find that the HRS Erdemir and Isdemir supplied to the Borusan Companies is a financial contribution in the form of a governmental provision of a good . . . .") (Exhibit TUR-22); WLP Final I&D Memo, p. 36 ("[W]e continue to find Erdemir and Isdemir to be public bodies, and hence 'authorities," . . . . Consequently, we find that the HRS Erdemir and Isdemir supplied to Toscelik is a financial contribution in the form of a governmental provision of a good . . . .") (Exhibit TUR-122).

[121] Turkey's First Written Submission, paras. 139-145, 289-295, 401-407, 512-518.

[122] Turkey's First Written Submission, paras. 143-144, 293-294, 405-406, 516-517.

[123] Turkey's First Written Submission, paras. 6-16.

documents and information on which the discussion is based were not before USDOC as record evidence in any of the challenged determinations. 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."[124] Moreover, "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."[125] Therefore, to assist the Panel in its review, we present below the record evidence that *was* before USDOC and the conclusions drawn therefrom.

84. In Section IV.C.1, we first present the legal framework governing public body findings. In Section IV.C.2, we present USDOC's examination of Erdemir and Isdemir as public bodies, in particular the involvement of OYAK, which USDOC examined as an organ of the GOT. In Section IV.C.3, we rebut Turkey's claims against the record evidence relied upon by USDOC in its examination of OYAK, Erdemir and Isdemir. As will be demonstrated, USDOC's determinations with respect to Erdemir and Isdemir are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

1. Legal Framework

85. Article 1.1 of the SCM Agreement provides, in relevant part, that "a subsidy shall be deemed to exist if:"

> (a)(1) *there is a financial contribution* by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or service other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the functions illustrated in (i) to (iii) above which would normally be

[124] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193) (emphasis added)).
[125] *Japan – DRAMs (Korea) (AB)*, para. 131 (quoting *US – Countervailing Duty Investigation on DRAMS*, para. 154) (emphasis added).

> vested in the government and the practice, in no real sense, differs from practices normally followed by governments . . . .

86. Thus, the first question in any subsidy analysis is whether there is a financial contribution by a government or a public body. As the Appellate Body has found, Article 1.1(a),

> defines and identifies the governmental conduct that constitutes a financial contribution. It does so both by listing the relevant conduct, and by identifying certain entities and the circumstances in which the conduct of those entities will be considered to be conduct of, and therefore be attributed to, the relevant WTO Member.[126]

87. If the entity is governmental, *i.e.*, "a government or any public body," and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution.[127] As explained further below, the use of distinct terms in Article 1.1(a)(1) to describe governmental entities – "a government" and "any public body" – suggests that these terms have distinct and different meanings.[128]

88. The term "government," means, among other things: "The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry."[129] In *Canada – Dairy*, the Appellate Body explained that a "'government agency' is, in our view, an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens."[130]

89. With respect to the term "public body," the Appellate Body considers that "the term public body in Article 1.1(a)(1) of the SCM Agreement means 'an entity that possesses, exercises or is vested with governmental authority.'"[131] In the view of the United States, the Appellate Body has erroneously collapsed the term "public body" into "government" (or "government agency") in its interpretation, failing to properly interpret the ordinary meaning of the term, in its context.[132] For purposes of this discussion, however, we explain the approach of

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[126] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[127] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[128] *See US – Countervailing Duty Measures on Certain Products from China (Panel)*, para. 7.68.
[129] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.57 (citing Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1123).
[130] *Canada – Dairy (AB)*, para. 97.
[131] *US – Carbon Steel (India) (AB)*, para. 4.37.
[132] U.S. Appellee Submission, *US – Carbon Steel (India) (AB),* para. 509 and n. 650 (citing an article in the Journal of World Trade penned by Michael Cartland, Gérard Depayre, and Jan Woznowski, each of whom participated in the Negotiating Group on subsidies and countervailing measures in the Uruguay Round. In that article, the authors explain that "Article 1 of the SCMA is not about restraining behaviour of anyone; to the contrary, in some sense it is about describing what kinds of entities might provide 'gifts' to certain other entities, with disciplines where those gifts distort trade. It is simply not necessary for a particular entity to have regulatory power (to constrain others'

the Appellate Body and, later, that the analysis of USDOC satisfies that approach. We note that the Appellate Body has correctly understood that a public body need not have the "power to regulate, control, or supervise individuals, or otherwise restrain conduct of others."[133] A public body, in its view, must "be found to be vested with governmental authority or exercising a governmental function,"[134] and the core function at issue for purposes of Article 1.1(a) is whether the entity can make a contribution of government financial resources.

90. As the Appellate Body summarized in *US – Carbon Steel (India)*,

> whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates."[135] For example, evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates may inform the question of whether the conduct of an entity is that of a public body. The absence of an express statutory delegation of governmental authority does not necessarily preclude a determination that a particular entity is a public body. Instead, there are different ways in which a government could be understood to vest an entity with "governmental authority", and therefore different types of evidence may be relevant in this regard. In order properly to characterize an entity as a public body in a particular case, it may be relevant to consider "whether the functions or conduct [of the entity] are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member", and the classification and functions of entities within WTO Members generally.[136]

91. Importantly, "[i]n the same way that "no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[137]

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behaviour) for that entity to be able to provide gifts that might distort trade, that is, to channel trade distorting *government resources* to particular recipients in an economy." Cartland, Michael, Depayre, Gérard & Woznowski, Jan. 'Is Something Going Wrong in the WTO Dispute Settlement?' Journal of World Trade 46, no. 5 (2012), pp. 979-1015, available at: https://www.kluwerlawonline.com/abstract.php?area=Journals&id=TRAD2012031).

[133] *US – Carbon Steel (India) (AB)*, para. 4.17 (rejecting India's argument that in order to be a public body, an entity must have the power to regulate, control, or supervise individuals, or otherwise restrain conduct of others).

[134] *US – Carbon Steel (India) (AB)*, para. 4.17

[135] *US – Carbon Steel (India) (AB)*, para. 4.29.

[136] *US – Carbon Steel (India) (AB)*, para. 4.29.

[137] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317. *See also US – Carbon Steel (India) (AB)*, paras. 4.9, 4.29, 4.42.

92. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body described the types of evidence that may be relevant to an evaluation of the core features of an entity and its relationship to the government. "First, one can look at legal instruments. Second, one can look at the actions of the entity. And third, one can look into whether the government exercises meaningful control over the entity."[138] Moreover, "[i]n some instances, … where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority."[139]

93. In *US – Carbon Steel (India)*, the Appellate Body summarized its earlier findings in *US – Anti-Dumping and Countervailing Duties (China)*, explaining 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."[140]

94. Thus, "the determination of whether a particular conduct is that of a public body must be made by evaluating the core features of the entity and its relationship to government in the narrow sense."[141] "Just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[142]

95. Before turning to a description of USDOC's determinations in the four challenged proceedings, we recall the standard of review to be applied by panels when reviewing an investigating authority's determination. 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… . This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation."[143] However, the standard of review "precludes a panel from engaging in a *de novo* review of the facts of the case 'or substitut[ing] its judgment for that of the competent

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[138] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318 ("It follows, in our view, 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."))

[139] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.

[140] *US – Carbon Steel (India) (AB)*, para. 4.10 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para 318).

[141] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 345.

[142] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.

[143] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193)).

authorities'."[144] That a Panel might have come to a different conclusion than the investigating authority based on the same facts would not support a finding that the authority acted inconsistently with the SCM Agreement.[145]

96. As discussed further below, Turkey attempts to support its arguments by focusing narrowly on individual documents on the record of each proceeding. USDOC's determinations, however, were based on the totality of the evidence on the record.[146] 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."[147] 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."[148]

2. USDOC's Public Body Determinations Are Consistent With Article 1.1(a)(1) of the SCM Agreement Under the Appellate Body's Approach

97. In the challenged determinations, after consideration of the record as a whole, USDOC determined Erdemir and Isdemir to be public bodies, based on numerous considerations, including the involvement of OYAK, as an organ of the GOT, in Erdemir.[149] As detailed below,

[144] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 379 (quoting *US – Steel Safeguards (AB)*, para. 299 (referring to *Argentina – Footwear (EC) (AB)*, para. 121)).
[145] *See US – Hot-Rolled Steel (Panel),* para. 7.205 (finding that the panel was not able to overturn the evaluation of the administering authority if the establishment of the facts was proper and the evaluation unbiased and objective, even though the panel might have reached a different conclusion).
[146] WLP Final I&D Memo, p. 36 (Exhibit TUR-122) ("Therefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); HWRP Final I&D Memo, p. 23 (Exhibit TUR-46) ("Therefore, based on the totality of the record evidence, as described under the 'Analysis of Programs – Provision of HRS for LTAR' section above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); CWP Final I&D Memo, p. 30 (Exhibit TUR-22) ("Therefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); OCTG Final I&D Memo, p. 35 (Exhibit TUR-85) ("Based on the record evidence as a whole, as described above under the 'Analysis of Programs – Provision of HRS for LTAR' section, we find Erdemir and Isdemir to be public bodies . . . .").
[147] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted).
[148] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted).
[149] WLP Final I&D Memo, p. 36 (Exhibit TUR-122) ("Therefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); HWRP Final I&D Memo, p. 23 (Exhibit TUR-46) ("Therefore, based on the totality of the record evidence, as described under the 'Analysis of Programs – Provision of HRS for LTAR' section above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); CWP Final I&D Memo, p. 30 (Exhibit TUR-22) ("Therefore, based on the record evidence as a whole, as described under the 'Analysis of Programs –

USDOC examined OYAK as an organ of the GOT, detailing 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. USDOC then considered numerous indicia of the GOT's meaningful control over Erdemir and Isdemir, including: the GOT's controlling stake in Erdemir; the Prime Ministry Privatization Administration's (TPA) veto power over decisions related to closure, sale, merger, and liquidation; and the presence of OYAK and TPA officials on Erdemir's Board of Directors. The GOT's meaningful control was further evidenced through the alignment of Erdemir's stated corporate objectives in its 2012 and 2013 Annual Reports with the GOT's macroeconomic policies. As discussed below, this evidence demonstrated that Erdemir and Isdemir possess, exercise or are vested with governmental authority. Thus, after examining the totality of the evidence, USDOC determined Erdemir and Isdemir to be public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement.

98. USDOC first described the legal basis for OYAK's authority as the pension fund for the Turkish military and the functions it performs pursuant to this authority. As USDOC observed, OYAK was created, by virtue of its authorizing statute,[150] Law No. 205 (1961), "as an institution related to the Ministry of National Defense."[151] 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.[152] In carrying out this function, USDOC noted that Law No. 205 specifies that OYAK's property "shall enjoy the same rights and privileges as State property"[153] 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.[154] USDOC likewise observed that "members of the armed forces must by law contribute part of their salaries to OYAK."[155] Specifically, Article 17 of Law No. 205 calls for

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Provision of LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); OCTG Final I&D Memo, p. 35 (Exhibit TUR-85) ("Based on the record evidence as a whole, as described above under the 'Analysis of Programs – Provision of HRS for LTAR' section, we find Erdemir and Isdemir to be public bodies . . . .").

[150] 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).

[151] 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).

[152] 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).

[153] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Article 37 (Exhibit TUR-30); OCTG Law No. 205, Article 37 (Exhibit TUR-58); CWP Law No. 205, Article 37 (Exhibit TUR-11); WLP Law No. 205, Article 37 (Exhibit TUR-107).

[154] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* HWRP Law No. 205, Article 35 (Exhibit TUR-30); OCTG Law No. 205, Article 35 (Exhibit TUR-58); CWP Law No. 205, Article 35 (Exhibit TUR-11); WLP Law No. 205, Article 35 (Exhibit TUR-107).

[155] 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).

mandatory membership in OYAK for members of the Turkish Armed Forces, and Article 18 provides for a mandatory levy on their salaries.[156]

99. USDOC also described the extensive overlap between OYAK's leadership structure and the Turkish Armed Forces, as well as other organs of the GOT. In the OCTG final determination, USDOC explained that a study by the Turkish Economic and Social Studies Foundation concluded that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control."[157] Indeed, in examining Law No. 205 in the four proceedings, USDOC observed:[158]

> 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.[159]

100. USDOC next examined the functions and conduct of Erdemir and Isdemir, specifically the meaningful control by the GOT. USDOC examined the ownership of Erdemir and

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[156] HWRP Law No. 205, Articles 17, 18 (Exhibit TUR-30); OCTG Law No. 205, Articles 17, 18 (Exhibit TUR-58); CWP Law No. 205, Articles 17, 18 (Exhibit TUR-11); WLP Law No. 205, Articles 17, 18 (Exhibit TUR-107).

[157] 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)).

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

[159] Moreover, Law No. 205 contains several provisions concerning OYAK's leadership structure. For instance, Article 3 of Law No. 205 specifies that OYAK's Representative Assembly is to be composed entirely of members of the Turkish Armed Forces, who are "designated by their respective commanders or superiors." Article 4 of Law No. 205 details that these members of the Turkish Armed Forces elect half of the forty-person General Assembly, with the other half of General Assembly seats reserved for specific GOT leaders (*e.g.*, the Minister of National Defense and the Minister of Finance) and three individuals from the private sector "who will be appointed by the Minister of National Defense." The General Assembly, in turn, elects three members of OYAK's Board of Directors, drawing from candidates nominated by the Minister of National Defense and Chief of the General Staff. The four other members of the Board of Directors, as well as the Chairman of the Board of Directors, are selected by an Election Committee composed of: the Minister of National Defense, the Minister of Finance, the President of the Court of Accounts of the Republic of Turkey, the President of the Board of General Audit of the Prime Ministry of the Republic of Turkey, the Chairman of the Union Chambers and Commodity Exchanges of Turkey, and the Chairman of the Board of the Banks Association of Turkey. Article 11(i) of Law No. 205 specifies that, among other duties, the Board of Directors is charged with determining "the methods for managing the assets of the Fund." *See* HWRP Law No. 205(Exhibit TUR-30); OCTG Law No. 205 (Exhibit TUR-58); CWP Law No. 205 (Exhibit TUR-11); WLP Law No. 205 (Exhibit TUR-107).

Isdemir.[160] In the OCTG final determination, USDOC explained that Erdemir holds 3% of its own shares, and OYAK, through its wholly-owned holding company, Ataer Holding A.S., owns a 49.93% stake in Erdemir – a majority of the remaining shares.[161] Therefore, USDOC determined that OYAK is the majority owner of Erdemir.[162] Erdemir, in turn, owns a 92.91% stake in its subsidiary, Isdemir.[163] In the WLP final determination, USDOC similarly examined record evidence and found that OYAK is the majority shareholder of Erdemir;[164] and that Erdemir in turn owns over 90% of Isdemir.[165] USDOC looked to similar record evidence and made the same determination in the HWRP [166] and CWP determinations.[167]

101. USDOC then tied the stated corporate objectives and accomplishments of Erdemir and Isdemir to certain macroeconomic goals defined by the GOT, demonstrating that Erdemir and Isdemir designed their corporate priorities to adhere to state-crafted policy. In doing so, USDOC established that Erdemir's and Isdemir's purview extends beyond that of a typical profit-oriented private firm to encompass considerations that are governmental in the legal order of Turkey.

102. Specifically, in the OCTG final determination, USDOC explained that Erdemir's 2012 Annual Report states that Erdemir "implemented policies which promoted…customers to engage in <u>export-oriented production</u>" and "supports the use of <u>domestically mined resources</u> for raw materials in view of…the added value created by the domestic suppliers in favor of the local industries."[168] The report further states, "[p]roduction of flat steel began in 2008 at Iskenderun plant with the implementation of Modernization and Transformation Investments, so as to balance the long and flat steel production levels in Turkey. Producing flat steel products is crucial for the development of Turkish steel industry, and Isdemir plays a significant role in enhancing the capacity of flat steel production . . . ."[169] USDOC determined that "{t}hese policies are in line with the GOT's…2012-2014 Medium Term Programme," which 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."[170] In particular, Erdemir's policies adhered to the Medium Term Programme's stated

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[160] *See* OCTG Final I&D Memo, p. 33 ("[H]owever, we did not rely only on OYAK majority ownership of Erdemir. Instead, we considered this information on Erdemir's ownership together with other information on the record.") (Exhibit TUR-85).
[161] OCTG Final I&D Memo, p. 20 and n. 145 (Exhibit TUR-85).
[162] OCTG Final I&D Memo, p. 20 (Exhibit TUR-85).
[163] OCTG Final I&D Memo, p. 20 (Exhibit TUR-85).
[164] WLP Final I&D Memo, pp. 13-14 (Exhibit TUR-122).
[165] WLP Final I&D Memo, pp. 13-14 (Exhibit TUR-122).
[166] HWRP Final I&D Memo, p. 11 (Exhibit TUR-46).
[167] CWP Final I&D Memo, p. 8 (Exhibit TUR-22).
[168] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); *see also* OCTG Erdemir 2012 Annual Report (complete), pp. 29, 35 (emphasis added) (Exhibit USA-5).
[169] OCTG Erdemir 2012 Annual Report (complete), p. 5 (Exhibit USA-5).
[170] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); *see also* Medium Term Programme, p. 12 (Exhibit USA-6).

objective to "decrease high dependency of production and exports on imports" through "policies and supports enhancing domestic production capacity."[171]

103. Similarly, in the WLP,[172] CWP[173] and HWRP[174] determinations, USDOC examined Erdemir's 2013 Annual Report, noting its statement that through "flat steel sales to exporting industries," Erdemir "made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013"[175] and "continues to create value added for Turkish industry through its initiatives to increase the use of domestic sources of raw materials."[176] The 2013 Annual Report, which designates Erdemir as "Turkey's iron and steel power,"[177] also notes that Erdemir made "35% of its flat steel sales to the steel pipe manufacturing sector, one of the largest exporting sectors in Turkey."[178] It further states that Erdemir's "goal is to meet the country's ever-growing need for flat steel and pave the way for the development and growth of Turkish industry[,]"[179] and that "Isdemir also began manufacturing flat products in 2008 with the Modernization and Transformation Capital Investments undertaken after Isdemir's acquisition by Erdemir that year. This largest single investment in the history of the Republic of Turkey served to mitigate the imbalance between long and flat steel production in the country."[180] USDOC determined that "{t}hese policies are in line with the GOT's stated policy in its 2012-2014 Medium Term Programme to improve Turkey's balance of payments,"[181] as discussed above. Therefore,

[171] OCTG Final I&D Memo, p. 21 n.160 (Exhibit TUR-85); *see also* Medium Term Programme, p. 23 (Exhibit USA-6).
[172] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); *see also* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[173] CWP Final I&D Memo, p. 9 (Exhibit TUR-22); *see also* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[174] HWRP Final I&D Memo, p. 12 (emphasis added) (Exhibit TUR-46
[175] Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[176] WLP Final I&D Memo, p. 14 (emphasis added) (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (emphasis added) (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (emphasis added) (Exhibit TUR-46).
[177] *See* Erdemir 2013 Annual Report (complete), p. 2 (Exhibit USA-7). *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).
[178] Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7). *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).
[179] Erdemir 2013 Annual Report (complete), p. 6 (Exhibit USA-7). *See also* WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-9); HWRP Final I&D Memo, p. 12 (Exhibit TUR-12) (discussing how Erdemir "continues to create value added for Turkish industry through its initiatives to increase the use of domestic sources of raw materials").
[180] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-9); HWRP Final I&D Memo, p. 12 (Exhibit TUR-12); *see also* Erdemir 2013 Annual Report (complete), p. 6 (Exhibit USA-7).
[181] 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).

contrary to Turkey's arguments,[182] Erdemir's 2012 and 2013 Annual Reports demonstrated Erdemir's commitment to the objectives of the GOT's Medium Term Programme.

104. USDOC then examined Erdemir's Annual Report and Articles of Association. In the OCTG final determination, USDOC found evidence indicating that "OYAK effectively decides the composition of the majority of Erdemir's board through its majority shareholder voting rights in Erdemir."[183] Specifically, USDOC explained that Erdemir's Annual Report states, "[e]ach shareholder or the representative of the shareholder attending an Ordinary or an Extraordinary General Assembly Meetings shall have one voting right for each share."[184] 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."[185] As a result, USDOC determined that OYAK controls the selection of Erdemir's board.[186] Likewise, in the CWP, HWRP, and WLP determinations,[187] USDOC similarly considered Erdemir's Articles of Association which state that "[e]ach share has only one voting right,"[188] and that the "Board of Directors consists of minimum 5 and maximum 9 members to be selected by the General Assembly of Shareholders."[189]

105. In each of the determinations, USDOC also examined the role of the Turkish Prime Ministry Privatization Administration (TPA), which oversees the restructuring of Turkey's enterprises. USDOC examined Erdemir's Annual Reports, which state that OYAK and the TPA both maintain members on Erdemir's Board of Directors.[190] Specifically, both Erdemir's 2012 and 2013 Annual Reports state that the nine-member board is composed of three seats by OYAK, one by TPA, two by other investors, and three held independently.[191] Therefore,

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[182] Turkey's First Written Submission, paras. 155, 305, 416, 528. Turkey argues that USDOC improperly focused on evidence of the GOT's ability to control Erdemir, and did not consider whether Erdemir, in fact, operated autonomously or under government control.
[183] OCTG Final I&D Memo, p. 22 (Exhibit TUR-85).
[184] OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).
[185] OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).
[186] OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).
[187] 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).
[188] 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).
[189] 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).
[190] 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).
[191] OCTG Final I&D Memo, p. 22, n. 163 (citing OCTG Erdemir 2012 Annual Report (complete), pp. 54-55 (Exhibit USA-5)) (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); Erdemir 2013 Annual

USDOC considered record evidence illustrating that the GOT, through OYAK and TPA, held four of the nine seats, which provided further indication that the GOT effectively exercised meaningful control over Erdemir and Isdemir.

106. In addition, USDOC cited the TPA's veto power over any decision related to the closure, sale, merger, or liquidation of Erdemir and Isdemir.[192] 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."[193] 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.[194]

107. Accordingly, USDOC provided reasoned and adequate explanations in each determination that the GOT, through OYAK and the TPA, exercised "meaningful control" over Erdemir and Isdemir. Specifically, USDOC examined OYAK's majority ownership of Erdemir, Erdemir's Annual Reports, the TPA's power to close or make capacity adjustments, and the presence of the GOT officials on Erdemir's Board of Directors.

3. Turkey's Challenges Against the Record Evidence Are Wholly Without Merit

108. Turkey argues that the evidence cited by USDOC does not support a determination that OYAK is a public body.[195] Specifically, Turkey disagrees with USDOC's interpretation of Law No. 205, the statute that created OYAK.[196] Next, Turkey claims that OYAK's property under Turkish law is consistent with that of other Turkish pension funds.[197] Turkey also argues that because OYAK's member contributions are private funds, not owned or controlled by the GOT, the mandatory nature of participation for some members does not support USDOC's finding.[198] Fourth, Turkey claims that the members of OYAK are acting in their individual capacities, and not as government officials.[199] Turkey also argues that USDOC did not consider contradictory

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).

[192] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85). *See* Erdemir's Articles of Association, Articles 21, 22, 37. (Exhibit USA-8).

[193] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85). *See* OCTG Erdemir 2012 Annual Report (complete), pp. 62-63 (Exhibit USA-5).

[194] 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).

[195] Turkey's First Written Submission, paras. 111-131, 260-281, 374-393, 485-504.

[196] Turkey's First Written Submission, paras. 111-114, 261-264, 374-377, 485-488.

[197] Turkey's First Written Submission, paras. 115-119, 265-269, 378-382, 489-492.

[198] Turkey's First Written Submission, paras. 120-122, 270-272, 383-385, 493-495.

[199] Turkey's First Written Submission, paras. 123-131, 273-281, 386-393, 496-504.

record evidence that OYAK acted independently of the government.[200] Although, as described above, the USDOC did not determine – and was not required to determine – that OYAK is a public body, we offer responses to Turkey's arguments below, because Turkey's arguments could also be relevant to OYAK's status as an organ of the GOT.

109. In arguing that the evidence relied upon by USDOC does not support its examination concerning OYAK, Turkey mainly points to a position paper authored by a law firm, and the GOT's and Borusan's case briefs. Throughout its submission, Turkey presents as objective facts, statements from these non-objective pieces of record evidence.

110. Specifically, in countering the OCTG, HWRP and WLP determinations, Turkey relies on a position paper authored by a law firm that was on the record of the three proceedings.[201] As USDOC explained in the OCTG final determination, however, this position paper was commissioned by OYAK as a result of a report from WYG, a consulting firm, ("WYG Report"), as well as the Turkish authorities' observations on the WYG Report, "that OYAK qualified as a public undertaking and that State aid rules are applicable to OYAK's investment decisions."[202] Specifically, the position paper explains that OYAK asked the law firm to "provide assessments of sections of the WYG report and the Turkish authorities' observations on that report."[203] This position paper further 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."[204] Because the position paper was created for the express purpose of rebutting statements in the WYG report, that is, a report that opined that OYAK was a public undertaking and that State aid rules were applicable to OYAK's investment decisions, *USDOC asked the GOT twice* to submit the referenced WYG report and other documents that this position paper cited.[205] However, the GOT claimed that it could not submit the documents under its confidentiality agreements with the European Union or provide public summaries of their contents.[206]

111. Turkey now presents to the panel as evidence statements from this position paper that merely are a law firm's "legal analysis."[207] Without the complete information referenced within

[200] Turkey's First Written Submission, paras. 132-135, 282-285, 394-397, 505-508.
[201] Turkey's First Written Submission, paras. 111-135, 260-285, 374-397.
[202] OCTG Borusan Post-Preliminary Memo (Exhibit TUR-75). *See also* 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).
[203] 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).
[204] OCTG Position Paper by Hogan Lovells, p. 2 (Exhibit TUR-66); *see also* WLP Position Paper by Hogan Lovells, p. 2 (Exhibit TUR-99); HWRP Position Paper by Hogan Lovells, p. 2 (Exhibit TUR-39).
[205] OCTG Borusan Post-Preliminary Memo (Exhibit TUR-75); WLP Final I&D Memo, p. 13, n. 56 (Exhibit TUR-122); HWRP Final I&D Memo, p. 11 (Exhibit TUR-46).
[206] OCTG Borusan Post-Preliminary Memo (Exhibit TUR-75); WLP Final I&D Memo, p. 13 (Exhibit TUR-122); HWRP Final I&D Memo, p. 11 (Exhibit TUR-46).
[207] OCTG Position Paper by Hogan Lovells, p. 2 (Exhibit TUR-66); *see also* WLP Position Paper by Hogan Lovells, p. 2 (Exhibit TUR-99); HWRP Position Paper by Hogan Lovells, p. 2 (Exhibit TUR-39).

the position paper, including the WYG report that opined that OYAK was a public undertaking and that State aid rules were applicable to OYAK's investment decisions, USDOC was left to consider the position paper along with the totality of the record evidence, and weighed it accordingly.[208]

112. As for the CWP determination, in attempts to undermine USDOC's finding, Turkey points repeatedly to Borusan's case brief in the proceeding.[209] A case brief in a USDOC administrative proceeding, at which point parties are not permitted to submit new record evidence, is simply argument made by an interested party in a proceeding. Moreover, the statements that Turkey has pulled from Borusan's case brief are themselves unsupported by record evidence, and are merely assertions presented by an interested party.[210] Thus, by relying on administrative case briefs and the law firm position paper, Turkey does no more than proffer, in a conclusory manner, its alternative interpretation of the record facts. Although Turkey now attempts to fault USDOC for failing to give proper consideration to evidence that contradicted its finding, USDOC properly weighed the evidence and gave the law firm position paper and case briefs their due accord.

113. Turkey also argues that USDOC failed to provide a reasoned and adequate explanation with respect to Erdemir and Isdemir because USDOC has taken certain statements out of context in Erdemir's 2012 and 2013 Annual Reports.[211] In doing so, Turkey essentially asks the Panel to act as the initial trier of fact. However, a panel must not conduct a *de novo* evidentiary review, but

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[208] WLP Final I&D Memo, p. 36 (Exhibit TUR-122) ("Therefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); HWRP Final I&D Memo, p. 23 (Exhibit TUR-46) ("Therefore, based on the totality of the record evidence, as described under the 'Analysis of Programs – Provision of HRS for LTAR' section above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); CWP Final I&D Memo, p. 30 (Exhibit TUR-22) ("Therefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies . . . ."); OCTG Final I&D Memo, p. 35 (Exhibit TUR-85) ("Based on the record evidence as a whole, as described above under the 'Analysis of Programs – Provision of HRS for LTAR' section, we find Erdemir and Isdemir to be public bodies . . . .").

[209] Turkey's First Written Submission, paras. 485-504. *See also* CWP Borusan's Case Brief (Exhibit TUR-5).

[210] *See, e.g.,* Turkey's First Written Submission, para. 490, n. 1185 and para. 492, n. 1189 (arguing that the fact that OYAK is exempt from paying corporate income tax is not unique or exclusive to OYAK and citing an unsupported statement in CWP Borusan's Case Brief, p. 14 ("OYAK is treated in a similar way to any other private pension fund operating in the general social security system that provides supplementary pension rights to employees.") (Exhibit TUR-5)); *see also* 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.

[211] Turkey's First Written Submission, paras. 147-152, 297-302, 409-413, 520-525.

instead should "bear in mind its role as *reviewer* of agency action."[212] Turkey's request that the Panel conduct a *de novo* review is therefore inappropriate. Indeed, similar arguments and interpretation of the evidence were presented to USDOC in each of the challenged proceedings.[213] As explained above, USDOC weighed the evidence and determined to give weight to the plain language in Erdemir's Annual Report, which states that Erdemir "implemented policies which promoted the customers to engage in export-oriented production" and supported domestic suppliers in favor of local industries."[214] Moreover, the fact that Erdemir's focus on export-oriented production aligned with the Turkish Medium Term Programme provided additional evidence that the government was exerting control over Erdemir directly.[215] Thus, Turkey's characterization of the "context" of the paragraphs that USDOC cited offers Turkey's preferred alternative interpretation of the record evidence, but does not demonstrate that USDOC's conclusion was not based on record evidence.

114. Finally, Turkey argues that USDOC refused to consider evidence that demonstrates that OYAK operates independently of the government, and that Erdemir operates on a commercial basis.[216] However, as demonstrated by the four challenged determinations, contrary to Turkey's assertion, USDOC considered this information and provided a reasoned and adequate explanation for its rejection. As USDOC explained, "a firm's commercial behavior is not dispositive in determining whether that firm is a government 'authority.'"[217] Specifically, USDOC explained, "this line of argument conflates the issues of the 'financial contribution' being provided by an authority and 'benefit.'"[218] USDOC also explained that, regardless of whether "loans or goods or services are provided at commercial prices, *i.e.,* act in a commercial

[212] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis in original).
[213] OCTG Final I&D Memo, p. 33 ("Borusan and the GOT, for example, dispute the significance of the following statement in the post-preliminary analyses: 'For example, Erdemir's 2012 Annual Report states . . . .'") (Exhibit TUR-85); WLP Final I&D Memo, p. 32 ("Toscelik disagrees with the Department's contention that the GOT's purposed 'significant involvement' in OYAK infects Erdemir because of the declaration in Erdemir's annual report that it made a major contribution to the 4.6 percent increase in Turkey's manufacturing exports in 2013.") (Exhibit TUR-122); CWP Final I&D Memo, p. 27 ("For example, the Department cites as evidence of control statement in Erdemir's annual report that it played a role in increasing Turkey's' exports and that it sought to increase its use of domestically-procured raw materials. However this statement is unremarkable and is evidence of nothing more than the operations of a profit maximizing business.") (Exhibit TUR-22); HWRP Final I&D Memo, p. 20 ("MMZ contends that Erdemir cannot carry out government policy by selling HRS at below-market prices as it must fully disclose such activity to its shareholders.") (Exhibit TUR-46).
[214] OCTG Final I&D Memo, p. 33-34 (Exhibit TUR-85); WLP Final I&D Memo, pp. 14, 35 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[215] OCTG Final I&D Memo, p. 34 (Exhibit TUR-85); WLP Final I&D Memo, pp. 14, 35 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[216] Turkey's First Written Submission, paras. 132-135, 153-165, , 282-285, 303-316, 394-397, 414-426, 502, 505-508, 526-538.
[217] OCTG Final I&D Memo, p. 35 (Exhibit TUR-85); HWRP Final I&D Memo, p. 22 (Exhibit TUR-46); WLP Final I&D Memo, p. 36 (Exhibit TUR-122); CWP Final I&D Memo, p. 29 (Exhibit TUR-22).
[218] OCTG Final I&D Memo, p. 35 (Exhibit TUR-85); HWRP Final I&D Memo, p. 22 (Exhibit TUR-46); WLP Final I&D Memo, p. 36 (Exhibit TUR-122); CWP Final I&D Memo, p. 29 (Exhibit TUR-22).

manner," they are "still being provided by an authority and, thus, constitutes a financial contribution . . . ."[219]

115. This reasoning is consistent with the approach taken by dispute settlement panels in prior proceedings.[220] For example, in *Korea – Commercial Vessels (Panel)*, the panel stated that,

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

116. Moreover, this reasoning is supported by the structure of the SCM Agreement, which disciplines subsidies that constitute a financial contribution pursuant to Article 1.1(a)(1); confer a benefit pursuant to Article 1.1(a)(2); and are specific pursuant to Article 1.2. The bases for determining the existence of a financial contribution are laid out clearly in Article 1.1(a)(1), and, notably, do not include consideration of whether the financial contribution in question is provided consistent with market principles. Instead, such considerations are incorporated into the determination of benefit, which is covered by other provisions of the SCM Agreement.[221] 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. 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."[222]

117. Accordingly, contrary to Turkey's claims, consideration of whether a financial contribution was provided consistent with market principles is not germane to the determination of the existence of a financial contribution, as determined by USDOC.[223]

118. As discussed above, USDOC considered the evidence that was submitted and, taking into account the totality of the evidence before it, came to a different conclusion than that for which

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[219] OCTG Final I&D Memo, p. 35 (Exhibit TUR-85); HWRP Final I&D Memo, p. 22 (Exhibit TUR-46); WLP Final I&D Memo, p. 36 (Exhibit TUR-122); CWP Final I&D Memo, p. 29 (Exhibit TUR-22).
[220] *See, e.g.*, *Korea – Commercial Vessels (Panel)*, para. 7.28.
[221] 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).
[222] *See US – Gasoline (AB)*, p. 23.
[223] OCTG Final I&D Memo, p. 35 (Exhibit TUR-85); HWRP Final I&D Memo, p. 22 (Exhibit TUR-46); WLP Final I&D Memo, p. 36 (Exhibit TUR-122); CWP Final I&D Memo, p. 29 (Exhibit TUR-22).

Turkey now argues. This was because the evidence to which Turkey now points, including its selective citation of various pieces of evidence, simply was outweighed, in USDOC's view, by the ample record evidence to the contrary that supported USDOC's determinations, and which USDOC discussed at length, in each of the determinations. The Panel should, as the Appellate Body has found previously, "seek to review the [USDOC's] decision on its own terms, in particular, by identifying the inference drawn by [*USDOC*] from the evidence, and then by considering whether the evidence could sustain that inference."[224] The evidence before USDOC, taken in its totality, as analyzed and discussed by USDOC in the four challenged determinations supports the conclusion that, consistent with the SCM Agreement, USDOC's public body determinations with respect to Erdemir and Isdemir were reasoned and adequate; based on the totality of the evidence on the record; and establish that Erdemir and Isdemir possess, exercise, or are vested with governmental authority to perform governmental functions in Turkey.[225]

119. When it upheld USDOC's public body determination with respect to state-owned commercial banks in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body reasoned that, "[w]hether or not we would have reached the same conclusion, it seems to us that … the USDOC did consider and discuss evidence indicating that SOCBs in China are controlled by the government and that they effectively exercise certain governmental functions."[226] Likewise, here, whether or not the Panel – or Turkey – would have reached the same conclusion, it is undeniable that USDOC considered and discussed the record evidence indicating that Erdemir and Isdemir are meaningfully controlled by the government, and possess, exercise, or are vested with governmental authority to perform governmental functions in Turkey

120. For the reasons given above, the Panel should find that USDOC's public body determinations with respect to Erdemir and Isdemir are consistent with Article 1.1(a)(1) of the SCM Agreement. Moreover, notwithstanding Turkey's claims, it is clear on the face of USDOC's determinations that USDOC properly applied the correct interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. Because Turkey has not shown that USDOC's determinations are inconsistent with Article 1.1(a)(1), its consequential claims under Articles 10 and 32.1 of the SCM Agreement must also fail.

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

121. Turkey argues that USDOC's use of facts available in calculating subsidy rates in the OCTG, WLP, and HWRP investigations is inconsistent with Article 12.7 of the SCM Agreement.[227]

122. With respect to the OCTG investigation, Turkey argues that USDOC's determination to rely on facts available is inconsistent with Article 12.7 of the SCM Agreement because USDOC

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[224] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis in original on the "*agency*").
[225] *US – Countervailing Measures (China) (Panel)*, para. 7.66.
[226] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[227] Turkey's First Written Submission, paras. 193-211, 322-338, 432-442.

allegedly failed to take "due account" of difficulties the responding company experienced in reporting the requested information.[228] In particular, Turkey claims that USDOC improperly failed to select a "reasonable replacement" for the missing information,[229] and that USDOC's application of facts available was punitive.[230]

123. With respect to the WLP investigation, Turkey claims that USDOC acted inconsistently with Article 12.7 because its use of facts available resulted in an inaccurate subsidy calculation that has "no factual connection" to the subsidy programs under investigation.[231] Turkey points in particular to USDOC's determination of a 20 percent rate for certain tax-related programs and 14.01 percent rate for programs where no above-*de minimis* rates had been calculated for the same or similar programs, as well as USDOC's use of rates previously calculated for "similar" subsidy programs in other Turkish countervailing duty investigations.[232]

124. With respect to the HWRP investigation, Turkey argues that USDOC's application of facts available is inconsistent with Article 12.7 because the subsidy rates applied to the responding companies are "not accurate and have no factual connection" to the subsidy programs under investigation.[233] In particular, Turkey disagrees with USDOC's selection of the "*highest* subsidy rate for *similar* programs" from other Turkish countervailing duty proceedings.[234]

125. Below, we describe the legal framework of 12.7 of the SCM Agreement. We then (1) describe USDOC's findings and (2) demonstrate that Turkey's claims are without merit with respect to each of the investigations at issue. 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 cooperation.

1. Legal Framework

126. Article 12.7 of the SCM Agreement provides a Member's authority to make determinations on the basis of the facts available. Article 12.7 states, in relevant part, that:

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

127. That is, Article 12.7 "permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization . . . and

[228] Turkey's First Written Submission, paras. 196-197.
[229] Turkey's First Written Submission, para. 205.
[230] Turkey's First Written Submission, para. 196.
[231] Turkey's First Written Submission, para. 328.
[232] Turkey's First Written Submission, paras. 327-329.
[233] Turkey's First Written Submission, para. 440.
[234] Turkey's First Written Submission, para. 438.

injury."[235] The ability to rely on the facts available in these circumstances "is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation."[236]

128. In resorting to "facts available" under Article 12.7, the missing information must be "necessary." "[T]he use of the term 'necessary' to qualify the term 'information' carries significance," because "[i]t is meant to ensure that Article 12.7 is not directed at mitigating the absence of 'any' or 'unnecessary' information, but rather is concerned with overcoming the absence of information required to complete a determination."[237] If such "necessary" information is absent, "the process of identifying the 'facts available' should be limited to identifying replacements for the 'necessary information' that is missing from the record."[238]

129. When an investigating authority must rely on "facts available," "[t]here has to be a connection between the 'necessary information' that is missing and the particular 'facts available' on which a determination under Article 12.7 is based." That is, "an investigating authority must use those 'facts available' that 'reasonably replace the information that an interested party failed to provide', with a view to arriving at an accurate determination."[239]

130. The "facts available" refer "to those facts that are in the possession of the investigating authority and on its written record."[240] Thus, an Article 12.7 determination "'cannot be made on the basis of non-factual assumptions or speculation.'"[241] The extent to which the investigating authority must evaluate the possible "facts available," and the form that evaluation may take, "depend[s] on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made in the course of an investigation."[242]

131. Finally, an interested party or Member's lack of cooperation is relevant to the investigating authority's selection of particular "facts available" under Article 12.7. The final

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[235] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.
[236] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296 (Article 12.7 ensures that "the work of an investigating authority should not be frustrated or hampered by non-cooperation on the part of interested parties.").
[237] *US – Carbon Steel (India) (AB)*, para. 4.416.
[238] *US – Carbon Steel (India) (AB)*, para. 4.416.
[239] *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.
[240] *US – Countervailing Measures (China) (AB)*, para. 4.178 (citing *US – Carbon Steel (India) (AB)*, para. 4.417).
[241] *US – Countervailing Measures (China) (AB)*, para. 4.178 (quoting *US – Carbon Steel (India) (AB)*, para. 4.417); *see also US – Carbon Steel (India) (AB)*, para. 4.428.
[242] *US – Carbon Steel (India) (AB)*, para. 4.421; *see also US – Countervailing Measures (China) (AB)*, para. 4.179 (citing *US – Carbon Steel (India) (AB)*, para. 4.421) ("the nature and extent of the explanation and analysis required will necessarily vary from determination to determination")).

sentence of paragraph 7 of Annex II of the AD Agreement, which provides relevant context for the interpretation of Article 12.7,[243] states that:

> It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

132. In explaining this sentence, the Appellate Body has observed that it:

> acknowledges that non-cooperation could lead to an outcome that is less favourable for the non-cooperating party. It describes what could occur as a result of a non-cooperating party's failure to supply or otherwise withhold relevant information and the investigating authority's use of the "facts available" on the record. The juxtaposition between the "result" and the "situation" of non-cooperation in this clause confirms our understanding that the non-cooperation of a party is not itself the "basis" for replacing the necessary information". Rather, non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact. Annex II to the Anti-Dumping Agreement thus provides contextual support for our understanding that the procedural circumstances in which information is missing are relevant to an investigating authority's use of "facts available" under Article 12.7 of the SCM Agreement.[244]

133. The Appellate Body has thus acknowledged that a non-cooperating party's knowledge of the consequences of failing to provide information can be taken into account by an investigating authority, along with other procedural circumstances in which information is missing, in ascertaining those "facts available" on which to base a determination.[245] Where there are several "facts available" from which to choose, "an investigating authority must nevertheless evaluate and reason which of the 'facts available' reasonably replace the missing 'necessary information', with a view to arriving at an accurate determination."[246]

[243] Article 12.7 contains similar obligations to those under Article 6.8 of the AD Agreement, and the Appellate Body has explained that "it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations." *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295; *see also id.*, para. 291.
[244] *US – Carbon Steel (India) (AB)*, para. 4.426.
[245] *US – Carbon Steel (India) (AB)*, para. 4.426.
[246] *US – Carbon Steel (India) (AB)*, para. 4.426.

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

134. With respect to the OCTG investigation, Turkey argues that USDOC's determination to rely on facts available is inconsistent with Article 12.7 of the SCM Agreement because USDOC allegedly failed to take "due account" of difficulties Borusan experienced in reporting the requested information. In particular, Turkey claims that USDOC improperly failed to select a "reasonable replacement" for the missing information, and that USDOC's application of facts available was punitive.

135. As explained in detail below, USDOC took due account of Borusan's difficulties, including by granting an extension to allow Borusan additional time to gather the requested data. USDOC also selected a reasonable replacement for the missing information by relying on data that Borusan had provided for another of its facilities. USDOC's application of facts available was thus not punitive and fully complied with Article 12.7.

a. USDOC's Multiple Requests for Information and Subsequent Application of Facts Available

136. During the course of the OCTG investigation, Borusan repeatedly failed to respond to USDOC's multiple requests for information regarding Borusan's purchases of HRS for two of its production facilities. USDOC thus properly relied on the facts otherwise available on the record to make its determinations regarding those HRS purchases.

In its initial questionnaire, USDOC requested that Borusan "report all of [its] purchases of hot-rolled steel during the POI [period of investigation]."[247] USDOC explained that this purchase data should be reported "regardless of whether your company used the input to produce the subject merchandise during the POI."[248]

137. USDOC initially provided Borusan with 37 days to submit a complete response to the questionnaire.[249] Borusan requested additional time, claiming that the information requested regarding its purchases of HRS was "time consuming" to compile and could not be completed within the original deadline.[250] USDOC then granted Borusan a 12-day extension to respond.[251] Borusan's deadline was subsequently tolled for an additional 16 days due to administrative

[247] OCTG Initial Questionnaire at Section III, p. 6 (Exhibit TUR-80).
[248] Letter from USDOC to the Government of Turkey, "Countervailing Duty Investigation; Certain Oil Country Tubular Goods from the Republic of Turkey" (August 27, 2013) (OCTG Initial Questionnaire) at Section III, p. 6 (Exhibit TUR-80).
[249] OCTG Initial Questionnaire at Cover Letter, p. 2 (Exhibit USA-10).
[250] Letter from Borusan to USDOC, "Oil Country Tubular Goods from Turkey, Case No. C-489-817: Extension Request," p. 3 (Sep. 10, 2013) (Exhibit USA-11).
[251] Letter from USDOC to Borusan, "Countervailing Duty Investigation: Certain Oil Country Tubular Goods from the Republic of Turkey" (Sep. 10, 2013), p. 1 (Exhibit USA-12).

reasons.[252] In total, therefore, Borusan had 65 days to prepare its response to the initial questionnaire.

138. In its response to the questionnaire, Borusan stated that during the POI it had production facilities at three locations: Gemlik, Halkali, and Izmit.[253] However, notwithstanding USDOC's request that purchase information be reported regardless of whether it was used to produce the subject merchandise, Borusan only reported its HRS purchases for the Gemlik facility.[254] Borusan claimed that this was because only the Gemlik mill produced the subject merchandise.[255]

139. After receiving Borusan's questionnaire response, USDOC sent the company additional questions in the form of a supplemental questionnaire.[256] In particular, USDOC noted Borusan's failure to report its HRS purchases for the Halkali and Izmit mills.[257] USDOC referred Borusan to the instructions in the initial questionnaire to report all HRS purchases, regardless of whether Borusan used the HRS to produce subject merchandise.[258] USDOC thus reiterated its request that Borusan report *all* its purchases of HRS, including purchases for the Halkali and Izmit facilities. USDOC provided Borusan with 15 days to respond.[259]

140. In its response to the supplemental questionnaire, Borusan again failed to provide the HRS purchase data that USDOC had requested.[260] Borusan stated that it experienced significant difficulties in compiling the HRS purchase data, because it had to compile the information from two separate data systems.[261] Borusan asked USDOC to consider the burden of reporting purchases for all three facilities and permit Borusan to report purchases only for the Gemlik plant.[262] However, Borusan stated that "if [USDOC] insists on full reporting of all hot-coil

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[252] Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Shutdown of the Federal Government," (October 18, 2013) (Exhibit USA-13); *see also* Letter from Borusan to USDOC, "Oil Country Tubular Goods from Turkey, Case No. C-489-817, Initial Questionnaire Response" (October 31, 2013) (OCTG Borusan Initial Questionnaire Response) at Cover Letter, p. 2 (Exhibit TUR-53).
[253] OCTG Borusan Initial Questionnaire Response at Responses, p. 11 (Exhibit TUR-53) .
[254] OCTG Borusan Initial Questionnaire Response at Responses, p. 11 (Exhibit TUR-53) .
[255] OCTG Borusan Initial Questionnaire Response at Responses, p. 11 (Exhibit TUR-53).
[256] Letter from USDOC to Borusan, "Supplemental Questionnaire for Borusan Group, "Supplemental Questionnaire for Borusan Group Companies in the Countervailing Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey" (November 21, 2013) (OCTG Borusan Supplemental Questionnaire) at Cover Letter, p. 1 (Exhibit TUR-54).
[257] OCTG Borusan Supplemental Questionnaire at Question 6 (Exhibit TUR-54).
[258] OCTG Borusan Supplemental Questionnaire at Question 6 (Exhibit TUR-54).
[259] OCTG Borusan Supplemental Questionnaire at Cover Letter, p. 1 (Exhibit TUR-54).
[260]Letter from Borusan to the Department of Commerce, "Oil Country Tubular Goods from Turkey, Case No. C-489-817, Supplemental Questionnaire Response" (December 5, 2013) (OCTG Borusan Supplemental Questionnaire Response) at Responses, pp. 8-11 (Exhibit TUR-55).
[261] OCTG Borusan Supplemental Questionnaire Response at Responses, p. 8 (Exhibit TUR-55).
[262] OCTG Borusan Supplemental Questionnaire Response at Responses, pp. 9-10 (Exhibit TUR-55).

purchases from every facility then BMB stands ready to provide that information with the understanding that it will require several weeks to do so."[263]

141. At this point, more than 100 days had elapsed since USDOC issued the initial questionnaire and first requested that Borusan provide data on all of its HRS purchases during the period of investigation. Despite receiving multiple requests to report all of its HRS purchases, and despite seeking — and obtaining — an extension to allow additional time to compile this data, Borusan nevertheless failed to provide information for two of its three production facilities.

142. Borusan also failed to file an extension request to provide the HRS purchase information for the Halkali and Izmit mills after the deadline for the supplemental questionnaire, as specified in USDOC's instructions. As the initial questionnaire that USDOC sent to Borusan explained:

> If you are unable to respond completely to every question in the attached questionnaire by the established deadline, or are unable to provide all requested supporting documentation by the same date, you must notify the officials in charge and submit a written request for an extension of the deadline for all or part of the questionnaire response. . . Statements included within a questionnaire response regarding a respondent's ongoing efforts to collect part of the requested information, and promises to supply such missing information when available in the future, do not substitute for a written extension request. All extension requests must be in writing and should state the reasons for the request pursuant to 19 CFR 351.302(c). . . .
>
> [F]ailure to properly request extensions for all or part of a questionnaire response may result in the application of partial or total facts available, pursuant to section 776(a) of the Act, which may include adverse inferences, pursuant to section 776(b) of the Act.[264]

143. Similarly, the supplemental questionnaire issued to Borusan stated the following:

> Please submit the response to the attached questions in accordance with the guidelines contained in the original questionnaire, and remember that pursuant to 19 CFR 351.302, information submitted after the deadline will be untimely filed and may be returned to the submitter. In such a case, the Department may have to use facts available, as required by section 776(c) of the Tariff Act of 1930,

[263] OCTG Borusan Supplemental Questionnaire Response at Responses, p.11 (Exhibit TUR-55).
[264] OCTG Initial Questionnaire at Section I, para. H (emphasis added) (Exhibit USA-10).

as amended, in the preliminary determination of this investigation.[265]

144. Borusan disregarded USDOC's instructions in both the initial and supplemental questionnaires to report all its HRS purchases by the relevant deadlines. Although Borusan claimed in its response to the supplemental questionnaire that it could provide information for the Halkali and Izmit facilities, Borusan did not request an extension in accordance with USDOC's instructions and made no other attempt to provide the requested information.

145. Due to Borusan's continued failure to provide data regarding its HRS purchases for the Halkali and Izmit mills, USDOC found that it could not properly determine the benefit that Borusan received from each purchase of HRS from Erdemir and its subsidiary, Isdemir.[266] Therefore, in the final determination, USDOC determined that it had to rely on "facts available" in calculating Borusan's countervailing duty rate.[267]

146. In particular, USDOC found that Borusan failed to cooperate by withholding requested information regarding its purchases of HRS, despite having two opportunities to provide this information, and that it never requested an extension to provide this information in accordance with USDOC's instructions.[268] Accordingly, USDOC relied on the facts available to find that the Halkali and Izmit facilities each purchased a quantity of HRS during the period of investigation corresponding to each facility's annual production capacity,[269] adjusted to reflect the same ratio as Borusan's purchases for the Gemlik mill of HRS from Erdemir and Isdemir compared to its total HRS purchases from all sources.[270] USDOC also found that these HRS purchases for the Halkali and Izmit mills were made at the lowest price on the record for the Gemlik facility's HRS purchases from Erdemir and Isdemir.[271]

b. Turkey Has Not Shown that USDOC's Application of Facts Available Was Inconsistent with Article 12.7 of the SCM Agreement

147. Turkey argues that USDOC's determination to rely on facts available is inconsistent with Article 12.7 of the SCM Agreement because USDOC allegedly failed to take "due account" of the difficulties Borusan experienced in gathering and reporting the requested information.[272] In particular, Turkey claims that USDOC improperly failed to select a "reasonable replacement" for

[265] OCTG Borusan Supplemental Questionnaire at Cover Letter, p. 1 (emphasis added) (Exhibit TUR-54).
[266] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[267] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[268] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[269] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[270] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[271] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[272] Turkey's First Written Submission, paras. 196-197.

the missing information in light of these difficulties.[273] Therefore, Turkey argues, USDOC's application of facts available was punitive, inconsistent with Article 12.7.[274]

148. Turkey's argument is not supported by record evidence. As the record shows, USDOC took due account of Borusan's difficulties in gathering data regarding its HRS purchases, including by granting an extension and by issuing a supplemental questionnaire to allow Borusan to remedy its initial deficient reporting, which permitted Borusan significant additional time to gather such data. USDOC also selected a reasonable replacement for the missing information by relying on the HRS purchase data that Borusan had provided for another of its facilities. Therefore, USDOC's application of facts available was not punitive and fully complied with Article 12.7.

149. SCM Article 12.7 provides that determinations may be made on the basis of the facts available where an "interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation."[275] Article 12.11 of the SCM Agreement requires an investigating authority to "take due account of any difficulties experienced by interested parties" in supplying the information referred to in Article 12.7.[276] The kinds of "difficulties," or lack thereof, experienced by interested parties to be considered by an investigating authority may include:

> the nature and availability of the evidence being sought, the adequacy of protection accorded by an investigating authority to the confidentiality of information, the time period provided in which to respond, and the extent or number of opportunities to respond . . . .[277]

150. In the OCTG investigation, USDOC determined that the design and structure of the HRS for LTAR subsidy program were aimed at benefiting all products produced by Borusan.[278] USDOC thus needed information regarding all of Borusan's purchases of HRS in order to accurately calculate any benefits that Borusan received from this program.[279]

151. As described above, USDOC requested in its initial questionnaire that Borusan report all of its purchases of HRS, regardless of whether the HRS was used to make the subject

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[273] Turkey's First Written Submission, para. 205.
[274] Turkey's First Written Submission, para. 196.
[275] SCM Agreement, Article 12.7.
[276] *US – Countervailing Duty Measures on Carbon Steel (AB)*, para. 4.422.
[277] *US – Countervailing Duty Measures on Carbon Steel (AB)*, para. 4.422.
[278] OCTG Final I&D Memo, p. 26 ("To calculate the net subsidy rate attributable to each company, we divided the benefit by each company's respective *POI sales*.") (emphasis added) (Exhibit TUR-85).
[279] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85); OCTG Initial Questionnaire at Section III, p. 6 (Exhibit TUR-80).

merchandise.[280] When Borusan requested additional time to respond,[281] USDOC took Borusan's difficulties into account and granted a 12-day extension.[282] Borusan ultimately had 65 days to prepare its response to the initial questionnaire,[283] in contrast to the 37 days that USDOC had originally allotted. Notwithstanding this additional time, Borusan chose not to provide the requested information for two of its facilities.[284] Despite USDOC making a second request for this data,[285] and despite over 100 days elapsing from the date of USDOC's initial request, Borusan again failed to provide the information requested in response to the supplemental questionnaire.[286]

152. In addition, Borusan failed to file an extension request to provide the HRS purchase information for the Halkali and Izmit mills after the deadline. Both the initial questionnaire and supplemental questionnaire clearly explained that USDOC may use facts available if a party failed to submit information in a timely matter.[287] To avoid such an outcome, parties may submit a "written request for an extension of the deadline for all or part of the questionnaire response."[288] Borusan was well aware of this requirement, as it had previously filed just such an extension request with respect to the initial questionnaire.[289] Yet Borusan decided not to seek additional time to respond to the supplemental questionnaire by filing for an extension.

153. Due to Borusan's non-cooperation, necessary information pertaining to a subsidization determination was missing from the record. Furthermore, USDOC found that this hole in the record was due to Borusan's failure to provide the requested information on multiple occasions.[290] The Appellate Body has recognized the importance of investigating authorities being able to set deadlines for the submission of information.[291] Here, Borusan had over 100 days to provide data for the Halkali and Izmit facilities, and it could have requested an extension to the extent even more time was required. Instead, Borusan failed to provide this data. Because

[280] OCTG Initial Questionnaire at Section III, p. 6 (Exhibit TUR-80).
[281] Letter from Borusan to USDOC, "Oil Country Tubular Goods from Turkey, Case No. C-489-817: Extension Request" (September 10, 2013) (Exhibit USA-11).
[282] Letter from USDOC to Borusan, "Countervailing Duty Investigation: Certain Oil Country Tubular Goods from the Republic of Turkey" (September 10, 2013) (Exhibit USA-12).
[283] This includes the additional 16 days during which Borusan's deadline was tolled. *See* Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Shutdown of the Federal Government" (October 18, 2013) (Exhibit USA-13).
[284] OCTG Borusan Initial Questionnaire Response at Responses, p. 11 (Exhibit TUR-53).
[285] OCTG Borusan Supplemental Questionnaire at Question 6 (Exhibit TUR-54).
[286] OCTG Borusan Supplemental Questionnaire Response at Responses, pp. 8-11 (Exhibit TUR-55).
[287] OCTG Initial Questionnaire at Section I, para. H (Exhibit USA-10); OCTG Borusan Supplemental Questionnaire at Cover Letter, p. 1 (Exhibit TUR-54).
[288] OCTG Initial Questionnaire at Section I, para. H (Exhibit USA-10); *see also* OCTG Borusan Supplemental Questionnaire at Cover Letter, p. 1 ("Please submit the response to the attached questions in accordance with the guidelines contained in the original questionnaire . . . .") (Exhibit TUR-54).
[289] Letter from Borusan to USDOC, "Oil Country Tubular Goods from Turkey, Case No. C-489-817: Extension Request" (Sep. 10, 2013).
[290] OCTG Final I&D Memo, pp. 9-11.
[291] *See US – Hot-Rolled Steel (AB)*, para. 73.

that necessary information was absent from the record due to Borusan's own failure to provide it, USDOC appropriately resorted to Article 12.7 "to fill in gaps."[292]

154. Given the facts described above, USDOC properly determined that "Borusan failed to cooperate by not acting to the best of its ability."[293] 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."[294] That the outcome is less favorable than Borusan would have like does not mean the application of facts available was punitive or otherwise inconsistent with Article 12.7.[295]

155. Moreover, Turkey has not explained why the facts selected by USDOC were not a "reasonable replacement" for the missing purchase data. The quantity of HRS identified for the Halkali and Izmit facilities does not exceed their yearly production capacity,[296] and the purchases of HRS from Erdemir and Isdemir determined by USDOC were in the same ratio as the Gemlik mill's purchases of HRS from the same producers.[297] In addition, the HRS purchase price selected by USDOC was a price actually paid by Borusan for purchases of HRS from Erdemir and Isdemir for the Gemlik facility.[298] There was no evidence on the record that contradicted or raised questions about this purchase price and its reasonableness as a replacement for the missing data. Because Borusan only provided HRS purchase data for the Gemlik facility,[299] the use of such data is not punitive, but serves as a reasonable replacement for the data Borusan failed to provide for the Halkali and Izmit mills.

156. USDOC also made reasonable inferences to select among the facts available in calculating the quantity of HRS purchased for the Halkali and Izmit facilities from Erdemir and Isdemir. In fact, USDOC *reduced* its initial calculation of these HRS quantities in order to arrive at a more accurate determination of the relevant subsidy rates.[300] In its post-preliminary analysis, USDOC initially determined that Borusan purchased the same quantity of HRS for the Halkali and Izmit mills as it did for the Gemlik mill.[301] However, based on comments received from

[292] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.
[293] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[294] *See US – Carbon Steel (India) (AB)*, para. 4.426 (explaining that "Annex II to the Anti-Dumping Agreement thus provides contextual support for our understanding that the procedural circumstances in which information is missing are relevant to an investigating authority's use of 'facts available' under Article 12.7 of the SCM Agreement").
[295] *See US – Carbon Steel (India) (AB)*, para. 4.426.
[296] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[297] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[298] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[299] OCTG Borusan Initial Questionnaire Response at Responses, p. 11 (Exhibit TUR-53); OCTG Borusan Supplemental Questionnaire Response at Responses, pp. 8-11 (Exhibit TUR-55).
[300] OCTG Final I&D Memo, pp. 50-52 (Exhibit TUR-85).
[301] Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Countervailing Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey: Post-Preliminary Analysis Memorandum for Borusan Mannesmann Boru Sanayi ve Ticaret A.S., Borusan Istikbal Ticaret, Borusan Mannesmann Boru Yatirim Holding A.S., and Borusan Holding A.S. (collectively, "Borusan")" (OCTG Borusan Post-Preliminary Analysis), p. 14 (April 18, 2014) (Exhibit TUR-75).

interested parties and information on the record, and in order to derive a more accurate subsidy calculation, USDOC adjusted that inference for its final determination.[302]

157. For the final determination, USDOC considered the fact that the Halkali and Izmit mills had lower annual production capacities than the Gemlik mill, and that the Gemlik mill only purchased a percentage of its HRS from Erdemir and Isdemir.[303] Based on this information, USDOC found that the Halkali and Izmit mills purchased HRS from Erdemir and Isdemir as a percentage of their annual production capacity, and then calculated this percentage using the same percentage as the Gemlik mill's purchases of HRS from Erdemir and Isdemir.[304] These determinations, which were consistent with the data Borusan provided during the OCTG proceeding, ultimately reduced the subsidy rates that USDOC calculated in its final determination for Borusan's purchases of HRS for the Halkali and Izmit mills.[305]

158. Turkey's claim that USDOC applied the lowest HRS purchase price to "*all* purchases of hot rolled steel for the Halkali and Izmit mills, estimated at the facilities' *entire annual production capacity*," is thus factually incorrect.[306] As explained above, USDOC's final subsidy calculations are based on only a *portion* of the Halkali and Izmit mills' production capacity, with that portion corresponding to the exact same percentage as the Gemlik mill's purchases of HRS from Erdemir and Isdemir. USDOC did not calculate the benefit based on the mills' "*entire annual*" production capacity, contrary to Turkey's allegations.

159. In short, USDOC considered the difficulties that Borusan experienced in providing the requested information. USDOC provided Borusan with an extension, multiple opportunities, and a reasonable period to report this information (*i.e.,* 100 days). Additionally, although Borusan stated that it could provide the information, it failed to request a formal extension, in accordance with USDOC's explicit instructions. Borusan was also informed multiple times that its failure to report the requested information could result in the application of facts available. In addition, USDOC selected a reasonable replacement for this information by relying on the actual information that Borusan had provided for another of its facilities during the course of the investigation.

160. Accordingly, USDOC acted consistently with Article 12.7, both in taking due account of Borusan's difficulties and in using facts available to replace the necessary information that Borusan had failed to provide.

[302] OCTG Final I&D Memo, pp. 50-52 (Exhibit TUR-85).
[303] OCTG Final I&D Memo, pp. 51-52 (Exhibit TUR-85).
[304] OCTG Final I&D Memo, pp. 51-52 (Exhibit TUR-85).
[305] OCTG Final I&D Memo, pp. 51-52 (Exhibit TUR-85).
[306] Turkey's First Written Submission, para. 209 (emphasis in original).

3. 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

161. As detailed above 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 a single program: the Provision of HRS for LTAR program.[307] Therefore, the claims raised in Turkey's first written submission regarding other programs examined in the WLP investigation fall outside the Panel's terms of reference. Turkey has opted not to raise *any* substantive arguments in its first written submission with respect to the Provision of HRS for LTAR program in the WLP investigation. Therefore, Turkey has not properly raised any claims under Article 12.7 of the SCM Agreement, and thus the Panel should not make any findings in relation to this claim.

162. In the interest of completeness, however, the United States provides the below discussion to demonstrate that, in any event, Turkey's claims fail on the merits. In its written submission, Turkey claims that USDOC acted inconsistently with Article 12.7 because its use of facts available resulted in an inaccurate subsidy calculation that has no factual connection to the subsidy programs under investigation. Turkey points in particular to USDOC's determination of a 20% rate for certain tax-related programs and 14.01% rate for programs where no above-*de minimis* rates had been calculated for the same or similar programs, as well as USDOC's use of rates previously calculated for similar subsidy programs in other Turkish countervailing duty investigations.

163. As explained in detail below, Borusan refused to participate in verification, thereby preventing USDOC from verifying the accuracy of any information that Borusan had reported with respect to the subsidy programs at issue. With no verifiable benefit information on the record with respect to Borusan, USDOC instead properly applied facts available — including rates from the same or similar subsidy programs and from prior Turkish countervailing duty proceedings — as a reasonable replacement for the missing information.

a. Borusan's Refusal to Participate in Verification and USDOC's Subsequent Application of Facts Available

164. As a result of Borusan's failure to participate in verification during the WLP investigation, USDOC properly used facts available to determine a countervailable subsidy rate for the subsidy programs under investigation.

165. On April 14, 2015, Borusan notified USDOC that it would not participate in verification for the WLP proceeding.[308] Borusan requested that USDOC instead rely on the verification report and exhibits from the countervailing duty administrative review of *Circular Welded*

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[307] *See* Section III.B.1, *supra*.

[308] Letter from Borusan to USDOC, "Welded API Line Pipe from Turkey, Case No. C-489-823: Notice of Decision Not to Participate in Verification," pp. 1-2 (April 14, 2015) (Exhibit TUR-101).

Carbon Steel Pipes And Tubes (Pipes and Tubes) From Turkey, which covered the same time period as the WLP investigation.[309]

166. On April 28, 2015, USDOC notified Borusan that it would not be placing the *Pipes and Tubes* verification report and exhibits on the record in the WLP investigation.[310] USDOC noted that the "[v]erification of data submitted in a separate proceeding related to a different industry does not satisfy the requirement in section 782(i) of the [Tariff] Act [of 1930] that the Department verify the information relied upon in making its final determination here."[311]

167. In the final determination for the WLP investigation, USDOC found that Borusan, by its refusal to participate in verification, "significantly impeded the investigation and provided information that cannot be verified."[312] USDOC also found that Borusan failed to provide any satisfactory reason for its refusal to participate in verification.[313] In addressing Borusan's argument that USDOC could simply place the verification report and exhibits from the *Pipes and Tubes* administrative review on the record, USDOC again explained that it was required to verify all information relied upon in making a final determination in an investigation.[314]

168. USDOC further noted that it could not transfer proprietary information from one record to another record across different, unrelated proceedings.[315] USDOC observed that, under U.S. domestic law, "each segment of a proceeding is independent, with separate records and independent determinations."[316] This is particularly true with respect to completely separate proceedings, involving different products and different programs, as was the case with the WLP investigation and the *Pipes and Tubes* administrative review.[317]

169. USDOC explained that the records of the *Pipes and Tubes* administrative review and the WLP investigation were not the same.[318] For example, a number of subsidy programs examined in the WLP investigation were not examined in the *Pipes and Tubes* administrative review, including the Social Security Premium Incentive, Lignite for Less Than Adequate Remuneration, Incentives for Research & Development Activities, Export Insurance provided by the Turk Eximbank, and Export-Oriented Working Capital Program.[319] In addition, none of the

[309] Letter from Borusan to USDOC, "Welded API Line Pipe from Turkey, Case No. C-489-823: Notice of Decision Not to Participate in Verification," pp. 1-2 (April 14, 2015) (Exhibit TUR-101).
[310] Letter from USDOC to Borusan, "Countervailing Duty Investigation: Welded Line Pipe from the Republic of Turkey," (April 28, 2015) (Exhibit USA-20).
[311] Letter from USDOC to Borusan, "Countervailing Duty Investigation: Welded Line Pipe from the Republic of Turkey," (April 28, 2015) (Exhibit USA-20).
[312] WLP Final I&D Memo, p. 4 (Exhibit TUR-122).
[313] WLP Final I&D Memo, p. 30 (Exhibit TUR-122).
[314] WLP Final I&D Memo, p. 30 (Exhibit TUR-122).
[315] WLP Final I&D Memo, p. 30 (Exhibit TUR-122).
[316] WLP Final I&D Memo, p. 30 (Exhibit TUR-122).
[317] WLP Final I&D Memo, p. 30 (Exhibit TUR-122).
[318] WLP Final I&D Memo, pp. 30-31 (Exhibit TUR-122).
[319] WLP Final I&D Memo, p. 31 (Exhibit TUR-122).

petitioners in the two proceedings were the same.[320] The petitioners in the WLP proceeding were unable to comment on the *Pipes and Tubes* record and USDOC's conclusions regarding Borusan in that administrative review.[321]

170. USDOC also found that relying on the findings in the *Pipes and Tubes* administrative review would allow Borusan to select the proceedings in which it decided to participate, thereby prejudicing the ability of petitioners and other interested parties to engage on issues in the proceedings where it did not participate.[322] Because of Borusan's non-cooperation, necessary information on the record was not verified.[323] Therefore, USDOC found it appropriate to use facts available for Borusan in the final determination.[324]

171. Thus, for the final determination, USDOC found that Borusan benefitted from each of the programs raised in the petition, with the exception of any programs that were previously proven not to exist.[325] USDOC further based the countervailing duty rate for the programs at issue on facts otherwise available. [326]

172. In particular, for the seven income tax reduction or elimination programs alleged in the petition, USDOC determined that Borusan paid no income tax during the period of investigation.[327] Since the standard income tax rate for corporations in Turkey during the period of investigation was 20 percent, USDOC found that the highest possible benefit for these seven income tax programs was also 20 percent.[328] Accordingly, USDOC applied this 20 percent rate on a combined basis for the seven income tax programs.[329]

173. For seven other subsidy programs, including the Provision of HRS for LTAR, USDOC applied the above-zero rates that were calculated for a cooperating respondent in the WLP investigation, Toscelik.[330] For ten programs where no above-zero rate was calculated for Toscelik in the WLP proceeding, USDOC applied the highest subsidy rate calculated for the same or, if lacking such a rate, for a similar program in a countervailing duty investigation or administrative review involving Turkey.[331] In selecting similar programs, USDOC matched programs based on program type and treatment of the benefit.[332]

[320] WLP Final I&D Memo, p. 31 (Exhibit TUR-122).
[321] WLP Final I&D Memo, p. 31 (Exhibit TUR-122).
[322] WLP Final I&D Memo, p. 31 (Exhibit TUR-122).
[323] WLP Final I&D Memo, p. 31 (Exhibit TUR-122).
[324] WLP Final I&D Memo, p. 4 (Exhibit TUR-122).
[325] WLP Final I&D Memo, p. 31 (Exhibit TUR-122).
[326] WLP Final I&D Memo, p. 4 (Exhibit TUR-122).
[327] WLP Final I&D Memo, p. 5 (Exhibit TUR-122).
[328] WLP Final I&D Memo, p. 5 (Exhibit TUR-122).
[329] WLP Final I&D Memo, p. 5 (Exhibit TUR-122).
[330] WLP Final I&D Memo, p. 5 (Exhibit TUR-122).
[331] WLP Final I&D Memo, p. 6 (Exhibit TUR-122).
[332] WLP Final I&D Memo, p. 6 (Exhibit TUR-122).

174. Finally, for six subsidy programs where USDOC was unable to find above-*de minimis* rates calculated for the same or similar programs in a prior Turkish countervailing duty proceeding, USDOC applied the highest calculated subsidy rate for any program identified in a Turkish countervailing duty proceeding that could have been used by Borusan.[333] To this end, USDOC excluded rates from company-specific programs and from programs that could not benefit the industry to which Borusan belongs.[334] The rate USDOC determined for these six programs was 14.01 percent.[335]

b. Turkey Has Not Shown That USDOC's Application of Facts Available Was Inconsistent with Article 12.7

175. Turkey claims that USDOC acted inconsistently with Article 12.7 of the SCM Agreement because its use of facts available resulted in a subsidy calculation that is "not accurate and has no factual connection to the alleged subsidy programs actually investigated."[336] Turkey points in particular to USDOC's determination of a combined 20% rate for the seven income tax-related programs and 14.01% rate for six programs where no above-*de minimis* rates had been calculated for the same or similar programs,[337] as well as USDOC's use of rates previously calculated for "similar" subsidy programs in other Turkish CVD investigations.[338] Turkey's arguments are unsupported by the evidence and reflect a misunderstanding of Article 12.7.

176. In this case, Borusan informed USDOC that it would not participate in verification,[339] thereby preventing USDOC from verifying the accuracy of any information that Borusan had reported with respect to the subsidy programs at issue. As a result, USDOC was left with no verifiable benefit information on the record with respect to Borusan.[340] USDOC cannot calculate a rate for a non-cooperating company when the necessary information required for such a calculation is not available. Verifiable benefit information is necessary to USDOC's analysis and its absence necessarily hinders that determination.

177. As described above, to make a determination in each instance where a subsidy program under review was missing verified benefit information, USDOC used a proxy by first seeking to identify a subsidy rate for the identical subsidy program using rates that were calculated from information provided by cooperating companies, whether in the current investigation or in prior countervailing duty investigations.[341] Where no information on the identical program was available, USDOC then looked for a similar or comparable subsidy program from other

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[333] WLP Final I&D Memo, p. 7 (Exhibit TUR-122).
[334] WLP Final I&D Memo, p. 7, n. 28 (Exhibit TUR-122).
[335] WLP Final I&D Memo, pp. 7-9 (Exhibit TUR-122).
[336] Turkey's First Written Submission, para. 328.
[337] Turkey's First Written Submission, para. 327.
[338] Turkey's First Written Submission, para. 329.
[339] Letter from Borusan to USDOC, "Welded API Line Pipe from Turkey, Case No. C-489-823: Notice of Decision Not to Participate in Verification," pp. 1-2 (April 14, 2015) (Exhibit TUR-101).
[340] WLP Final I&D Memo, p. 31 (Exhibit TUR-122).
[341] WLP Final I&D Memo, p. 4 (Exhibit TUR-122).

countervailing duty investigations involving Turkey.[342] Finally, if no similar programs could be identified, USDOC applied the highest calculated subsidy rate for any program identified in a Turkish countervailing duty investigation that could conceivably be used by the non-cooperating company.[343]

178. Although Turkey challenges the total subsidy rate calculated by USDOC for Borusan's WLP,[344] Turkey only included argumentation and evidence in its written submission for two categories of subsidy programs: (1) programs for which USDOC was unable to identify above-zero rates calculated for the same or similar programs in prior Turkish countervailing proceedings, and (2) income tax reduction or elimination programs.[345] For the remaining programs, Turkey failed to provide any arguments or evidence that USDOC's rate determinations were inconsistent with Article 12.7.[346] Therefore, to the extent Turkey intended to challenge USDOC's subsidy rate determinations for these other programs under Article 12.7, its challenge has failed.

179. For those programs where USDOC was unable to identify above-zero rates calculated for either the same or similar programs, USDOC applied the highest calculated subsidy rate for any program identified in a Turkish countervailing duty proceeding that could conceivably be used by Borusan.[347] USDOC determined this rate to be 14.01 percent.[348] Turkey refers to this rate as "inaccurate," "historical," and "unrelated" to the WLP proceeding.[349] However, USDOC appropriately selected this rate as a reasonable replacement for necessary benefit information that was not on the record due to Borusan's failure to cooperate. Since USDOC was unable to identify any identical or similar programs, USDOC properly turned to "facts available" from prior countervailing duty proceedings involving Turkey.[350] Moreover, USDOC specifically excluded any rates from company-specific programs or from programs that would not conceivably benefit the industry to which Borusan belongs.[351] By focusing only on those

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[342] WLP Final I&D Memo, p. 4 (Exhibit TUR-122).
[343] WLP Final I&D Memo, p. 4 (Exhibit TUR-122).
[344] Turkey's First Written Submission, paras. 325-326, 328.
[345] Turkey's First Written Submission, paras. 327.
[346] Turkey's First Written Submission, paras. 322-330. These programs comprise the Provision of HRS for LTAR, Provision of Land for LTAR, Law 5084: Energy Support, Rediscount Program, Post-Shipment Rediscount Credit Program, Exemption from Property Tax, 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.
[347] WLP Final I&D Memo, pp. 7-9 (Exhibit TUR-122).
[348] WLP Final I&D Memo, pp. 7-9 (Exhibit TUR-122).
[349] Turkey's First Written Submission, para. 327.
[350] WLP Final I&D Memo, p. 7 (Exhibit TUR-122).
[351] WLP Final I&D Memo, p. 7, n. 28 (Exhibit TUR-122).

programs that Borusan could conceivably benefit from, USDOC sought to arrive at an accurate benefit determination, consistent with SCM Article 12.7.

180. For these programs, Turkey also suggests that USDOC inappropriately "treated Customs Duty Exemptions and VAT Exemptions as separate subsidies."[352] However, Turkey has provided no evidence to support such an assertion. In fact, based on record evidence submitted by the Government of Turkey, the Customs Duty Exemptions and VAT Exemptions are separate subsidy programs.[353] USDOC thus reasonably replaced the missing rate information for each of these subsidy programs with the calculated 14.01 percent rate.

181. Finally, with respect to the income tax programs, USDOC found that the programs "pertained to either the reduction of income tax paid or the payment of no income tax."[354] USDOC thus inferred that Borusan had paid no income tax during the period of investigation and determined that the amount of that benefit was 20 percent, the standard income tax rate for corporations in Turkey during the period of investigation.[355] Although Turkey appears to consider these to be "inaccurate determinations," Turkey has offered no explanation or argumentation that would support such a claim.[356] In fact, USDOC's has appropriately applied facts available. Since some of the relevant income tax programs could result in the payment of no income taxes, a company benefitting from those programs could reasonably be expected not to pay income tax, particularly in the absence of any record evidence to the contrary. In addition, the calculated 20 percent rate is the standard income tax rate for corporations in Turkey, based on record evidence that was submitted by the Government of Turkey itself.[357] USDOC thus acted consistently with SCM Agreement Article 12.7, and Turkey has not shown otherwise.

c. USDOC's Imposition of Countervailing Duty Measures is Not in Excess of the Amount of Subsidy Found to Exist

182. Turkey also claims that USDOC acted contrary to its obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 "by applying countervailing duty measures in excess of the amount of subsidization attributable to HWRP [sic]."[358] In particular, Turkey objects to the subsidy rates calculated for "similar" programs and "for any program identified in a Turkish CVD proceeding that could conceivably be used by Borusan." Turkey claims these rates bear no relationship to the amount of subsidization attributable to WLP.[359]

183. As detailed above in the United States' Preliminary Ruling Request, this claim falls outside the scope of the Panel's terms of reference, and thus the Panel may not make any

[352] Turkey's First Written Submission, para. 327.
[353] WLP Final I&D Memo, p. 7, n. 29 (Exhibit TUR-122).
[354] WLP Final I&D Memo, p. 5 (Exhibit TUR-122).
[355] WLP Final I&D Memo, p. 5 (Exhibit TUR-122).
[356] Turkey's First Written Submission, para. 327.
[357] WLP Final I&D Memo, p. 5, n. 16 (Exhibit TUR-122).
[358] Turkey's First Written Submission, para. 329.
[359] Turkey's First Written Submission, para. 329.

findings in this respect.[360] In the interest of completeness, however, the United States provides the below discussion.

184. Turkey's arguments under SCM Article 19.4 and GATT 1994 Article VI:3 are inapt, as they are based upon a flawed understanding of these provisions.

185. Consistent with the language of Article VI:3 of the GATT 1994, SCM Article 19.4 requires that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist."[361] In other words, no countervailing duty may be imposed on an imported product if no countervailable subsidy is found to exist with respect to that imported product, and the countervailing duty imposed may not exceed the subsidy amount that the investigating authority calculated.[362] Article 19.4 thus "establishes a clear nexus between the imposition of a countervailing duty, and the existence of a (countervailable) subsidy."[363] Notably, SCM Article 19.4 does *not* prevent Members from levying a countervailing duty on an imported product up to the amount of the subsidy found to exist — it only prevents the imposition of duties in excess of that amount.

186. Here, USDOC determined that Borusan benefitted from certain subsidy programs.[364] USDOC further determined the rate for each of the relevant subsidies on the basis of "facts available."[365] As explained in the preceding Section, each of these determinations is consistent with SCM Article 12.7. Adding together the subsidy rates for all of the programs at issue, USDOC found the total countervailable subsidy rate for Borusan to be 152.20 percent *ad valorem*.[366]

187. This 152.20 percent *is* the "amount of subsidy found to exist" by USDOC for Borusan's WLP pursuant to SCM Article 19.4. USDOC has instructed U.S. Customs and Border Protection ("CBP") to collect deposits for countervailing duties for Borusan WLP at that rate.[367] The amounts ultimately levied would depend on whether an administrative review is conducted, but if none is requested, the amount levied would correspond exactly to the subsidy calculated in the investigation. SCM Agreement Article 19.4 only prohibits the levying of countervailing duties "in excess of" the subsidy amount, and (aside from its substantive claims) there is no argument by Turkey that any amounts levied have exceeded the subsidy amount calculated.[368] The United States has thus acted consistently with Article 19.4 and Article VI:3 of the GATT 1994 by not

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[360] *See* Section III.B.2, *supra*.
[361] *US – Countervailing Measures on Certain EC Products (AB)*, para. 139.
[362] *US – Lead and Bismuth II (Panel)*, para. 6.52.
[363] *US – Lead and Bismuth II (Panel)*, para. 6.52.
[364] WLP Final I&D Memo, pp. 4-7 (Exhibit TUR-122).
[365] WLP Final I&D Memo, pp. 5-7 (Exhibit TUR-122).
[366] WLP Final I&D Memo, p. 7 (Exhibit TUR-122).
[367] U.S. Customs and Border Protection (CBP) Instructions, "Countervailing duty order on welded line pipe from Turkey (C-489-823)" (December 12, 2015) (Exhibit USA-22).
[368] Under the United States' retrospective duty assessment system, after the completion of an affirmative countervailing investigation, USDOC instructs CBP to collect cash deposits of countervailing duties on merchandise that enters the United States.

applying countervailing duties in excess of the amount of subsidy that was found to exist by USDOC.

4. 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

188. With respect to the HWRP investigation, Turkey argues that USDOC's application of facts available is inconsistent with Article 12.7 of the SCM Agreement because the subsidy rates applied to the responding companies are inaccurate and have no factual connection to the subsidy programs under investigation. In particular, Turkey disagrees with USDOC's selection of subsidy rates for similar programs from other Turkish countervailing duty proceedings.

189. As explained in detail below, Turkey's arguments are unsupported by the evidence and fail to demonstrate an inconsistency with Article 12.7. The responding companies claimed in their questionnaire responses that they did "not use" or were "not eligible" for the relevant programs, and it was only at verification that USDOC discovered that respondents had in fact benefitted from the programs. As a result, USDOC appropriately relied on facts available by applying subsidy rates calculated for the same or similar programs.

a. MMZ and Ozdemir's Failure to Provide Accurate Questionnaire Responses and USDOC's Subsequent Application of Facts Available

190. As a result of respondents' failure to provide an accurate response to USDOC's questions regarding the subsidy programs at issue during the HWRP investigation, USDOC properly relied on the facts otherwise available to determine a countervailable subsidy rate for certain programs.

191. In the initial questionnaire, USDOC requested information from mandatory respondents MMZ and Ozdemir (collectively, "respondents") about the subsidy programs on which USDOC initiated the investigation.[369] In particular, the questionnaire asked a number of program-specific questions regarding the following three programs: (1) Deduction from Taxable Income for Export Revenue ("Deduction from Taxable Income"), (2) Provision of Electricity for Less Than Adequate Remuneration ("Provision of Electricity for LTAR"), and (3) Exemption from Property Tax.[370]

192. In October 2015, MMZ and Ozdemir submitted responses to the initial questionnaire.[371] In response to the questionnaire's program-specific questions regarding the Deduction from

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[369] Letter from USDOC to the Government of Turkey, "Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Countervailing Duty Questionnaire," Section II (September 9, 2015) ("HWRP Initial Questionnaire Section II (complete)") (Exhibit USA-23).

[370] HWRP Initial Questionnaire Section II (complete) at Sections II.B, II.E, II.M (Exhibit USA-23).

[371] *See* Letter from MMZ to USDOC, "Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: MMZ ONUR BORU PROFIL URETIM SANAYi VE TiC A.S. (MMZ) Response to the Department's Section III (CVD) Questionnaire (October 30, 2015) ("HWRP MMZ Initial Questionnaire Response")

Taxable Income program, MMZ stated: "Not Applicable. MMZ did not use this program."[372] With respect to questions regarding the Provision of Electricity for LTAR program, MMZ stated that it "is not located in an OIZ [Organized Industrial Zone] and is not eligible for benefits under this program pursuant to Turkish Law Number 5084."[373]

193. Similarly, in response to the program-specific questions regarding the Exemption from Property Tax program, Ozdemir stated:

> Ozdemir did not receive any benefits under this program. Eligibility for this program is limited to enterprises located within certain designated regions. Since none of the Ozdemir's plants are located in those regions, Ozdemir was not eligible to use this program.[374]

194. Based on MMZ's and Ozdemir's questionnaire responses, USDOC did not request additional information regarding these subsidy programs and concluded that MMZ and Ozdemir did not use them in its preliminarily determination.[375]

195. At verification, however, USDOC discovered that MMZ and Ozdemir had in fact benefited from these programs. As explained in the verification report for MMZ, USDOC made the following factual observations during verification: "MMZ received benefits from the Deductions from Taxable Income for Export Revenue program" and "MMZ purchased electricity at regulated prices."[376]

196. The verification report also noted that MMZ attempted to "correct" its questionnaire response at the commencement of verification to acknowledge the use of the previously-unreported Deductions from Taxable Income program.[377] USDOC rejected MMZ's revision, as

(Exhibit USA-24); Letter from Ozdemir to USDOC, "Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey; Response to questionnaire" (October 30, 2015) ("HWRP Ozdemir Initial Questionnaire Response") (Exhibit USA-25).

[372] HWRP MMZ Initial Questionnaire Response at Responses, p. 14 (Exhibit USA-24).

[373] HWRP MMZ Initial Questionnaire Response at Responses, p. 8 (Exhibit USA-24).

[374] HWRP Ozdemir Initial Questionnaire Response at Responses, pp. 32-33 (Exhibit USA-25).

[375] Memorandum from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Countervailing Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Decision Memorandum for the Preliminary Determination" (December 18, 2015) (complete) ("HWRP Preliminary Decision Memo (complete)"), pp. 12-13, 16 (Exhibit USA-26); Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination, 80 Fed. Reg. 80749 (December 28, 2015) ("HWRP Preliminary Determination") at 80750 (Exhibit TUR-40).

[376] Memorandum from USDOC, "Verification of the Questionnaire Responses of MMZ Onur Boru Profil uretim San Ve Tic. A.S." (March 10, 2016) ("HWRP Verification of MMZ Questionnaire Responses"), p. 2 (Exhibit USA-28).

[377] HWRP Verification of MMZ Questionnaire Responses, p. 2 (Exhibit USA-28).

it was not a minor correction.[378] As USDOC had informed the respondents two weeks prior to verification:

> [V]erification is not intended to be an opportunity for the submission of new factual information. Information will be accepted at verification only when the information makes minor corrections to information already on the record or when information is requested by the verifiers, in accordance with the agenda below, to corroborate, support, and clarify factual information already on the record.[379]

197. USDOC also found that Ozdemir benefited from the Exemption from Property Tax program.[380] Specifically, company officials disclosed for the first time at verification that Ozdemir did not make any tax payments on its facilities in the Zonguldak OIZ for the first five years following their construction in December 2008.[381] This directly contradicted Ozdemir's claim in its questionnaire response that it was ineligible to use the Exemption from Property Tax program because none of the Ozdemir's plants were located in the designated regions.[382] In addition, Ozdemir was unable to provide evidence during verification that it paid property taxes on the factory located in the Zonguldak OIZ during the period of investigation (*i.e.,* January 1, 2014 through December 31, 2014).[383]

198. Accordingly, in the final determination, USDOC found that the application of facts available to determine the countervailable subsidy rate for the above-mentioned subsidy programs was warranted because MMZ and Ozdemir failed to accurately answer USDOC's questions regarding the programs, including reporting assistance which should have been discovered in the respondents' accounting system.[384] In particular, for the Deduction from Taxable Income program, USDOC applied the above-zero rates calculated for Ozdemir in the HWRP investigation for this program to MMZ.[385] For the remaining two programs, USDOC

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[378] HWRP Verification of MMZ Questionnaire Responses, p. 2 (Exhibit USA-28).
[379] Letter from USDOC, "Countervailing Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey; Verification of MMZ ONUR BORU PROFIL URETIM SANAYi VE TiC A.S.'s Questionnaire Responses" (January 19, 2016) ("HWRP MMZ Verification Agenda"), p. 2 (Exhibit USA-29); Letter from USDOC, "Countervailing Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey; Verification of Ozdemir Boru Profil San ve Tic. Ltd Sti .'s Questionnaire Responses" (January 19, 2016) ("HWRP Ozdemir Verification Agenda"), p. 2 (Exhibit USA-30).
[380] Memorandum from USDOC, "Verification of the Questionnaire Responses of Ozdemir Boru Profil San ve Tic. Ltd Sti." (March 10, 2016) ("HWRP Verification of Ozdemir Questionnaire Responses"), pp. 2, 9 (Exhibit USA-31).
[381] HWRP Verification of Ozdemir Questionnaire Responses, pp. 2, 9 (Exhibit USA-31).
[382] Memorandum from USDOC re Ministerial Error Allegations in the Final Determination (August 19, 2016), pp. 4-5 (Exhibit USA-32).
[383] Memorandum from USDOC re Ministerial Error Allegations in the Final Determination (August 19, 2016), p. 5 (Exhibit USA-32).
[384] HWRP Final I&D Memo. p. 6 (Exhibit TUR-46).
[385] HWRP Final I&D Memo, p. 7 (Exhibit TUR-46).

applied the highest subsidy rate calculated for similar programs in a countervailing duty investigation involving Turkey.[386]

b. Turkey Has Not Shown That USDOC's Application of Facts Was Inconsistent with Article 12.7

199. Turkey argues that USDOC's application of facts available is inconsistent with Article 12.7 of the SCM Agreement because the subsidy rates applied to MMZ and Ozdemir "are not accurate and have no factual connection to the alleged subsidy programs actually investigated."[387] In particular, Turkey disagrees with USDOC's selection of the "*highest* subsidy rate for *similar* programs" from other Turkish countervailing duty proceedings, and points specifically to (1) the use for the Provision of Electricity for LTAR program of a rate that was in turn based on facts available in a prior proceeding, and (2) the use for the Exemption from Property Tax program of a rate calculated for an export tax rebate program in effect in 1986.[388]

200. Turkey's arguments are unsupported by the evidence and fail to demonstrate an inconsistency with Article 12.7. MMZ and Ozdemir claimed in their questionnaire responses that they did "not use" or were "not eligible" for the relevant programs,[389] and it was only at verification that USDOC discovered that respondents had in fact benefitted from the programs.[390] USDOC reasonably concluded that respondents had failed to cooperate with the investigation and determined to rely on the facts otherwise available. USDOC was under no obligation, either in U.S. law or the SCM Agreement, to accept new information at such a late stage in the proceeding.

201. Notably, Turkey has provided no evidence or substantive argumentation that the rate USDOC selected for the Deduction from Taxable Income program was determined contrary to Article 12.7.[391] Although Turkey alleges that "USDOC selected countervailable subsidy rates for *similar* programs from *other* Turkish countervailing duty proceedings" for the three programs at issue,[392] this allegation is incorrect with respect to the Deduction from Taxable Income program. In fact, the rate USDOC selected for this program is the *same* rate that USDOC calculated for Ozdemir for the *same* program (Deduction from Taxable Income) in the *same* proceeding (HWRP investigation).[393] By "reasonably replac[ing]" information that MMZ had failed to provide with actual data submitted by its fellow respondent in the same investigation,

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[386] HWRP Final I&D Memo, p. 7 (Exhibit TUR-46).
[387] Turkey's First Written Submission, para. 440.
[388] Turkey's First Written Submission, para. 438.
[389] HWRP MMZ Initial Questionnaire Response at Responses, pp. 8, 14 (Exhibit USA-24); HWRP Ozdemir Initial Questionnaire Response at Responses, pp. 32-33 (Exhibit USA-25).
[390] HWRP Verification of MMZ Questionnaire Responses, p. 2 (Exhibit USA-28); HWRP Verification of Ozdemir Questionnaire Responses, pp. 2, 9 (Exhibit USA-31).
[391] Turkey's First Written Submission, paras. 432-442.
[392] Turkey's First Written Submission, para. 436 (emphasis added).
[393] HWRP Final I&D Memo, p. 7 (Exhibit TUR-46).

USDOC sought to "arriv[e] at an accurate determination,"[394] consistent with Article 12.7 of the SCM Agreement.

202. 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,[395] and therefore turned to "facts available" for similar subsidy programs.[396] 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.[397] Turkey has not explained why USDOC's determinations in this respect "are not accurate and have no factual connection to the alleged subsidy programs actually investigated."[398] And Turkey points to no evidence on the record of the respective review that contradicted or raised questions about the subsidy rates that were to be applied as facts available. Because the subsidy rate for each program was on a par with identical or similar subsidy programs, the rate is not a punitive one, but instead provides a reasonable estimate of the level of subsidization provided by the government consistent with Article 12.7 of the SCM Agreement.

c. USDOC's Imposition of Countervailing Duty Measures is Not in Excess of the Amount of Subsidy Found to Exist

203. Turkey also claims that USDOC acted contrary to its obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 "by applying countervailing duty measures in excess of the amount of subsidization attributable to HWRP."[399] In particular, Turkey objects to USDOC's application of a rate for the provision of electricity for LTAR that was previously calculated based on the provision of HRS for LTAR.[400] Turkey claims this rate bear no relationship to the amount of subsidization attributable to HWRP.[401]

204. As detailed above in the United States' Preliminary Ruling Request, this claim falls outside the scope of the Panel's terms of reference, and thus the Panel may not make any findings in this respect.[402] In the interest of completeness, however, the United States provides the below discussion.

205. Turkey's arguments under SCM Article 19.4 and GATT 1994 Article VI:3 are inapt, as they are based upon a flawed understanding of these provisions.

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[394] *US – Carbon Steel (India) (AB)*, para. 4.426.
[395] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46).
[396] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46).
[397] HWRP Final I&D Memo, p. 7 (Exhibit TUR-46).
[398] Turkey's First Written Submission, para. 440.
[399] Turkey's First Written Submission, para. 441.
[400] Turkey's First Written Submission, para. 441.
[401] Turkey's First Written Submission, para. 441.
[402] *See* Section III.B.2, *supra*.

206. Consistent with the language of Article VI:3 of the GATT 1994, SCM Article 19.4 requires that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist."[403] In other words, no countervailing duty may be imposed on an imported product if no countervailable subsidy is found to exist with respect to that imported product, and the countervailing duty imposed may not exceed the subsidy amount that the investigating authority calculated.[404] Article 19.4 thus "establishes a clear nexus between the imposition of a countervailing duty, and the existence of a (countervailable) subsidy."[405] Notably, SCM Article 19.4 does *not* prevent Members from levying a countervailing duty on an imported product up to the amount of the subsidy found to exist — it only prevents the imposition of duties in excess of that amount.

207. Here, USDOC determined that MMZ benefited from the Provision of Electricity for LTAR program.[406] USDOC further determined the subsidy rate for this program to be 2.08 percent on the basis of "facts available."[407] As explained in the preceding Section, each of these determinations is consistent with SCM Article 12.7. Adding together this 2.08 percent subsidy rate with the subsidy rates for all of the other programs MMZ benefitted from, USDOC found the total countervailable subsidy rate for MMZ to be 9.87 percent *ad valorem*.[408]

208. This 9.87 percent *is* the "amount of subsidy found to exist" by USDOC for MMZ's HWRP pursuant to SCM Article 19.4. USDOC has instructed CBP to collect deposits for countervailing duties for MMZ HWRP at that rate.[409] The amounts ultimately levied would

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[403] *US – Countervailing Measures on Certain EC Products (AB)*, para. 139.

[404] *US – Lead and Bismuth II (Panel)*, para. 6.52.

[405] *US – Lead and Bismuth II (Panel)*, para. 6.52.

[406] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46); Memorandum from USDOC re Ministerial Error Allegations in the Final Determination (August 19, 2016) ("HWRP Ministerial Error Memo"), pp. 5-6 (Exhibit USA-32).

[407] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46); HWRP Ministerial Error Memo, pp. 5-6 (Exhibit USA-32). Although Turkey asserts that the rate selected by USDOC for the Provision of Electricity for LTAR program was 15.58 percent, this is not accurate. *See* Turkey's First Written Submission, para. 436. After issuing its final determination, USDOC received comments from the Government of Turkey and MMZ arguing that USDOC had made a ministerial error in using the 15.58 percent rate because that rate had been changed to 2.08 percent following litigation in the proceeding from which USDOC had obtained the rate. *See* HWRP Ministerial Error Memo, pp. 5-6. USDOC agreed, and changed the rate to 2.08 percent in its amended final determination. *See* HWRP Ministerial Error Memo, pp. 5-6 (Exhibit USA-32); *see also* Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 81 Fed. Reg. 62,874, 62,875 (September 13, 2016) (Exhibit TUR-44).

[408] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46); HWRP Ministerial Error Memo, pp. 5-6 (Exhibit USA-32); Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 81 Fed. Reg. at 62,874 (September 13, 2016) (Exhibit TUR-44).

[409] *See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 81 Fed. Reg. 62,874, 62,875 (September 13, 2016) (Exhibit TUR-44); *see also* U.S. CBP Instructions, "Countervailing duty order and amended final determination on heavy walled rectangular welded carbon steel pipes and tubes from the Republic of Turkey (C-489-825)" (September 13, 2016) (Exhibit USA-27).

depend on whether an administrative review is conducted, but if none is requested, the amount levied would correspond exactly to the subsidy calculated in the investigation. SCM Article 19.4 only prohibits the levying of countervailing duties "in excess of" the subsidy amount and (aside from its substantive claims) there is no argument by Turkey that any amounts levied have exceeded the subsidy amount calculated.[410] The United States has thus acted consistently with Article 19.4 and Article VI:3 of the GATT 1994 by not applying countervailing duties in excess of the amount of subsidy that was found to exist by USDOC.

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

209. Turkey claims that USDOC's findings of *de facto* specificity for the provision of HRS for LTAR in the four challenged proceedings are inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement.[411] Specifically, Turkey claims that USDOC failed to identify or evidence the existence of a subsidy program.[412] Moreover, USDOC also failed to take into consideration the extent of diversification of economic activities, as well as the length of time during which the subsidy program has been in operation.[413] Lastly, Turkey claims that because USDOC acted inconsistently with its obligations under Articles 2.1(c) and 2.4, the United States is also in violation of Articles 10 and 32.1 of the SCM Agreement.[414]

210. However, as discussed below, USDOC in each proceeding identified the subsidy program at issue, *i.e.*, the provision of HRS for LTAR, based on record evidence, and found that the program was *de facto* specific, consistent with the SCM Agreement.

1. Legal Framework

211. Article 1.2 of the SCM Agreement provides that a subsidy can only be subject to countervailing measures if it is "specific in accordance with the provisions of Article 2." Article 2.1 "sets out a number of principles for determining whether a subsidy is specific by virtue of its limitation to an enterprise or industry or group of enterprises or industries ('certain enterprises')."[415]

212. The "central inquiry" under Article 2.1 is to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to "certain enterprises" within the jurisdiction of the granting

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[410] U.S. CBP Instructions, "Countervailing duty order and amended final determination on heavy walled rectangular welded carbon steel pipes and tubes from the Republic of Turkey (C-489-825)" (September 13, 2016) (Exhibit USA-27).

[411] Turkey's First Written Submission, paras. 212-220, 331-338, 443-451, 544-552.

[412] Turkey's First Written Submission, paras. 216-217, 334-335, 447-448, 548-549.

[413] Turkey's First Written Submission, paras. 218-219, 336-337, 449-450, 550-551.

[414] Turkey's First Written Submission, paras. 220, 338, 451, 552.

[415] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 364. By contrast, Article 2.2 articulates how a subsidy can be "regionally" specific, and Article 2.3 "deems all prohibited subsidies within the meaning of Article 3 (export subsidies and import substitution subsidies) to be specific."

authority.[416] As the Appellate Body observed in *US – Anti-Dumping and Countervailing Duties (China)*, the term "certain enterprises"—which appears in the *chapeau* and throughout Article 2.1—refers to "a single enterprise or industry or a class of enterprises or industries that are known and particularized."[417] This term involves "a certain amount of indeterminacy at the edges," and a determination of whether a group of enterprises or industries constitute "certain enterprises" can only be made on a case-by-case basis.[418]

213. Subparagraphs (a) through (c) of Article 2.1 articulate principles that inform this analysis. Specifically, they state:

> (a) Where the granting authority, of the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such a subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions [FN omitted] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant the subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority as well as the length of time during which the subsidy programme has been in operation.

[416] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366.
[417] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.
[418] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

214. The Appellate Body has emphasized that these are "principles," and not rules.[419] In some cases, application of one subparagraph may unequivocally indicate specificity or non-specificity, and further considerations under other subparagraphs may be unnecessary.[420]

215. Article 2.1(a) addresses the principles applicable for finding that a subsidy is *de jure* specific, that is, when access to the subsidy is "explicitly limited to certain enterprises." Article 2.1(b) provides a framework for finding a subsidy is not *de jure* specific "because there are objective criteria or conditions that are clearly spelled out in law, regulation, or other official document."[421]

216. 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.[422] 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."

217. 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."[423] Article 2.1(c) "concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise."[424]

218. 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." The panel in *US – Antidumping and Countervailing Duties (China)* observed:

> In conducting this analysis, we are conscious of the need to avoid a *de novo* review of the evidence, but we are equally

[419] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366; *see also US – Carbon Steel (India) (Panel)*, para. 7.118.
[420] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371; *US – Carbon Steel (India) (Panel)*, para. 7.119.
[421] *US – Countervailing Measures (China) (AB)*, para. 4.120.
[422] *US – Softwood Lumber IV (Panel)*, para. 7.123; *see also id.*, para. 7.124.
[423] *US – Countervailing Measures (China) (Panel)*, para. 7.240.
[424] *US – Countervailing Measures (China) (Panel)*, para. 7.252.

> mindful of the Appellate Body's admonition that it is the duty of a panel reviewing an investigating authority's determination to conduct a "critical and searching" examination, based on the information contained in the record and the explanations given by the authority in its published report. We also recall the Appellate Body's finding that it is not necessary for an authority conducting a countervailing duty investigation to cite or discuss every piece of supporting record evidence for each fact in the final determination. By the same reasoning, we consider *a fortiori* that where a given piece of evidence forms an explicit part of a finding by an investigating authority, it can be presumed that that evidence has been fully examined even if the discussion in the determination is limited to certain of its aspects.[425]

219. 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."[426]

2. USDOC's Determinations That The Provision Of Hot-Rolled Steel For Less Than Adequate Remuneration Was Used By A Limited Number of "Certain Enterprises" Is Consistent With Articles 2.1(c) and 2.4 of the SCM Agreement

220. In each of the determinations at issue, USDOC determined on the basis of positive evidence that the HRS for LTAR subsidy program was "use[d] . . . by a limited number of certain enterprises" and, thus, *de facto* specific under Article 2.1(c). As we explain below, in each case USDOC proceeded on the basis of the information provided to it by the GOT and other interested parties, and ultimately arrived at a determination clearly substantiated by this positive evidence.

221. In each challenged proceeding, the HRS for LTAR subsidy program was first identified to USDOC by petitioners and alleged to be specific.[427] USDOC reviewed the accuracy and adequacy of the evidence provided by petitioners to substantiate these claims and determined in each proceeding that the evidence was sufficient to justify the initiation of an investigation.[428]

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[425] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.50.
[426] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.50.
[427] *See* 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).
[428] *See* 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).

USDOC proceeded to investigate the HRS program in each proceeding. USDOC asked questions of the GOT and other interested parties and provided all parties with opportunities to comment. USDOC asked the GOT to provide a list of industries in Turkey that directly purchased HRS under the HRS subsidy program, and in each proceeding the GOT provided the requested information.[429] Specifically, the GOT provided as follows:

- In the OCTG investigation, the GOT identified eight industries: construction, automotive, machinery and industrial, electrical equipment, appliances, agricultural, oil and gas, and containers and packaging.[430]
- In the WLP investigation, the GOT identified nine industries: steel pipe and profile, rerolling producers, machinery, construction, domestic appliances, automotive, shipbuilding, agricultural equipment, and pressure purposes.[431]
- In the HWRP investigation, the GOT identified nine industries: steel pipe and profile, rerolling producers, machinery, construction, domestic appliances, automotive, shipbuilding, agricultural equipment, and pressure purposes.[432]
- In the CWP administrative review, the GOT identified eight industries: construction, automotive, machinery industry, domestic appliances, agricultural, shipbuilding, steel pipe and profile, and rerolling producers.[433]

222. Further, the GOT and other interested parties in each proceeding provided USDOC with a complete transaction-specific accounting of the provision of hot-rolled steel under the HRS subsidy program during the period of investigation by the selected respondents.[434] Based upon the limited nature of the lists of industries identified in each case, USDOC in each case ultimately issued a final determination finding that use of the subsidy program was confined to a limited number of industries and that, therefore, the provision of HRS for LTAR is *de facto* specific within the meaning of Article 2.1(c).[435]

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[429] OCTG Final I&D Memo, p. 22 (Exhibit TUR-85); WLP Final I&D Memo, p. 15 (Exhibit TUR-122); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); CWP Final I&D Memo, p. 9-10 (Exhibit TUR-22).
[430] OCTG Final I&D Memo, p. 22 (Exhibit TUR-85).
[431] WLP Final I&D Memo, p. 15 (Exhibit TUR-122).
[432] HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[433] CWP Final I&D Memo, p. 9-10 (Exhibit TUR-22).
[434] *See* OCTG Tosçelik Questionnaire Response, p. 14 (Exhibit TUR-82); OCTG Toscelik Questionnaire Response, Exhibit 22, "Coil Purchases" (November 12, 2013) ("OCTG Toscelik Questionnaire Response, Exhibit 22") (Exhibit USA-16); OCTG Borusan Initial Questionnaire Response, pp. 10-12 (Exhibit TUR-53); OCTG Borusan Questionnaire Response, Exhibit 9B, "BMB Purchases of Hot-Rolled Steel and Benchmark" (October 31, 2013) ("OCTG Borusan Questionnaire Response, Exhibit 9B") (Exhibit USA-14); Letter from Toscelik, "Welded Line Pipe: Toscelik Questionnaire Response" (January 21, 2015) ("WLP Toscelik Questionnaire Response"), pp. 9-10 and Exhibit 12 (Exhibit USA-18); Letter from Borusan, "Welded API Line Pipe from Turkey, Case No. C-489-982: Response to Initial Countervailing Duty Questionnaire" (January 22, 2015) ("WLP Borusan Initial Questionnaire Response"), p. 11-12 and Exhibit 18 (Exhibit USA-15); HWRP MMZ Initial Questionnaire Response, p. 7 and Exhibit 5 (Exhibit USA-24); CWP Borusan Supplemental New Subsidy Allegations Questionnaire Response, p. 2 and Exhibits NSA-8, NSA-9 (Exhibit USA-19).
[435] *See* OCTG Final I&D Memo, p. 49 (Exhibit TUR-85); WLP Final I&D Memo, p. 15 (Exhibit TUR-122); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); CWP Final I&D Memo, pp. 9-10, 31 (Exhibit TUR-22).

3. The Records Support The Existence Of A "Subsidy Program"

223. Turkey alleges that USDOC failed to identify or evidence the existence of a "subsidy programme" for the provision of HRS.[436] Specifically, Turkey argues that contrary to *US – Countervailing Measures (China)*, USDOC conducted no analysis and pointed to no evidence of a "plan" or "scheme" for the provision of HRS for LTAR.[437] Turkey further alleges that in the absence of formal evidence, the existence of a subsidy program may be demonstrated by "a systemic series of actions."[438] However, according to Turkey, USDOC also failed to point to such evidence.[439] Turkey's claim ignores the underlying facts of the specificity determinations – facts demonstrating that USDOC *did* identify the subsidy programs in each investigation, and that USDOC's determination of the existence of the provision of HRS for LTAR was grounded in record facts and consistent with Articles 2.1(c) and 2.4 of the SCM Agreement.[440]

224. In *US – Countervailing Measures (China)*, the Appellate Body considered the significance of the term "programme" in paragraph (c) of Article 2.1, following "subsidy," and whether a "subsidy programme" (as distinct from a "subsidy") thus required the formalities of being reduced to writing or pronounced in some manner.[441] In that case, state-owned enterprises consistently provided inputs at prices that USDOC found to be LTAR, pursuant to "unwritten measures."[442] The Appellate Body underlined that, generally, "[e]vidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, for instance, in the form of a law, regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy."[443] In the particular context of *US – Countervailing Measures (China)*, the Appellate Body envisioned that a subsidy program, in the form of an unwritten "plan or scheme" could be evidenced by "a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises."[444]

225. Here, the record supports USDOC's determination that the provision of HRS for LTAR is a "subsidy program" in the form of "plan or scheme" through a systematic series of actions. In particular, in each challenged proceeding, the HRS for LTAR subsidy program was first identified in the application submitted by the petitioners,[445] which USDOC found to be

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[436] Turkey's First Written Submission, paras. 216-217, 334-335, 447-448, 548-549.
[437] Turkey's First Written Submission, paras. 216, 334, 447, 548.
[438] Turkey's First Written Submission, paras. 217, 335, 448, 549.
[439] Turkey's First Written Submission, paras. 217, 335, 448, 549.
[440] OCTG Final I&D Memo, pp. 21-22 (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).
[441] *US – Countervailing Measures (China) (AB)*, paras. 4.141-4.145.
[442] *See US – Countervailing Measures (China) (AB)*, paras. 4.128, 4.147.
[443] *US – Countervailing Measures (China) (AB)*, para. 4.141.
[444] *See US – Countervailing Measures (China) (AB)*, para. 4.141.
[445] *See* OCTG Petition, Vol. X (July 2, 2013), p. 11 (Exhibit TUR-74); WLP Petition, Vol. III, p. 4-5 (Exhibit USA-9); HWRP Petition, Vol. V, p. 5 (Exhibit USA-17); CWP New Subsidy Allegation, pp. 3-4 (Exhibit USA-33).

substantiated by record evidence.[446] In the OCTG investigation, the application identified that under the National Restructuring Plan, the GOT stepped in to assist Turkish steel producers and provided subsidies to the HRS industry, in particular, in order to increase Turkish HRS production.[447] The petitioners alleged that the overall effect of the subsidies provided under the Plan was to provide HRS for LTAR.[448] In the HWRP investigation, petitioners made allegations along similar lines, alleging that OYAK pursued policies of boosting output, particularly for export-oriented production.[449] The application also alleged that the effect of these policies was the provision of HRS for LTAR.[450] Likewise, in the WLP investigation, the same supporting information identified in the OCTG application also was submitted in support of the WLP application.[451] In the CWP proceeding, USDOC determined to initiate an investigation into the provision of HRS for LTAR as a result of the OCTG final determination.[452]

226. In each of the proceedings, USDOC thereafter determined to investigate the program, including by asking questions of Turkey and other interested parties and reviewing their responses,[453] identified the program in the preliminary determinations,[454] gave all parties the opportunity to comment, and ultimately made a final determination with respect to the program in each of the cases.[455] Specifically, USDOC in each proceeding explained that record evidence established that Erdemir and Isdemir were providing HRS for LTAR as a result of the GOT's policies for export-oriented production.[456]

227. First, in the OCTG final determination, USDOC examined and discussed Erdemir's 2012 Annual Report, which states that Erdemir "implemented policies which promoted…customers to engage in export-oriented production" and "supports the use of domestically mined resources for raw materials in view of…the added value created by the domestic suppliers in favor of the local

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[446] *See* 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).
[447] OCTG Petition, Vol. X, pp. 4-5 (Exhibit TUR-74).
[448] OCTG Petition, Vol X, p. 7 (Exhibit TUR-74).
[449] HWRP Initiation Checklist, p. 7 (Exhibit TUR-37).
[450] HWRP Initiation Checklist, p. 7 (Exhibit TUR-37).
[451] WLP Initiation Checklist, p. 8 (Exhibit TUR-115).
[452] CWP New Subsidy Allegation Memorandum (Exhibit USA-21).
[453] *See, e.g.,* OCTG Tosçelik Questionnaire Response, p. 14 (Exhibit TUR-82); OCTG Toscelik Questionnaire Response, Exhibit 22 (Exhibit USA-16); OCTG Borusan Initial Questionnaire Response, pp. 10-12 (Exhibit TUR-53); OCTG Borsuan Questionnaire Response, Exhibit 9B (Exhibit USA-14); WLP Tosçelik Questionnaire Response, pp. 9-10 and Exhibit 12 (Exhibit USA-18); WLP Borusan Initial Questionnaire Response, p. 11-12 and Exhibit 18 (Exhibit USA-15); HWRP MMZ Initial Questionnaire Response, p. 7 and Exhibit 5 (Exhibit USA-24); CWP Borusan Supplemental New Subsidy Allegations Questionnaire Response, p. 2 and Exhibits NSA-8, NSA-9 (Exhibit USA-19).
[454] *See, e.g.*, OCTG Post-Preliminary Analysis Memorandum for Borusan, p. 7 (Exhibit TUR-75); OCTG Post-Preliminary Analysis Memorandum for Toscelik, p. 6. (Exhibit TUR-76).
[455] 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).
[456] 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).

industries."[457] USDOC determined that "{t}hese policies are in line with the GOT's…2012-2014 Medium Term Programme," which was promulgated by the Ministry of Development to achieve certain objectives, including "increasing employment, maintaining fiscal discipline, increasing domestic saving, [and] reducing the current account deficit, [in] this way strengthening macroeconomic stability in stable growth process."[458] In particular, the policies 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."[459] 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.[460]

228. Similarly, in the WLP and CWP determinations, USDOC examined Erdemir's 2013 Annual Report, which states that through "flat steel sales to exporting industries," Erdemir "made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013"[461] and "continues to create value added for Turkish industry through initiatives to increase the use of domestic sources of raw materials."[462] The 2013 Annual Report, which designates Erdemir as "Turkey's iron and steel power,"[463] also notes that Erdemir made 35% of its flat steel sales to the steel pipe manufacturing sector, one of the largest exporting sectors in Turkey."[464] USDOC determined that "[t]hese policies are in line with the GOT's stated policy in its 2012-2014 Medium Term Programme to improve Turkey's balance of payments."[465] With this evidence in mind, a systematic series of actions establishing a "plan" or "scheme" was then established by information submitted by the Turkish respondents in the two proceedings. Specifically, the respondents provided USDOC with a complete transaction-specific accounting of the provision

[457] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); *see also* OCTG Erdemir 2012 Annual Report (complete), pp. 29, 35 (Exhibit USA-5).
[458] OCTG Final I&D Memo, p. 21 n.160 (Exhibit TUR-85); *see also* Medium Term Programme, p. 12 (Exhibit USA-6).
[459] OCTG Final I&D Memo, p. 21 n.160 (Exhibit TUR-85); *see also* Medium Term Programme, p. 12 (Exhibit USA-6).
[460] *See* OCTG Tosçelik Questionnaire Response, p. 14 (Exhibit TUR-82); OCTG Toscelik Questionnaire Response, Exhibit 22 (Exhibit USA-16); OCTG Borusan Questionnaire Response, pp. 10-12 (Exhibit TUR-53); OCTG Borsuan Questionnaire Response, Exhibit 9B (Exhibit USA-14)
[461] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22). *See also* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[462] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22). *See also* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[463] *See* Erdemir 2013 Annual Report (complete), p. 2 (Exhibit USA-7).
[464] *See* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[465] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22). *See also* Medium Term Programme, p. 23 (Exhibit USA-6).

of HRS for LTAR.[466] USDOC in each proceeding relied on this evidence in identifying the subsidy program alleged by petitioners.

229. Finally, in the HWRP determination, USDOC also examined Erdemir's 2013 Annual Report, which states that through "flat steel sales to exporting industries," Erdemir "made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013"[467] and "continues to create value added for Turkish industry through initiatives to increase the use of domestic sources of raw materials."[468] The 2013 Annual Report, which designates Erdemir as "Turkey's iron and steel power,"[469] also notes that Erdemir made 35% of its flat steel sales to the steel pipe manufacturing sector, one of the largest exporting sectors in Turkey."[470] Similarly, USDOC again relied upon the complete transaction-specific accounting that was submitted by the Turkish respondents, establishing a series of transactions for the provision of HRS for LTAR.[471]

230. Thus, USDOC properly determined that through the repeated provision of HRS for LTAR, in accordance with stated GOT policy, Erdemir and Isdemir engaged in a systematic series of actions that is probative of the existence of a subsidy program. Therefore, Turkey's claims that there was no subsidy "program" within the meaning of Article 2.1(c) of the SCM Agreement, and that USDOC's determination lacked positive evidence under Article 2.4, are without merit.

4. USDOC's Evaluation of the Specificity Factors Listed in Article 2.1(c) was Consistent with Its Obligations Under the SCM Agreement

231. Turkey also asserts in its submission that USDOC did not consider in its specificity determination the factors listed in the final sentence of Article 2.1(c)—i.e., the "extent of diversification of economic activities within the jurisdiction of the granting authority" and "the length of time during which the subsidy program has been in operation."[472] However, Turkey has not even asserted a *prima facie* case of inconsistency, because it fails to explain how USDOC allegedly neglected the factors set out in the third sentence of Article 2.1(c). Turkey admits that an investigating authority may take into account these factors implicitly,[473] such that absence of an express reference cannot, without more, substantiate a breach. But Turkey does

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[466] 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).
[467] HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[468] HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[469] Erdemir 2013 Annual Report (complete), p. 2 (Exhibit USA-7).
[470] Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[471] HWRP MMZ Initial Questionnaire Response, p. 7 and Exhibit 5 (Exhibit USA-24).
[472] Turkey's First Written Submission, paras. 218-219, 336-337, 449-450, 550-551.
[473] Turkey's First Written Submission, paras. 218-219, 336-337, 449-450, 550-551.

not explain how USDOC's alleged lack of consideration of these factors affected the overall specificity determination and thereby resulted in a breach of Article 2.1(c).

232. USDOC took all required factors into account in its specificity determinations. Article 2.1(c) states that "account shall be taken" of the factors listed in the third sentence. The term "shall" indicates that it is mandatory for investigating authorities to deal or reckon with those factors.[474] 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.

233. Accordingly, previous panels have found that "taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly."[475] Indeed, panels have upheld determinations by investigating authorities where these factors were taken into account implicitly.[476] Such implicit findings are all the more reasonable where, as here, none of the parties to the countervailing duty proceedings ever argued or suggested that the factors had any bearing on the facts at issue.[477]

234. Here, neither of the two factors identified in the third sentence of Article 2.1(c) was alleged in the proceedings at issue to have any bearing on the specificity inquiries, nor does Turkey point to any such evidence now. Nor was there evidence on the record to suggest the length of the program raised questions regarding the existence of a program. With respect to the "length of time during which the subsidy program has been in operation," as the panel in *US – Large Civil Aircraft* observed, if a "subsidy program is relatively new, the fact that 'certain enterprises' have been the main or most frequent beneficiaries under the program may be a reflection of the fact that the program has not been in operation long enough to have a wide range of users, rather than an indication that the program is de facto specific."[478] Here, USDOC found no evidence tending to demonstrate that the HRS subsidy program was subject to the complications that can arise with new subsidy programs.

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

[475] *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).

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

[477] *See EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.229 ("[T]he record does not indicate that the parties ever raised the issue that the disproportionate use of the Program's funds for Hynix was somehow to be explained by the lack of diversification of the Korean economy or the length of time the program had been in operation. We therefore do not find it unreasonable that the EC did not include in the Final Determination any explicit statement regarding these matters.").

[478] *US – Large Civil Aircraft (Second Complaint) (Panel)*, para. 7.747.

235. Like the duration factor, the extent of diversification of Turkey's economy had no bearing on the specificity analysis.[479] Therefore, as with the duration factor, the lack of explicit discussion of the extent of diversification of Turkey's economy does not demonstrate that USDOC acted inconsistently. Rather, as discussed above, USDOC implicitly took into account the factor.

236. Accordingly, USDOC's specificity findings in each of the four challenged determinations are consistent with the SCM Agreement. Because Turkey has not demonstrated that the United States acted inconsistently with Article 2.1(c) and 2.4 of the SCM Agreement, Turkey's claims under Articles 10 and 32.1 of the SCM Agreement must also fail.

F. USITC's Cumulation of the Effects of Imports in the Determinations of Injury is Not Inconsistent with Article 15 of the SCM Agreement

237. Turkey argues that USITC has a practice, in material injury determinations, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, and 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.[480] Turkey also argues that the USITC has a practice, in sunset reviews, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, and that this practice is inconsistent with Article 15.3 of the SCM Agreement, both "as such" and as applied in its sunset review of CWP.[481]

238. Turkey's claims have no merit. First, Turkey has failed to demonstrate that a "practice" regarding cumulation exists, either with respect to original investigations or sunset reviews. Second, Turkey is wrong in arguing that Article 15.3 prohibits the cumulation of dumped and subsidized imports in investigations or sunset reviews. The cumulation of subsidized imports with dumped imports is consistent with both the text and the object and purpose of the SCM Agreement, which, in conjunction with the AD Agreement, authorizes Members to provide relief to industries being injured by unfairly traded imports from a variety of sources.[482]

239. Below, the United States will explain (1) how Turkey's "as such" challenge fails because it has not established the existence of a rule or norm of general and prospective application; (2) that the cumulation of dumped and subsidized imports in these investigations is not prohibited by

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[479] USDOC was aware of the publicly known fact that Turkey has a wealthy and diversified economy—a fact that Turkey neither raised nor contested. *See, e.g.*, *US – Softwood Lumber IV (Panel)*, para. 7.124 (finding that USDOC took into account the "publicly known fact" that Canada is a highly diversified economy when USDOC noted that the vast majority of companies and industries in Canada do not receive benefits under the programs in question). In contrast to this diversified economy, the GOT responded in each proceeding that only a limited number of industries used this program. *See* OCTG Final I&D Memo, p. 22 (Exhibit TUR-85); WLP Final I&D Memo, p. 15 (Exhibit TUR-122); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); CWP Final I&D Memo, p. 9-10 (Exhibit TUR-22).
[480] Turkey's First Written Submission, paras. 222, 340, 453.
[481] Turkey's First Written Submission, para. 554.
[482] *EC – Tube or Pipe Fittings (AB)*, para. 116.

Article 15.3 of the SCM Agreement; and (3) that the cumulation of imports in sunset reviews is not inconsistent, either "as such" or as applied in the CWP sunset review, with Article 15.3.

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

240. Turkey claims that "the ITC has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, *i.e.*, non-subsidized imports," and that this "practice" is inconsistent "as such" with Article 15.3 of the SCM Agreement.[483] Specifically, Turkey alleges that this "practice" is applied systematically in USITC's injury determinations, and that the USITC considers this practice to be required by U.S. law.[484] Turkey argues that this alleged practice should therefore be considered a rule or norm of general application, subject to challenge "as such."[485]

241. We note at the outset that Turkey is challenging a "practice," not a written measure. As the panel in *US – Gambling* found, a "'practice' can be considered as an autonomous measure that can be challenged in and of itself or it can be used to support an interpretation of a specific law that is being challenged 'as such'."[486] Turkey challenges the former – an alleged "practice" as an autonomous measure. Turkey has not challenged, nor has it included as a measure in its panel request, the U.S. statute governing cumulation.[487] Where a written measure, like a statute, is challenged, there would be no uncertainty as to the existence or content of the measure that has been challenged. "The situation is different," however, where the challenge relates to an alleged unwritten measure, in which case "the very existence of the challenged 'rule or norm' may be uncertain."[488]

242. As explained in detail in Section IV.A above, "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."[489] Rather, there is a "high [evidentiary] threshold" that must be reached by a complaining party, who must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application.[490] Evidence of such a measure "may include proof of the systematic application of the challenged 'rule or norm'."[491] In finding the existence of a rule or norm of

[483] Turkey's First Written Submission, para. 222 (emphasis added).
[484] Turkey's First Written Submission, para. 224.
[485] Turkey's First Written Submission, para. 224.
[486] *US – Gambling (Panel)*, para. 6.196.
[487] Indeed, the Appellate Body has previously rejected a challenge by India to the statutory provision applied by USITC in the underlying proceedings in this dispute. *US – Carbon Steel (India) (AB)*, paras. 4.622-4.625.
[488] *US – Zeroing (EC) (AB)*, para. 197.
[489] *US – Zeroing (EC) (AB)*, para. 196.
[490] *US – Zeroing (EC) (AB)*, para. 198.
[491] *US – Zeroing (EC) (AB)*, paras. 197-198.

general and prospective application in *US – Zeroing (EC)* — the finding upon which Turkey relies for its "as such" claim here — 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."[492]

243. Turkey's showing with respect to USITC's alleged practice falls far short of its burden. In support of its claim, Turkey points to a statement in the final injury determinations for OCTG, WLP, and HWRP, respectively. Specifically, Turkey recites the following statement in each of the final determinations:

> For purposes of evaluating the volume and [price] effects for a determination of material injury by reason of subject imports, section 771(7)(G)(i) of the Tariff Act requires the Commission to cumulate subject imports from all countries as to which petitions were filed . . . on the same day, if such imports compete with each other and with the domestic like product in the U.S. market.[493]

244. Turkey then asserts that "[t]he ITC considers the practice… to be required by U.S. law, specifically the injury statute 19 U.S.C. § 1677(7)(G), and judicial decisions interpreting the injury statute."

245. This evidence is insufficient to support the existence of an "autonomous" unwritten measure. First, Turkey itself states that the alleged "practice" it challenges is *considered by the USITC to be required by U.S. statute*. And the statement cited by Turkey from each determination similarly states that "section 771(&)(G)(i) of the Tariff Act requires the Commission" to take certain action. Again, however, Turkey has not challenged that U.S. law, or placed its content on the record of these proceedings.[494] Therefore, irrespective of what the U.S. statute may or may not require, Turkey has not even alleged, much less demonstrated, that a "practice" autonomous from the U.S. statute exists.

246. Second, Turkey has not proven the content of the alleged practice, much less its existence. After describing the specific "practice" of "'cross-cumulating' subsidized and non-subsidized imports" in each section of its submission, Turkey cites only to the specific injury determination at issue.[495] The fact that USITC cumulated the effects of subsidized and non-subsidized imports in the investigations at issue, however, does not demonstrate "systemic application" or that the alleged practice has "general and prospective application."

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[492] *US – Zeroing (EC) (AB)*, para. 204.
[493] Turkey's First Written Submission, paras. 223, 343, 456 (citations omitted).
[494] We also note that the U.S. statute governing cumulation was itself challenged "as such" in *US – Carbon Steel (India) (AB)*. The Appellate Body in that dispute reversed the panel's findings of inconsistency with respect to the only two statutory subsections (19 U.S.C. § 1677(7)(G)(i)(I) and (II)) that have to date been used by USITC in antidumping or countervailing duty investigations, including the investigations at issue in this dispute. *US – Carbon Steel (India) (AB)*, paras. 4.622-4.625.
[495] Turkey's First Written Submission, paras. 222-223, 342-343, 455-456.

247. Furthermore, the statement by the USITC in each determination to which Turkey next specifically refers does not describe the cumulation of subsidized imports and dumped, non-subsidized imports. Rather, the statement says that the relevant statute requires USITC "to cumulate subject imports from all countries as to which petitions were filed . . . on the same day, if such imports compete with each other and with the domestic like product in the U.S. market." This statement mimics language in the U.S. statute regarding cumulation, and does not indicate that both subsidized and dumped imports must be cumulated.

248. Finally, 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."[496] The panel observed that a U.S. investigating authority could depart from a practice as long as it explained its reasons for doing so, and concluded that this fact "prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action."[497] Therefore, Turkey's reference to a statement in the OCTG final determination and a footnote in the HWRP final determination in which USITC refers to a "practice" of cross-cumulation, does not support the existence of a rule or norm of general and prospective application in existence at the time of the panel's establishment.[498]

249. Moreover, USITC has declined on multiple occasions to exercise its discretion to cumulate the effects of imports from different countries in sunset reviews.[499] Turkey's assertion that the USITC "in practice" cumulates when the statutory preconditions are met is thus inaccurate.

250. Based on the foregoing, Turkey has failed 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 of the SCM Agreement should be rejected.

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

251. Turkey also argues that the cumulation of subsidized imports and dumped, non-subsidized imports in the investigations at issue is inconsistent with Article 15.3 of the SCM Agreement.[500] Notably, Turkey does not engage in any analysis of the text or context of Article 15.3 or of the rationale for this type of cumulation; instead, it relies solely on the Appellate Body's report in *US – Carbon Steel (India)*.[501] Therefore, Turkey has failed to establish that

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[496] *US – Export Restraints (Panel),* para. 8.126.
[497] *US – Export Restraints (Panel),* para. 8.126 (emphasis in original).
[498] Turkey's First Written Submission, para. 224, n. 526; *id.*, para. 457.
[499] *See, e.g.*, *Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam*, Inv. Nos. 731-TA-1063-1064 and 1066-1068 (Second Review), USITC Pub. 4688 (May 2017), pp. 26-27 (imports from Brazil not cumulated with imports from other subject countries).
[500] Turkey's First Written Submission, paras. 228-231, 343-345, 456-458.
[501] Turkey's First Written Submission, paras. 221-232, 339-346, 452-459.

Article 15.3 of the SCM Agreement prohibits the cumulation of subsidized and dumped imports. Moreover, an examination of the text, in context and in light of the object and purpose of the SCM Agreement demonstrates that such cumulation is permitted.

a. Turkey Has Failed to Show That Article 15.3 of the SCM Agreement Prohibits the Cumulation of Subsidized and Dumped Imports

252. Turkey has failed to make its legal case under Article 15.3 of the SCM Agreement. In its first written submission, Turkey does not explain how the text of Article 15.3 supports its claim that the provision contains a prohibition on "cross-cumulation," and instead cites only to the findings of the Appellate Body in a prior dispute. Such a showing is not sufficient. By failing to engage in any analysis of Article 15.3 of the SCM Agreement consistent with the customary rules of interpretation, Turkey ignores that WTO adjudicators must apply those customary rules of interpretation to the text of the covered agreements[502] and has not met its burden of proving that the cumulation of subsidized imports and dumped, non-subsidized imports in the investigations at issue is inconsistent with Article 15.3.

253. As the Appellate Body has acknowledged, "the burden of proof rest upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[503] If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party to rebut that presumption.[504]

254. In addition, Article 3.2 of the DSU provides that the dispute settlement system is intended to clarify the provisions of the WTO Agreements "in accordance with customary rules of interpretation of public international law."[505] These customary rules of interpretation include an analysis of the text of the provision in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose.[506] Thus, a proper interpretation of a provision of the WTO Agreements "must be made on the basis of a careful examination of the text, context and object and purpose of that provision."[507]

255. In this dispute, Turkey has claimed that USITC's cumulation of imports in the OCTG, WLP, and HWRP investigations is inconsistent with Article 15.3. The burden of proving those claims thus falls on Turkey. Yet Turkey has failed to engage in any analysis of Article 15.3 that would allow that burden to be met. In particular, Turkey has provided no interpretation of Article 15.3's text, context, object, or purpose.[508] Instead, Turkey has simply quoted statements

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[502] *See* DSU, Articles 3.2, 7.1, 11.
[503] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also EC – Selected Customs Matters (AB)*, para. 266.
[504] *US – Wool Shirts and Blouses (AB)*, p. 14.
[505] DSU, Article 3.2.
[506] *US – Gasoline (AB)*, p. 17.
[507] *See, e.g.*, *Canada – Periodicals (AB)*, para. 108.
[508] Turkey's First Written Submission, paras. 221-232, 339-346, 452-459.

made by the Appellate Body in a previous dispute.[509] This is not a sufficient basis upon which to make a legal showing.

256. Moreover, the Panel cannot simply apply the Appellate Body's analysis in *US – Carbon Steel (India)*, as Turkey appears to suggest.[510] As numerous previous panels have found, even in the absence of argumentation by a party, under DSU Article 11, a panel must satisfy itself that a breach has been made out by application of a covered agreement, properly interpreted, to the facts before it.[511] Article 11 of the DSU provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[512] An objective assessment requires that the panel make a legal assessment as to whether the measures in question conform with a Member's obligations under the relevant covered agreements.[513] Therefore, the Panel must interpret the text of Article 15.3, in its context, and in light of the object and purpose of the SCM Agreement. Turkey has failed to provide the Panel with any argumentation regarding such an interpretation and has thus failed to satisfy its burden with respect to this claim.

257. The United States therefore requests that the Panel reject Turkey's claims regarding the application of SCM Article 15.3, due to Turkey's failure to set out a *prima facie* case in satisfaction of its burden.

b. Article 15.3 Does Not Expressly Prohibit or Even Address Cross-Cumulation, and Its Silence Cannot Be Read as a Prohibition

258. Given Turkey's failure to engage with the text of SCM Agreement Article 15.3, the Panel's analysis should end there. The United States need not engage further with Turkey's claims, and the Panel may not make out Turkey's affirmative case for it. However, for completeness, the United States notes that a proper interpretation of Article 15.3 of the SCM Agreement reveals that nothing in the text of Article 15.3 prohibits the cumulation of subsidized imports with imports that are dumped. In its entirety, Article 15.3 provides that:

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

[509] Turkey's First Written Submission, paras. 227, 231.
[510] Turkey's First Written Submission, para. 231.
[511] *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.
[512] DSU, Article 11.
[513] DSU, Article 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).

> subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.[514]

259. That is, 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. By using the phrase "such imports," Article 15.3 makes clear that the only category of imports subject to the criteria contained in Article 15.3 are imports from countries that "are *simultaneously subject to countervailing duty investigations*."[515]

260. Article 15.3 does not address — and certainly does not set any prohibition against — an investigating authority conducting a cumulative assessment of the effects on the domestic industry of subsidized imports and dumped imports. In fact, it does not address dumped imports at all. Rather, Article 15.3 is *silent* on the issue of whether cumulation of dumped and subsidized is permissible.

261. In similar circumstances, the Appellate Body has found that the silence of an Agreement on the permissibility of a particular methodological approach towards cumulation does not indicate that the methodology is prohibited.[516] For example, in *US – Oil Country Tubular Goods Sunset Reviews (AB)*, the Appellate Body rejected Argentina's claim that an investigating authority could not conduct a cumulative assessment of imports from multiple countries in sunset reviews.[517] In that dispute, Argentina argued that the cumulation of imports from multiple countries was not permitted in sunset reviews under the AD Agreement because the practice was not specifically authorized or addressed in the sunset provisions of the Agreement.

262. The Appellate Body rejected Argentina's claim, concluding that, although cumulation was not expressly authorized in sunset reviews, it was permissible because it was consistent with the policies underlying the AD Agreement.[518] In reaching this conclusion, the Appellate Body explained that "[t]he silence of the text on this issue . . . cannot be understood to imply that cumulation is prohibited in sunset reviews."[519]

263. Applying the same interpretive principle here, the fact that Article 15.3 does not specifically authorize an authority to cumulate subsidized imports with imports that are dumped does not, in and of itself, indicate that such an approach is prohibited by the SCM Agreement. Turkey's claim would have the Panel read into Article 15.3 terms that are not there. Such an

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[514] SCM Agreement, Article 15.3 (emphasis added).
[515] SCM Agreement, Article 15.3 (emphasis added).
[516] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 294-300.
[517] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 294-300.
[518] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 294-300.
[519] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 294.

interpretation is not consistent with proper rules of interpretation, including those applied by the Appellate Body in prior reports, and should therefore be rejected by the Panel.

c. Both the Purpose of the Cumulation Provisions and the Context Provided by the AD Agreement and Article VI of the GATT 1994 Support an Interpretation that the Cumulation of Subsidized and Dumped Imports Is Permitted by the SCM Agreement

264. As the Appellate Body has acknowledged previously in the context of the AD Agreement, the ability to cumulate the injurious effects of dumped imports is a "useful tool" for an investigating authority "to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination."[520] The Appellate Body explained the rationale behind cumulation in *EC – Tube or Pipe Fittings* in the context of dumping investigations:

> A cumulative analysis logically is premised on a 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. If, for example, the imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not be individually identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury. In our view, by expressly providing for cumulation in Article 3.3 of the Antidumping Agreement, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports.[521]

265. Similarly, an analysis that focused solely on the injurious effects of either dumped or subsidized imports alone when both types of imports are injuring the industry at the same time

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[520] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 297.

[521] *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 Agreement 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.

would necessarily prevent the investigating authority from "adequately tak[ing] into account" the injurious effects of all unfairly traded imports, rendering the authority's injury analysis less than complete.[522] The Appellate Body has in fact 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."[523]

266. Moreover, as noted above, the Appellate Body has emphasized these policies in *US – Oil Country Tubular Goods Sunset Reviews (AB)*, a case involving the issue of whether cumulation was permitted in sunset reviews under the AD Agreement. Relying on its statements in *EC – Tube or Pipe Fittings*, the Appellate Body found that an authority could cumulate imports from multiple countries in sunset reviews, even though such an approach was not expressly permitted in the sunset provisions of the AD Agreement.[524] The Appellate Body explained that:

> Although *EC – Tube or Pipe Fittings* concerned an original investigation, we are of the view that {its} rationale is equally applicable to likelihood-of-injury determinations in sunset reviews. Both an original investigation and a sunset review must consider possible sources of injury: in an original investigation, to determine whether to impose antidumping duties on products from those sources, and in a sunset review, to determine whether anti-dumping duties should continue to be imposed on products from those sources. Injury to the domestic industry B whether existing injury or likely future injury B might come from several sources simultaneously, and the cumulative impact of those imports would need to be analyzed for an injury determination. . . .Therefore, notwithstanding the differences between original investigations and sunset reviews, cumulation remains a useful tool for investigating authorities in both inquiries to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination as to whether to impose B or continue to impose B anti-dumping duties on products from those sources.[525]

267. In other words, in *US – Oil Country Tubular Goods Sunset Reviews (AB)* and *EC – Tube or Pipe Fittings*, the Appellate Body emphasized that a cumulative assessment of the effects of unfairly traded imports from multiple countries is a critical component of the injury analysis authorized in the AD Agreement.[526] The same importance, of course, extends to the injury analysis conducted in countervailing duty investigations under the SCM Agreement.

[522] *EC – Tube or Pipe Fittings (AB)*, para. 116.
[523] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 549.
[524] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 296-297.
[525] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 296-297 (emphasis added).
[526] *EC – Tube or Pipe Fittings (AB)*, para. 117.

268. The Appellate Body's reasoning in *US – Oil Country Tubular Goods Sunset Reviews (AB)* and *EC – Tube or Pipe Fittings* regarding cumulation is similarly applicable to a situation where dumped *and* subsidized imports are having a simultaneous injurious impact on an industry. Notably, the AD and SCM Agreements contain nearly identical provisions governing an authority's injury analysis, including cumulation, in original investigations.[527]

269. This near identical language highlights the overlap of the injury analysis under the AD and SCM Agreements. Working hand in hand, both contemplate that an authority may consider the cumulative injurious effects of unfairly traded imports from multiple sources, given that these imports can have a cumulative injurious impact on the domestic industry.

270. Indeed, the Appellate Body has asserted that — in light of the references to Article VI of the GATT 1994 in the SCM Agreement, Article VI itself, and the many parallels between the obligations that apply to Members imposing antidumping duties and those imposing countervailing duties — it is appropriate to interpret the SCM Agreement within the context offered both by the AD Agreement and Article VI of the GATT 1994.[528]

271. Turkey, through its reliance on the Appellate Body report in *US – Carbon Steel (India)* alone, would have the Panel read the cumulation provisions of the AD and SCM Agreements "in willful isolation" from each other,[529] resulting in a reading of Article 15.3 that makes little sense in light of the policies underlying the cumulation provisions of each Agreement.[530]

272. If the view of the Appellate Body is that Members should not consider the remedies under the AD and SCM Agreements in isolation, it would be even more misguided to consider the injury caused by dumped and subsidized imports in isolation. Antidumping and countervailing duty remedies "are, from the perspective of producers and exporters, indistinguishable."[531] By the same token, injury caused by dumping and subsidization of imports is, from the perspective of domestic producers, indistinguishable. The Appellate Body recognized this when it observed that "it may well be the case that the injury the [antidumping and countervailing] duties seek to counteract is the same injury to the same industry."[532]

273. Article VI of the GATT 1994 also provides important context for considering the object and purpose of the SCM Agreement and its relationship with the AD Agreement.[533] Article 15.1 of the SCM Agreement expressly references Article VI of the GATT 1994, stating that the injury findings prescribed in Article 15 of the SCM Agreement relate to a "determination for purposes

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[527] *Compare* SCM Agreement, Article 15.3, *with* AD Agreement, Article 3.3.
[528] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 570.
[529] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 571.
[530] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 296-97; *EC - Tube or Pipe Fittings (AB)*, para. 117.
[531] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 570.
[532] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 570, n. 549.
[533] The cumulation of dumped and subsidized imports is fully consistent with the object and purpose of the SCM and AD Agreements, which authorize Members to provide relief to industries that are being injured by unfairly traded imports from a variety of sources. *See, e.g.*, *EC – Tube or Pipe Fittings (AB)*, para. 116.

of Article VI of GATT 1994."[534] The AD Agreement contains the same language in reference to Article VI.[535] 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 . . . ."[536]

274. In interpreting Article VI:6(a) of the GATT 1994, all of the language in the article should be considered. The phrase "as the case may be" acknowledges that cumulation of dumped and subsidized imports may be appropriate in particular injury investigations. In particular, this language recognizes that there may be situations in which it "may be the case" that the unfair trade practices covered by an authority's injury determination may involve dumping, subsidization, or both unfair trade practices. According to most common definitions, "as the case may be" means "according to the circumstances," and therefore does not indicate a binary choice between two options.[537] Article VI:6(a) requires that the effects of "dumping or subsidization, as the case may be," must cause injury to the domestic industry. The "circumstances" invoked by this phrase are the circumstances involving the injury to the domestic industry caused by the unfair trade practices.

275. Very often, a domestic industry will be faced with both dumped and subsidized imports, and where these circumstances exist, it would be appropriate to interpret Article VI:6(a) as contemplating a cumulative analysis of injury based on these circumstances. Therefore, 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. Furthermore, the use in Article VI:6(a) of the word "or" to join the phrases "dumping" and "subsidization" and the use of the phrase "as the case may be" reflects the fact that injury determinations can involve either or both unfair trade practices.

276. Focusing solely on the injurious effects of either dumped imports or subsidized imports alone would force a Member to make a country-specific analysis in the above circumstance. As discussed above, both the text of the AD and SCM Agreements, and the Appellate Body in *EC – Tube or Pipe Fittings*, recognize the inherent limitations in such an analysis.[538] Prohibiting investigating authorities from cross-cumulating, such that the same volume of subsidized imports from a country can be countervailed in some circumstances (where exporters in other countries also happen to be subsidized) but not in others (where the unfairly traded imports from other countries are dumped but not subsidized), will impair the right afforded to Members under the SCM Agreement to countervail injurious subsidized imports. For, while the obligations applicable in the context of antidumping and countervailing duty investigations are legally

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[534] SCM Agreement, Article 15.1.
[535] AD Agreement, Article 3.1.
[536] GATT 1994, Article VI:6(a).
[537] *See, e.g.*, "Collins" online definition, *available at* http://www.collinsdictionary.com/dictionary/english/as-the-case-may-be, last checked December 12, 2017; "Oxford Dictionaries" online definition, *available at* https://en.oxforddictionaries.com/definition/us/as_the_case_may_be, last checked December 12, 2017.
[538] *EC – Tube or Pipe Fittings (AB)*, para. 116.

distinct, the injury that has occurred to an industry, from the perspective of the relevant domestic industry, is cumulative. The United States therefore urges the Panel to interpret the SCM Agreement in a way that ensures that the treatment of those imports is consistent under all the applicable provisions of the WTO agreements.

277. In short, both the relevant context and the object and purpose of the AD and SCM Agreements support the proposition that cumulation of dumped and subsidized imports is consistent with the WTO Agreements. Whenever dumping and subsidization are simultaneously occurring in the market, there often will be cumulative price or volume effects from the dumped and subsidized imports — effects that will be indistinguishable to domestic producers injured by those imports. Where dumped and subsidized imports from multiple countries are having such a compounding effect on the industry, it is reasonable for an investigating authority to consider the effects of these imports on a cumulated basis in its analysis. Doing otherwise would prevent an investigating authority from properly taking into account the combined injurious impact of all unfairly traded imports that are affecting an industry adversely at the very same time.[539]

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

278. Turkey asserts 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.[540] Turkey's arguments fail for several reasons. First, Turkey has not presented sufficient evidence to demonstrate that such a "practice" exists. Even had Turkey succeeded in such a showing, however, 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.

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

279. Turkey claims that, "[s]imilar to its practice in investigations, the ITC has a practice, in assessing material injury in five-year reviews, of cumulating imports that are subject to countervailing duty orders with imports that are subject only to antidumping duty orders, *i.e.*, non-subsidized imports, with respect to which the five-year reviews are initiated on the same day," and that this "practice" is inconsistent "as such" with Article 15.3 of the SCM Agreement.[541] Specifically, Turkey claims that "in practice [USITC] cumulates all imports for which reviews of antidumping and countervailing duty orders are initiated on the same day, provided the subject imports are likely to compete with each other and with the domestic like

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[539] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 296-297; *EC – Tube or Pipe Fittings (AB)*, para. 116.
[540] Turkey's First Written Submission, paras. 553-562.
[541] Turkey's First Written Submission, para. 554.

product and are not likely to have no discernible adverse impact on the domestic industry in the event of revocation of the orders."[542] Turkey argues that this alleged "practice" should therefore be considered a rule or norm of general application, and thus is a measure subject to challenge.[543]

280. As with its challenge with respect to original investigations, Turkey's "as such" challenge to USITC's alleged practice of cross-cumulation in sunset reviews must fail because Turkey has not established the existence of a rule or norm of general and prospective application. As an initial matter, we again note that Turkey is challenging a "practice," not a written measure, and thus there is a "high [evidentiary] threshold" that must be reached by a complaining party.[544] The complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application.[545] Evidence of such a measure "may include proof of the systematic application of the challenged 'rule or norm'."[546]

281. Turkey's showing with respect to USITC's alleged practice falls far short of its burden. In support of its claim, Turkey points to the following statements in the final determination for CWP:

> The Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) [changed circumstances reviews] or (c) [five-year reviews] of this title were initiated on the same day, if such imports would be likely to compete with each other and with the domestic like product in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.[547]
>
> The Commission may exercise its discretion to cumulate, however, only if the reviews are initiated on the same day, subject imports are likely to compete with each other and the domestic like product in the U.S. market, and imports from each such country are not likely to have no discernible adverse impact on the domestic industry in the event of revocation.[548]

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[542] Turkey's First Written Submission, para. 557.
[543] Turkey's First Written Submission, para. 557.
[544] *US – Zeroing (EC) (AB)*, para. 198
[545] *US – Zeroing (EC) (AB)*, para. 198.
[546] *US – Zeroing (EC) (AB)*, paras. 197-198.
[547] Turkey's First Written Submission, para. 555.
[548] Turkey's First Written Submission, para. 556.

282. Turkey then asserts that, "while the ITC has discretion in electing whether or not to cumulate in five-year reviews, in practice it cumulates all imports for which reviews of antidumping and countervailing duty orders are initiated on the same day, provided the subject imports are likely to compete with each other and with the domestic like product and are not likely to have no discernible adverse impact on the domestic industry in the event of revocation of the orders."[549]

283. This evidence is insufficient to support the existence of an unwritten measure. First, Turkey itself states that the alleged "practice" it challenges *is subject to USITC's discretion*. To succeed in an "as such" challenge to any measure, a complainant must show that the application of the measure necessarily leads to WTO inconsistent action.[550] Turkey has made no such showing. As with the alleged practice challenged in the context of original investigations, Turkey does not claim that the statute itself is inconsistent with the SCM Agreement — nor could it, as that measure was not included in Turkey's panel request. Therefore, Turkey must prove its claim that USITC has exercised this discretion "in practice" in a manner that would constitute a "rule or norm" of "general and prospective application."[551] Turkey's reference to the single sunset determination at issue in this dispute is patently insufficient to do so. The fact that USITC cumulated subsidized and non-subsidized imports in the proceeding at issue does not demonstrate "systemic application" or that the alleged practice has "general and prospective application."

284. Based on the foregoing, Turkey has failed 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 of the SCM Agreement should be rejected.

b. Article 15.3 Is Not Applicable to Sunset Reviews

285. Turkey has similarly failed to show that Article 15.3 prohibited the cumulation of dumped and subsidized imports in the sunset review determination at issue. Review proceedings, including sunset review proceedings, are governed by Article 21 of the SCM Agreement — not Article 15.3. Therefore, Article 15.3 does not apply directly to the review determination at issue, and the Panel should reject Turkey's claim on that basis.

286. Turkey contends, without any basis, that "the Appellate Body's guidance in *US – Carbon Steel (India)* . . . applies with equal force to injury determinations in five-year reviews."[552] In

[549] Turkey's First Written Submission, para. 557.
[550] *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.").
[551] *US – Zeroing (EC) (AB)*, para. 196.
[552] Turkey First Written Submission, para. 558. Turkey merely notes that in *US – Carbon Steel (India) (AB)*, India challenged not only an original investigation, but also one sunset review. *Id.* at n. 1346. Turkey neglects to explain that the panel in *US – Carbon Steel (India)* concluded that India had failed to establish a *prima facie* case that the

fact, the panel in *US – Carbon Steel (India)* rejected India's claim that U.S. provisions on cumulative assessment in sunset reviews are inconsistent with Article 15 of the SCM Agreement.[553] The panel found that Article 21.3 of the SCM Agreement, which governs sunset reviews, "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 21.3.6."[554] Notably, India did not raise this issue on appeal.[555]

287. Moreover, the Appellate Body has consistently acknowledged that the provisions of the WTO Agreements governing dumping, subsidies, and injury findings in original investigations do *not* apply to an authority's likely injury analysis in sunset reviews.[556] As the Appellate Body explained in *US – Carbon Steel*, which involved a consideration of the interplay between the investigation and sunset review obligations of the SCM Agreement:

> [O]riginal investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation.[557]

288. Indeed, in the context of the AD Agreement, the Appellate Body has explained that the sunset provision of that agreement (AD Article 11.3):

> [D]oes not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination.[558]

289. In light of these principles, the Appellate Body has consistently rejected claims that the specific requirements governing original investigations under the WTO Agreements must be transposed into the sunset context.[559]

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cumulation provisions of U.S. law for sunset reviews were inconsistent with Article 15.3 of the SCM Agreement, either "as such" or "as applied." *US – Carbon Steel (India) (Panel),* paras. 7.388-7.391.

[553] *US – Carbon Steel (India) (Panel)*, paras. 7.388-7.392.

[554] *US – Carbon Steel (India) (Panel)*, para. 7.389.

[555] *US – Carbon Steel (India) (AB)*, para. 3.1.

[556] *US – Carbon Steel (AB)*, paras. 58-92; *see also US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 123-127; *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 301-303; *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, paras. 148-153).

[557] *US – Carbon Steel (AB)*, para. 87; *US - Corrosion-Resistant Steel Sunset Review (AB)*, para. 106.

[558] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

[559] *US – Carbon Steel (AB)*, paras. 58-92 (finding that the *de minimis* subsidy requirements set forth in Article 11.9 of the SCM Agreement are not applicable to the sunset review provisions of Article 21 of the Agreement); *see also*

290. In particular, the Appellate Body has expressly rejected claim that the Agreements' specific requirements relating to cumulation in original investigations can be applied directly in sunset reviews.[560] In *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)* and *US – Oil Country Tubular Goods Sunset Reviews (AB)*, the Appellate Body found the cumulation provision of the AD Agreement is not directly applicable to sunset reviews.[561] The Appellate Body explained that the requirements of the provision only "speak[] to the situation '[w]here imports of a product from more than one country are simultaneously subject to *antidumping investigations*',"[562] and that "the text of Article 3.3 plainly limits its applicability to original investigations."[563] As a result, the cumulation "conditions of Article 3.3 do not apply to likelihood of injury determinations in sunset reviews."[564]

291. The same reasoning applies in the context of the SCM Agreement.[565] Article 21 of the SCM Agreement does "not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review," nor does it "identify any particular factors that authorities must take into account in making such a determination."[566] Accordingly, the SCM Agreement imposes no specific limitation on an authority's cumulation decisions in a sunset review. While it is true that certain conditions are required before cumulating subsidized imports in injury investigations under Article 15.3, the specific injury analyses required in Article 15.3 are not directly applicable under Article 21.3 in a sunset review. For these reasons, both Turkey's "as such" and its "as applied" claims with respect to USITC's cumulation practices in sunset reviews must fail.

US – Corrosion-Resistant Steel Sunset Review (AB), paras. 123-127 (rejecting the idea that an authority must calculate dumping margins in a sunset review in the same manner as it does in antidumping investigations); *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 271, 294 (rejecting argument that the specific injury requirements contained in Article 3 of the AD Agreement, including the cumulation requirements, are applicable to a likelihood of injury determination in sunset reviews); *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, paras. 167-173 (rejecting argument that the cumulation provisions of the AD Agreement, set forth in Article 3.3, apply in sunset reviews under Article 11).

[560] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 286-294; *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, paras. 167-173.

[561] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 286-294; *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, paras. 167-173.

[562] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 294 (emphasis in original); *see also US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, para. 170.

[563] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 301; *see also US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, para. 170.

[564] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 302, 280; *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, para. 170.

[565] In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body noted that Article 11.3 is virtually textually identical to Article 21.3 of the SCM Agreement and concluded that, given the parallel wording of the two Articles, its prior descriptions of the sunset review provision in the SCM Agreement also serves, *mutatis mutandis*, as an apt description of Article 11.3 of the Anti-Dumping Agreement. *See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 104, n. 114.

[566] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

V. CONCLUSION

292. For the foregoing reasons, the United States respectfully requests that the Panel reject all of Turkey's claims.