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

(DS523)

SECOND EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

July 10, 2018

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. PRELIMINARY RULING REQUEST

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

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

2. However, Turkey's "some connection" argument has almost no limit, and would effectively read out the consultation requirement in DSU Article 4. Perhaps for this reason, in none of the disputes cited to by Turkey had the complainant failed to identify the measure at issue in its consultations request altogether. Since Turkey failed to identify the measures at issue in its consultation request, the addition of these new measures in its panel request cannot be a "natural evolution" from its consultation request. There is nothing in Turkey's consultation request for these measures to "evolve" *from*.

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

4. Turkey has impermissibly expanded the scope and changed the essence of the dispute, contrary to DSU Article 4.4, and thus its challenges to alleged U.S. injury and benefit practices, as well as its "as such" claims with respect to those practices, fall outside the Panel's terms of reference.

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

5. Turkey's request for establishment of a panel limited its claims under Article 12.7 of the SCM Agreement with respect to the WLP investigation to a single subsidy program: the Provision of Hot-Rolled Steel (HRS) for Less Than Adequate Remuneration (LTAR). However, Turkey's written submission includes a number of new claims regarding USDOC's application of facts available that were not identified in its panel request.

6. Turkey argues that the United States was "sufficiently notified" of the legal basis of Turkey's claim and that the United States' "due process" rights were only affected to a limited extent. Turkey also argues that the United States "could have asked for clarification following Turkey's request for the establishment of a panel" or "for an extension of time so as to have sufficient time to prepare its responses" to Turkey's first written submission. However, Turkey's arguments in this respect are not relevant to the Panel's analysis under DSU Article 6.2. Article 6.2 requires two elements; if either of these two elements is not properly identified, the matter would not be within the panel's terms of reference. Moreover, compliance with the requirements of Article 6.2 "must be objectively determined on the basis of the panel request as it existed at the time of filing" and be "demonstrated on the face" of the panel request. Thus, the Panel need not make a finding of whether the United States was "sufficiently notified" or the extent to which its "due process rights" were affected in order to find the additional claims under Article 12.7 to be outside its terms of reference.

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

8. Turkey argues that "USDOC's determination to apply adverse facts available with regard to Borusan in the WLP proceeding was not a program-specific determination," but was based on Borusan's decision to not participate in verification. However, USDOC engaged in separate fact-finding and legal determinations with respect to each of the 30 subsidy programs at issue in that proceeding. Turkey's decision to identify only one subsidy program in its panel request, and then raise claims regarding the remaining 29 programs in its written submission, has placed the United States at a distinct disadvantage in this proceeding.

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

9. Turkey's challenge under Articles 1.1(b) and 14(d) of the SCM Agreement falls outside the Panel's terms of reference because the out-of-country benchmark and benefit determination in the OCTG final determination ceased to exist and have legal effect at least 15 months prior to the date of the Panel's establishment.

10. In its response to the United States' preliminary ruling request, Turkey argues that the Appellate Body in *EC – Selected Customs Matters* "has also recognized two exceptions to the general requirement that measures must be in force at the time of establishment of the panel: where a measure is enacted subsequently or expires prior to establishment of the panel." Turkey explains that the latter "exception" was recognized by the Appellate Body in *US – Upland Cotton.*

11. The Appellate Body's findings in *US – Upland Cotton*, however, are not applicable to this dispute. In *US – Upland Cotton*, the issue was whether two subsidy measures (i.e., contract

payments) could be within the panel's terms of reference if the legislative basis for those measures had expired prior to the panel's establishment. The situation before this Panel is very different. The OCTG final determination in which USDOC used an out-of-country benchmark was successfully challenged by Turkish respondents at the U.S. Court of International Trade (USCIT), was remanded to USDOC, and was subsequently reversed by USDOC with regard to benefit in the OCTG remand determination. USDOC issued an amended final determination on March 10, 2016, which effectuated USDOC's remand determination to use in-country benchmarks. On that date, the OCTG final determination ceased to exist and have any legal effect with respect to the use of out-of-country benchmarks.

12. Therefore, Turkey cannot demonstrate that the benchmark and benefit determination in the OCTG final determination had effects that were "impairing the benefits accruing to it" at the time of the Panel's establishment. Once the amended OCTG final determination was issued on March 10, 2016, it changed the subsidy rates and served as the legal basis for the collection of cash deposits on entries.

13. Turkey disputes that the original OCTG benefit determination ceased to have legal effect by claiming that "there was a possibility that USDOC's remand determination would be reversed, and that the original benefit determined reinstated." However, that legal action in U.S. courts might have caused USDOC to further amend the duty rates, or to alter the legal basis of those rates, at a later date, does not mean that the superseded determination continued to have legal effect. Moreover, if a challenge were permitted based on Turkey's arguments, it would mean that a complainant could equally challenge a countervailing duty order in which no inconsistency was identified or claimed, based on the possibility that a domestic legal challenge to that order might result in an inconsistency at some time in the future. This would lead to absurd results, and is not consistent with a proper interpretation of the DSU.

14. Turkey argues that "although the benefit determination in the OCTG proceeding which resulted in the imposition of countervailing duties may have been superseded by the remand determination, the basic legislative framework and implementing regulations that gives rise to the United States' practice of rejecting in-country benchmarks in benefit determinations based on evidence of government ownership or control remains in place." To the extent Turkey now attempts to challenge the "basic legislative framework and implementing regulations that gives rise to the United States' practice," such a claim is outside the Panel's terms of reference.

II. TURKEY'S "AS SUCH" CHALLENGE UNDER ARTICLES 1.1(B) AND 14(D)

15. Turkey, in its responses to the Panel's questions, presents new evidence relating to 28 USDOC determinations purportedly demonstrating the existence of a "practice" that is a rule or norm, which necessarily led to WTO-inconsistent action on the part of USDOC. The Panel should reject Turkey's new evidence because it is untimely and contrary to the Panel's Working Procedures. Having failed to make its affirmative case in its first written submission, or even during the first Panel meeting, that such a "practice" exists, Turkey should not be permitted to make such a case at this late stage of the panel proceedings when the parties are to present rebuttal evidence, or evidence necessary for purposes of answering clarifying questions.

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

17. Turkey apparently considers that it is sufficient for it to submit these determinations as exhibits, and leave it to the Panel to review and analyze them on its own. A panel is not to make an affirmative case for a party through its own review of evidence, not based on the party's own claims and arguments. The Appellate Body similarly found in *Canada – Wheat* and *US-Gambling* that a complainant cannot succeed in making a *prima facie* case by submitting evidence without explaining how its content is relevant to the claims before the panel. The Panel should thus not examine this evidence further.

18. The United States also notes that the determinations fail to support Turkey's claim regarding the existence of the alleged practice at the time of the Panel's establishment, which necessarily led to WTO-inconsistent action on the part of USDOC. First, of the 28 determinations listed, 23 of the determinations could not assist in establishing a practice existing at the time of the Panel's establishment. Turkey cannot succeed in its challenge by demonstrating that USDOC had, *prior to* the date of the Panel's establishment, a practice regarding the use of out-of-country benchmarks. And, to the extent that Turkey could show that such a practice previously existed – which it has not – the United States has demonstrated no such practice existed at the time of the Panel's establishment, as evidenced by the HWRP, CWP, and WLP determinations at issue in this dispute, by other determinations that post-date these determinations, as well as the decision of the USCIT in the *Borusan* case.

19. Second, the five remaining determinations are not sufficient to demonstrate the existence of a rule or norm, and in any event, in fact contain findings by USDOC demonstrating that no such rule or norm exists. For example, some of the listed determinations are actually examples of where USDOC did *not* use out-of-country benchmarks. Other determinations listed by Turkey demonstrate that when USDOC uses an out-of-country benchmark, such findings are not based solely on evidence concerning the government constituting a majority or substantial portion of the market. Therefore, the new evidence provided by Turkey fails to support its claim.

III. TURKEY'S ARTICLE 1.1(A)(1) CLAIMS

20. As the United States has explained, Turkey's claim with respect to OYAK must fail because the requirements of Article 1.1(a)(1) of the SCM Agreement do not apply to USDOC's analysis of OYAK. Turkey argues that, although USDOC "did not explicitly refer to OYAK as a public body," "it is clear from the overall analysis that the USDOC analyzed OYAK under its standard for 'public body,' and not as a 'government organ' or part of the [GOT] in some other way." Turkey misses the point in suggesting that the use of particular terminology in a domestic determination can convert a factual finding into a legal finding for purposes of WTO dispute settlement. USDOC did not need to make a finding regarding whether OYAK was a public body under Article 1.1(a)(1), and none of Turkey's arguments change that fact.

21. Moreover, because Turkey's arguments concerning OYAK are raised separately from its challenge against USDOC's determinations concerning Erdemir and Isdemir, the Panel should decline to review Turkey's OYAK arguments because they are made on an independent basis.

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

23. In its previous submissions, the United States explained that USDOC determined Erdemir and Isdemir to be public bodies based on numerous considerations. Throughout this dispute, however, Turkey has attempted to draw the Panel away from its standard of review and from considering the totality of the record evidence, as USDOC did. Rather, Turkey isolates specific facts and assertions on the record of the proceedings, and continues to make assertions that rely on secondary non-objective material on the record, that is, a law firm position paper and case briefs from interested parties. Thus, in arguing that USDOC's determinations are inconsistent with the SCM Agreement, Turkey merely offers its own interpretation of the record, and seeks for the Panel to conduct a *de novo* review. However, a panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action." 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." Thus, the inquiry for the Panel is whether an unbiased and objective investigating authority could have determined Erdemir and Isdemir to be public bodies based on the totality of the record evidence before it.

24. A close examination of the arguments that Turkey has continued to make since its first written submission demonstrates that Turkey fails to engage with or undermine USDOC's examination of the totality of the record evidence. Many of the arguments are either premised on secondary non-objective material from the record, or are simply unsupported. Other arguments are premised on the isolation of a sentence pulled from the record, where Turkey thereby attempts to shield that sentence from the remainder of the record, which USDOC considered in totality.

25. Indeed, in contrast to Turkey's presentation of isolated record facts, USDOC weighed the totality of the record evidence. Turkey has therefore failed to demonstrate that an unbiased and objective investigating authority, when faced with the totality of the record evidence, could not have examined OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir, such that Erdemir and Isdemir could be found to be public bodies within the meaning of Article 1.1(a)(1).

26. Turkey claims that USDOC's public body determinations concerning Erdemir and Isdemir are inconsistent with Article 1.1(a)(1) because USDOC "refused to consider evidence regarding their commercial conduct." Turkey errs in suggesting that evidence of commercial, profit-maximizing behavior precludes a finding that an entity is controlled by the government.

To the contrary, while such evidence may be relevant to an investigating authority's determination, nothing in Article 1.1 suggests that, where meaningful control by the government is otherwise demonstrated, a public body cannot also exhibit commercial behavior.

27. Turkey argues that "evidence of an entity's corporate governance framework, policies and procedures that make it accountable to shareholders or members and require it to pursue commercial, profit-maximizing strategies, and external audit requirements are highly relevant to whether that entity is a public body." The United States agrees that such evidence may be relevant to an investigating authority's analysis. However, Turkey appears to equate a company exhibiting commercial, profit-maximizing behavior with a company operating independently and/or autonomously from the government. It is not the case, however, that either a government, or a government-controlled entity, cannot act in a commercial manner. Moreover, when viewed in light of the totality of the evidence, as USDOC did, the information cited by Turkey purporting to show "commercial conduct" does not undermine USDOC's finding that GOT meaningfully controlled Erdemir and Isdemir.

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

IV. TURKEY'S CLAIMS UNDER ARTICLE 12.7 OF THE SCM AGREEMENT

A. USDOC's Application of Facts Available in the OCTG Investigation

29. Turkey has clarified that its claims relate only to USDOC's "selection" of facts available, and do not include either USDOC's decision to resort to the use of facts available or whether the information requested by USDOC was "necessary" within the meaning of Article 12.7. In short, Turkey does not challenge USDOC's determination that Borusan failed to provide "necessary information," that this failure significantly impeded USDOC's investigation, and that the use of facts available was therefore warranted. Thus, it is undisputed that by failing to provide the requested information, Borusan hindered USDOC's ability to calculate the subsidy from the Provision of HRS for LTAR program.

30. Turkey's argument that "USDOC should have considered whether Borusan's failure to provide requested information was attributable to resource constraints, . . . and therefore whether it would have been reasonable to use the data which Borusan provided on its hot rolled steel purchases for the Gemlik mill to approximate the missing information or to ask Borusan to provide the missing information in a different form" is perplexing. USDOC did consider Borusan's "resource constraints," including when it granted Borusan's extension of time to respond to the initial questionnaire. In addition, USDOC did use the data Borusan provided on its HRS purchases for the Gemlik mill to approximate the missing information for the Halkali and Izmit mills. Finally, Turkey's suggestion that USDOC could have asked Borusan to provide the missing information in a different form is pure speculation. Turkey has cited to no evidence that USDOC requested the data in a "form" that was problematic, or that a "different form" would have resolved Borusan's claimed difficulties.

31. Turkey claims that USDOC acted inconsistently with Article 12.7 because it "relied on only a part of the evidence provided by Borusan – *e.g.*, only the lowest price on the record for the Gemlik mill's hot rolled steel purchases from Erdemir and Isdemir." However, Turkey has failed to explain, much less provide evidence, that its suggested approaches would provide a more accurate determination of the missing purchase data than the method used by USDOC.

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

B. USDOC's Application of Facts Available in the WLP Investigation

33. In response to the Panel's written questions after the first Panel meeting, Turkey has dramatically expanded the scope of its arguments under Article 12.7 with respect to the WLP investigation. In response to Question 49, Turkey sets forth a bullet-point list individually challenging USDOC's application of facts available with respect to 27 of the subsidy programs at issue in the WLP investigation: the original 13 programs that it challenged in its first written submission, as well as 14 additional programs that have never previously been addressed by Turkey under Article 12.7. The Panel should reject Turkey's attempt to challenge these 14 subsidy programs.

34. Turkey's belated introduction of new arguments and evidence is contrary to the Panel's Working Procedures and basic procedural fairness as it impairs the United States' ability to defend its interests. Turkey was well aware of these 14 programs at the time it filed its first written submission, and (assuming it had properly raised these claims in its panel request) it could have included a substantive challenge of USDOC's application of facts available with respect to those programs in that submission. The Panel should reject Turkey's attempt to bring such claims now.

35. Finally, the United States notes that for three of the subsidy programs at issue – including the Provision of HRS for LTAR program – Turkey still has provided *no* substantive argumentation or analysis. Turkey has clarified that its claims under Article 12.7 "relate[] specifically to the USDOC's *selection* of facts available" – namely, USDOC's selection of facts available to calculate subsidy rates for each of the programs at issue. Since Turkey's claims relate specifically to USDOC's selection of facts available – a necessarily program-specific determination – Turkey has failed to meet its burden of proof with respect to the three programs for which it has provided *no* substantive arguments regarding how USDOC's determination of a subsidy rate for those programs based on facts available is allegedly inconsistent with Article 12.7.

36. Moreover, as detailed in the United States' Preliminary Ruling Request, Turkey's panel request limited its claims under Article 12.7 with respect to the WLP investigation to the

Provision of HRS for LTAR program only. Since Turkey has opted not to raise *any* substantive arguments in any of its submissions with respect to the Provision of HRS for LTAR program, Turkey has not properly raised any claims under Article 12.7, and thus the Panel should not make any findings in relation to these claims.

37. In the interest of completeness, the United States briefly comments on Turkey's newly-raised arguments and demonstrates that they lack any substantive merit. Although Turkey appears to challenge USDOC's use of the "highest" possible rates, it has provided no argumentation or evidence that these rates are not a reasonable replacement for necessary information missing from the record.

38. Second, with respect to 27 programs, Turkey asserts that "while Borusan declined to participate in verification, the USDOC did verify the Government of Turkey's responses, which confirmed Borusan's own responses regarding its use or non-use of the investigated subsidy programs." However, because Borusan refused to participate in verification, USDOC did not verify the Government of Turkey's responses with respect to Borusan.

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

40. Fourth, Turkey claims that USDOC's resulting subsidy determination "cannot be described as 'accurate' because there is no connection between the allegedly missing 'necessary information' and the rates selected by the USDOC as 'facts available.'" However, Turkey has pointed to no evidence on the record to suggest that the rates chosen by USDOC were not accurate, or that other information on the record would have been more appropriate for use because it was more accurate. And in fact, for each subsidy program, USDOC's calculation of the subsidy rates was based on information provided by cooperating companies in the same or other Turkish countervailing duty investigations. The chosen rates reflect the actual subsidy practices of the Turkish government as reflected in the actual experiences of companies in Turkey, including Borusan's fellow respondent in the WLP investigation, and thus serve as a "reasonable replacement" for information that was missing from the record. Turkey has therefore failed to demonstrate that USDOC's application of facts available is inconsistent with Article 12.7.

C. USDOC's Application of Facts Available in the HWRP Investigation

41. Turkey's claims with respect to USDOC's application of facts available in the HWRP investigation are without merit. Because the subsidy rate calculated for each of the three HWRP programs challenged by Turkey was on a par with identical or similar subsidy programs, these rates were not punitive, but instead provided a reasonable estimate of the level of subsidization provided by the government, that an objective and unbiased investigative authority could have determined to use, as USDOC did.

V. TURKEY'S CLAIMS UNDER ARTICLES 2.1(C) AND 2.4

42. Turkey has confused the inquiry by claiming that "the United States argues that a 'series of transactions for the provision of [hot rolled steel] for [less than adequate remuneration]' is sufficient to demonstrate a subsidy 'plan' or scheme.'" USDOC's determinations were based on *both* the transaction-specific accountings of the provision of HRS for LTAR provided by the respondent parties *and* statements in Erdemir's 2012 and 2013 Annual Reports indicating that its actions furthered the promotion of export-oriented production consistent with GOT policy as set out in Turkey's 2012-2014 Medium Term Programme. Thus, Turkey's arguments that USDOC relied only on a list of transactions to demonstrate the existence of a subsidy program are misplaced.

43. Next, in the determinations at issue, USDOC took account of the extent of diversification of economic activities within Turkey and the length of time during which the HRS subsidy program had been in operation. With respect to the length of time factor, USDOC examined Erdemir's 2012 and 2013 Annual Reports, and in each proceeding requested and received from the GOT information regarding the production and provision of HRS for not only the period of investigation, but also the preceding two years, which demonstrated that the program usage data for the period of investigation was not anomalous in comparison to data for past years. With respect to the extent of diversification factor, USDOC took into account this factor when it considered and discussed the Medium Term Programme and Erdemir's 2012 and 2013 Annual Reports, which reflected the publicly known fact of Turkey's highly diversified economy.

44. The lack of any explicit findings with respect to the two factors is both reasonable and appropriate where, as here, none of the parties to the countervailing duty proceedings ever argued or suggested that the factors had any bearing on the facts at issue. This is also relevant to the Panel's assessment, as it reaffirms the United States' position that there were no facts on the record that call into question the soundness of USDOC's specificity findings.

VI. TURKEY'S CLAIMS UNDER ARTICLE 15.3 OF THE SCM AGREEMENT

45. Turkey's claims regarding cumulation in the context of original investigations under Article 15.3 of the SCM Agreement must fail. Not only has Turkey failed to demonstrate that a "practice" regarding cumulation exists, but Turkey is wrong that Article 15.3 prohibits the cumulation of dumped and subsidized imports.

46. Turkey has challenged USITC's alleged practice of cumulating dumped and subsidized imports in original investigations as a rule or norm of general and prospective application. In such a case, there is a "high [evidentiary] threshold" that must be reached by the complaining party. Turkey must not only show that the alleged "rule or norm" is attributable to the United States, but must establish its precise content, and that it has general and prospective application.

47. Turkey's showing with respect to USITC's alleged "practice" in original investigations has fallen far short of its burden. In support of its claim, Turkey's first written submission pointed to the three original injury determinations at issue in this dispute. However, as the United States explained in its previous submissions, the fact that USITC cumulated the effects of subsidized and non-subsidized imports in the investigations at issue does not demonstrate that

the alleged practice has been "systemic[ally] appli[ed]" or that it has general and prospective application. Moreover, 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."

48. In light of the United States' arguments, Turkey in its responses to Panel questions presents additional injury determinations which it argues provide further evidence of the existence of a practice. The Panel should reject Turkey's evidence because it is both untimely and unpersuasive. Permitting Turkey to introduce new evidence at this late stage is contrary to the Working Procedures adopted by the Panel and to procedural fairness and the orderly resolution of this dispute.

49. Further, Turkey bears the burden of proving that USITC's cumulation of imports in the OCTG, WLP, and HWRP investigations is inconsistent with Article 15.3. Yet Turkey has failed to engage in any analysis of Article 15.3 that would allow that burden to be met. It has provided no interpretation of the text, in context, of Article 15.3, or of the object and purpose of the SCM Agreement. Turkey has simply quoted statements made by the Appellate Body in a previous dispute, but this is not a sufficient basis upon which to make a legal showing. Under DSU Article 11, a panel must make an "objective assessment" of the matter before it, and that a breach has been made out by application of a covered agreement, properly interpreted, to the facts before it. Turkey has failed to provide the Panel with any argumentation that would allow the Panel to engage in such an interpretation, and its claims thus must fail.

50. Moreover, a proper interpretation of Article 15.3 reveals that nothing in the text of that provision prohibits the cumulation of subsidized imports with imports that are dumped. 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. Article 15.3 does not address – or set any prohibition against – an investigating authority conducting a cumulative assessment of the effects on the domestic industry of subsidized imports and dumped, non-subsidized imports. Article 15.3 is silent on this issue, and silence cannot be read as a prohibition. Both the purpose of the cumulation provisions of the AD and SCM Agreements and relevant context support the proposition that cumulation of dumped and subsidized imports is consistent with the WTO Agreements.

51. Turkey's "as such" challenge to USITC's alleged practice of cross-cumulation in sunset reviews also must fail because Turkey has not established the existence of a rule or norm of general and prospective application. To succeed in an "as such" challenge to any measure, a complainant must also show that the application of the measure necessarily leads to WTO-inconsistent action. Turkey has made no such showing. First, Turkey itself acknowledges that USITC has discretion in electing whether or not to cumulate in five-year reviews and does not argue that USITC is required to cumulate in the context of sunset reviews. Second, it cited to no evidence in its first written submission, other than the sunset determination in the CWP proceeding. Evidence that USITC has exercised its discretion to cumulate on one occasion does not demonstrate the existence of a measure, much less that the alleged practice necessarily leads to WTO-inconsistent action.

52. In its responses to Panel questions, Turkey erroneously asserts that the ITC always cross-cumulates subsidized and non-subsidized imports in reviews, despite its discretion not to do so, if

the other conditions for cumulation are satisfied. In actuality, in sunset reviews, USITC decides on a case-by-case basis whether to cumulate subject imports, largely on the basis of whether or not subject imports compete under similar conditions of competition. This examination of the conditions of competition is a separate, distinct, and additional analytic step from the question of whether imports are likely to compete with each other or with the domestic like product in the U.S. market. Turkey's listing of cases in its response to the Panel's questions does not cure Turkey's failure to provide sufficient evidence to demonstrate the content or existence of the alleged "practice" it challenges, or that the "practice" constitutes a rule or norm of general and prospective application.

53. Turkey has also failed to show that Article 15.3 prohibits the cumulation of dumped and subsidized imports in the context of sunset reviews. Sunset review proceedings are governed by Article 21, and not by Article 15.3, of the SCM Agreement. In fact, the Appellate Body has expressly rejected claims that the SCM and AD Agreements' specific requirements relating to cumulation in original investigations can be applied directly in sunset reviews.

54. Turkey offers no textual support for its position that Article 15.3 prohibits cross-cumulation in sunset reviews. Turkey's reliance on the object and purpose of the SCM Agreement, and its contention that cross-cumulation, whether in investigations or reviews, is inconsistent with this object and purpose, fails. The object and purpose of an agreement cannot have the effect of changing the text of that agreement.

55. Turkey also relies on the negotiating history of the SCM Agreement to support its argument that cross-cumulation is prohibited in reviews. Recourse to supplementary means of interpretation is not warranted, since the meaning of Articles 15 and 21 is clear. However, even if the use of supplementary means of interpretation were warranted, the negotiating history of the SCM Agreement does not support Turkey's position. In particular, Turkey has not pointed to any mention at all in the negotiating history of the issue here – cumulation in the context of sunset reviews – and therefore Turkey's entire discussion is inapposite.

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

I. TURKEY'S CHALLENGE TO USDOC'S PUBLIC BODY DETERMINATIONS

56. We note Turkey's argument that the United States has engaged in a "*post hoc*" defense. In making this argument, Turkey appears to suggest that where, for example, USDOC referred to specific language in a record document, its review of that document must be understood as having been limited to that language only, such that the Panel should find that USDOC otherwise did not examine or rely on that document in making its determination. Turkey's position is untenable and without any basis in the SCM Agreement or the DSU. An investigating authority is not required to cite or discuss, down to the word, every piece of supporting record evidence for each factual finding in its determination.

II. TURKEY'S CHALLENGE TO USDOC'S SPECIFICITY DETERMINATIONS

57. Turkey continues to suggest that the finding of a subsidy program was based on "a list of

transactions, some of which are above and some of which are below a benchmark price." Turkey argues that such a series of transactions is not positive evidence of a systematic series of actions, let alone a plan or scheme because "the frequency or number of transactions that provide a subsidy may be relevant evidence of an underlying 'plan or scheme,' but is not, in and of itself, sufficient evidence."

58. Turkey's arguments are wrong on both a factual and a legal basis. Factually, it is the two findings *in conjunction* – the repeated provision of hot-rolled steel for less than adequate remuneration, and its provision in accordance with stated GOT policy – that formed the basis of USDOC's finding that a "subsidy programme" existed.

59. Legally, Turkey's arguments also reflect a misunderstanding of the text of Article 2.1, as well as the findings of the Appellate Body on which it relies. In *US – Countervailing Measures (China)*, the Appellate Body recognized, the inquiry under "Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*." Thus, the only remaining question is whether the contribution and benefit were provided "pursuant to" "a systematic series of actions." Contrary to Turkey's claim then, a "systematic series of actions" need not consist entirely of acts of subsidization; rather, the subsidy in question must be provided "pursuant to" a series of actions that qualifies as a "program." The identification of a plan or scheme *pursuant to which* the subsidies in question are provided serves a particular purpose in this context because, in an analysis of *de facto* specificity, it is not the financial contribution or benefit that is in question, but rather "whether there are reasons to believe that a subsidy is, in fact, specific, even though there is no explicit limitation of access to the subsidy set out in [law]." As the Appellate Body observed, systematic activity or a series of activities may be evidence of an unwritten subsidy program.

60. Turkey's arguments that USDOC did not consider the two factors in Article 2.1(c) are equally unavailing. Turkey claims that the evidence presented by the United States is *post hoc*. However, where the path of an investigating authority's determination is reasonably discernable, an adjudicator should meet with that reasoning rather than avoid it on the basis of form. This principle is apparent in past cases. For example, the panels in *US – Softwood Lumber IV* and *EC – Countervailing Measures on DRAM Chips* both upheld the investigating authority's consideration of the factors provided in the final sentence of Article 2.1(c) where such consideration was implicit. Likewise, in *US – DRAMS*, the Appellate Body found that an investigating authority need not cite or discuss every piece of record evidence supporting its conclusion.

61. Here, USDOC explicitly discussed the evidence demonstrating the two factors in its determination. Having done so, and without these issues having been raised by any interested party in the investigation in the context of specificity, the Panel should find that USDOC took the two factors identified in Article 2.1(c) into account in making its specificity determination.

EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND SUBSTANATIVE MEETING

U.S. RESPONSE TO PANEL QUESTION 64

62. The Appellate Body in *US – Carbon Steel (India)* further stated that "a government's exercise of 'meaningful control' over an entity and its conduct, includ[es] control such that the government can use the entity's resources as its own." Thus, the Appellate Body has recognized that a government's exercise of meaningful control includes evidence that "the government can use the entity's resources," and has not stated that evidence that the government is in fact actually using an entity's resources is necessary.

63. In the United States' view, requiring evidence that the government is "in fact actually" exercising control over the entity and its conduct would conflate the public body analysis with the examination of a private body under Article 1.1(a)(1)(iv) of the SCM Agreement, where a demonstration of entrustment or direction is required. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* similarly found that there need not be "an affirmative demonstration of the link between the government and the specific conduct" as part of a public body analysis. Rather, "all conduct of a governmental entity [including an entity determined to be a public body] constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv)."

64. Turkey appears to suggest that an entity may be deemed a public body only when the entity is "exercising" governmental authority. This is incorrect, however, even under the public body approach of the Appellate Body. The Appellate Body has "explained 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'." Under the framework elaborated by the Appellate Body, an entity might be deemed a public body when there is evidence that the entity possesses or is vested with governmental authority, even if there is no evidence that the entity is exercising governmental authority at the time of the particular transaction at issue. Likewise, in the United States' view, an entity's ability or authority to transfer government resources is sufficient to find an entity as a public body.

65. Therefore, a determination that an entity exercises meaningful control, such that the government can use an entity's resources as its own, is sufficient. An investigating authority need not demonstrate that the government has "in fact actually" used an entity's resources, that is, that the government "in fact actually" exercised meaningful control.

U.S. RESPONSE TO QUESTION 74

66. The Appellate Body has stated that "[w]hether 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." Thus, the question is not whether the conduct under Article 1.1(a)(1) is governmental. Rather, the question is whether the entity engaging in the conduct is governmental.

67. Regardless, to the extent the Panel finds certain statements in *US – Carbon Steel (India*) persuasive concerning this issue, the United States observes that the evidence before USDOC in this case substantially differs both in substance and volume from that before USDOC in *US – Carbon Steel (India).*

U.S. RESPONSE TO QUESTION 86

68. In its oral statement at the second panel meeting, for the first time in this dispute, Turkey raised a new argument concerning certain USDOC determinations it cited in response to Question 34. Turkey appears to suggest that import penetration does not demonstrate an evaluation of whether in-country prices are distorted. However, past panels have recognized that import penetration is relevant to an investigating authority's distortion analysis. The panel in *US – Carbon Steel (India)* stated that "import transactions necessarily relate to prevailing market conditions in India because they are made by entities in India operating subject to Indian market conditions." The panel in *US – Coated Paper (Indonesia)* also recognized the relevance of import penetration to the distortion analysis. Therefore, contrary to Turkey's claim, USDOC's evaluation of import penetration is one factor that may be examined to determine whether a domestic market is distorted by government involvement.