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

(DS523)

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

June 19, 2018

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US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
US – 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 EXHIBITS

Exhibit No.	**Description**
USA-48	Section 516A(b)(2)(A) of the Tariff Act of 1930, as amended
USA-49	19 CFR § 351.301

I. CLAIMS REGARDING THE PUBLIC BODY DETERMINATION

Question 64 (*To the United States*): At paragraph 31 of its response to the Panel question No. 7, the United States comments that "the inquiry before the Panel with respect to OYAK is whether OYAK was found as a matter of fact to *be capable of* exercising meaningful control over Erdemir and Isdemir, such that the controlled entities would be public bodies within the meaning of Article 1.1(a)(1)" (emphasis added).

a. How is this consistent with the United States' observation at paragraph 30 of its response that "[t]he Appellate Body also has found that 'evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority *and exercises such authority* in the performance of governmental functions'" (emphasis added)?

b. Does this require an investigating authority to examine whether a government in fact *actually* exercises its authority over an entity's conduct?

Response (subparts a & b):

1. As the United States has previously explained and as discussed further in the U.S. response to Question 65, USDOC did not make, nor was it necessary for it to make, a legal finding that OYAK is a public body.[1] Because USDOC did not find that OYAK made a financial contribution, and thus, did not find that OYAK provided a countervailable subsidy, the requirements of Article 1.1(a)(1) and the Appellate Body's approach concerning the term "public body" cannot apply to USDOC's examination of OYAK. Therefore, the United States' response concerning the framework for examining a public body is for the purposes of assisting the Panel with respect to its examination of Turkey's challenge against USDOC's determinations concerning Erdemir and Isdemir, and not with respect to Turkey's challenge against OYAK.

2. The United States has explained that a proper interpretation of the text of Article 1.1(a)(1), in context, demonstrates that a public body is any entity that has the ability or authority to transfer government financial resources, including, for example, because that entity is meaningfully controlled by the government.[2] As the Panel's question notes, the Appellate Body also has found that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses

[1] United States' First Written Submission, paras. 77-80; United States' Response to Panel Questions Following the First Meeting ("United States' Response to First Panel Questions"), paras. 28-32; United States' Second Written Submission, para. 68.
[2] United States' Opening Statement at the First Panel Meeting, para. 39 (citing U.S. Opening Oral Statement, *US – Carbon Steel (India)*, paras. 11-12 (available at https://ustr.gov/sites/default/files/US.Oral_.Stmt%20as%20delivered.Public.pdf)); U.S. Other Appellant Submission, *US – Carbon Steel (India)*, paras. 5-8, 23-91 (available at https://ustr.gov/sites/default/files/US.Other_.Appellant.Sub_.Fin_.Public.pdf).

governmental authority and exercises such authority in the performance of governmental functions" such that the entity could be deemed a "public body" under Article 1.1(a)(1).[3]

3. The Appellate Body in *US – Carbon Steel (India)* further stated though 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."[4] 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.

4. 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.[5] 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)."[6]

5. Turkey appears to suggest that an entity may be deemed a public body only when the entity is "exercising" governmental authority.[7] 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'."[8] In *US – Carbon Steel (India)*, the Appellate Body clarified that "[t]he substantive legal question to be answered is therefore whether one or more of these characteristics exist in a particular case."[9] 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.

6. 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.

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[3] United States' Response to First Panel Questions, para. 30 (citing *US – Carbon Steel (India) (AB)*, para. 4.10).
[4] *US – Carbon Steel (India) (AB)*, para. 4.20.
[5] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[6] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[7] Turkey's Second Written Submission, para. 12.
[8] *US – Carbon Steel (India) (AB)*, para. 4.37.
[9] *US – Carbon Steel (India) (AB)*, para. 4.37 (emphasis added).

7. Regardless, as detailed in response to Question 74, contrary to Turkey's claims, the evidence relied upon by USDOC, taken together, demonstrates that the GOT in fact exercised meaningful control over Erdemir and Isdemir such that an unbiased and objective investigating authority could have determined the two entities to be public bodies consistent with Article 1.1(a)(1).[10]

Question 65 (*To the United States*): Turkey cites the statement in the *Borusan* domestic court proceeding that "[i]t appears undisputed that Commerce treated OYAK as a public entity by finding 'significant involvement' of the Turkish government in OYAK, and that Commerce treated OYAK's 'meaningful control' of Erdemir and Isdemir as governmental control".[11] Turkey also cites the USDOC's statement that "the GOT exercised meaningful control over OYAK".[12] Does the USDOC's observation that the government exercised "meaningful control" over OYAK imply that the USDOC considered OYAK as a "public body" and not a part of the Turkish government in the narrow sense?

Response:

8. As the United States has previously explained, USDOC did not make, nor was it necessary for it to make, a legal finding that OYAK is a public body.[13] Article 1.1(a)(1) states 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 . . . ."[14] The text of Article 1.1 thus applies to determinations where a subsidy is deemed to exist – *i.e.*, where a government or public body provides a financial contribution that confers a benefit.[15] Because USDOC did not find that OYAK made a financial contribution, and thus did not find that OYAK provided a countervailable subsidy, the requirements of Article 1.1(a)(1) cannot apply.[16] Therefore, the Panel need not make any legal determination regarding whether OYAK is a "government or any public body" capable of making such a contribution under the SCM Agreement.[17]

9. Moreover, as the United States previously explained, 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.[18] Although USDOC

[10] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355 ("[T]hese considerations, taken together, demonstrate that the USDOC's public body determination in respect of SOCBs was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government.") (emphasis added).
[11] Turkey's Second Written Submission, p. 8 n.40.
[12] OCTG Final I&D Memo, p. 33 (Exhibit TUR-85).
[13] United States' First Written Submission, paras. 77-80; United States' Response to First Panel Questions, paras. 28-32; United States' Second Written Submission, para. 68.
[14] United States' Opening Statement at the Second Panel Meeting, para. 19.
[15] United States' Opening Statement at the Second Panel Meeting, para. 19.
[16] United States' First Written Submission, paras. 77-80, United States' Response to First Panel Questions, paras. 28-32.
[17] United States' First Written Submission, paras. 77-80; United States' Response to First Panel Questions, paras. 28-32.
[18] United States' Second Written Submission, para. 70.

in its determinations stated that the GOT exercised meaningful control over OYAK, USDOC then went on further to clarify that USDOC determined that "[t]he record evidence [ ] shows that the GOT exercises meaningful control over Erdemir and Isdemir through its control of OYAK."[19] Therefore, as explained in prior submissions, USDOC determined that, as a factual matter, OYAK is an entity through which the GOT exercises meaningful control over Erdemir and Isdemir, the entities which provided the pertinent financial contribution in the proceedings at issue.[20] Despite Turkey's contention that USDOC applied the same legal standard to OYAK and Erdemir and Isdemir, USDOC did not assess the record facts pertaining to OYAK under the legal standard for public body. As explained above, USDOC did not, and did not need to, make a legal finding that OYAK is a public body under Article 1.1(a)(1).

10. Moreover, Turkey's arguments with respect to the *Borusan* court case are equally unavailing. In that proceeding, Turkey suggests that the United States "did not dispute" that USDOC treated OYAK as a public body in the OCTG investigation.[21] However, as previously explained, in the case, Borusan challenged USDOC's determination that "Erdemir and its subsidiary Isdemir, suppliers to Borusan of the hot rolled steel input, are statutorily 'authorities.'"[22] In examining the merits of Borusan's claims with respect to Erdemir and Isdemir, the USCIT held that "there is substantial evidence of record to support [USDOC's] OYAK findings, *e.g.,* that OYAK was created as part of the Turkish Ministry of National Defense, that the Turkish government has 'extensive' voting rights in OYAK, and that OYAK has the same privileges as state property."[23] This finding was consistent with the USCIT's earlier observation that "[USDOC] determined that the Turkish government controls Erdemir and Isdemir through its ownership and control of the military pension fund OYAK and through other means of control."[24] Thus, the USCIT's observations in the *Borusan* court case are consistent with USDOC's determinations in the challenged proceedings, *i.e.*, that OYAK is an entity through which the GOT exercises meaningful control over Erdemir and Isdemir.

Question 66 *To the United States*): Turkey argues at paragraph 37 of its second written submission that OYAK is "only a *supplemental* pension fund" that is not part of Turkey's social security system. Turkey argues at paragraph 38 that it is evident from facts that "are clearly stated in OYAK's annual reports which were on the record before the USDOC", citing OYAK's 2012, 2013 and 2014 annual reports and GOT questionnaire responses.

a. Does this evidence contradict assertions that OYAK is performing governmental functions? Please explain.

[19] United States' Second Written Submission, para. 70.
[20] United States' Response to First Panel Questions, paras. 31-32.
[21] Turkey's Response to Panel Questions Following the First Meeting ("Turkey's Response to First Panel Questions"), para. 26.
[22] United States' Second Written Submission, para. 71 (citing *Borusan*, 61 F. Supp. 3d at 1310 (Exhibit TUR-131)).
[23] United States' Second Written Submission, para. 71 (citing *Borusan*, 61 F. Supp. 3d at 1310 (Exhibit TUR-131)).
[24] United States' Second Written Submission, para. 71 (citing *Borusan*, 61 F. Supp. 3d at 1310 (Exhibit TUR-131)).

Response:

11. As an initial matter, because Turkey's claim in relation to OYAK relates to an alleged finding that USDOC did not make, Turkey's claim must be rejected on that basis alone.[25] 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 any of Turkey's arguments concerning OYAK because they are made on an independent basis.[26] To the extent the Panel wishes to consider Turkey's arguments in relation to OYAK, the examination by USDOC of OYAK is relevant only to the United States' rebuttal of Turkey's claim against the public body findings on Erdemir and Isdemir, and further supports why Turkey's claims must be rejected.[27]

12. With respect to USDOC's evaluation of the record evidence concerning OYAK, Turkey's assertion in paragraph 37 of its Second Written Submission that OYAK is a supplementary private occupational pension fund relies on non-record evidence and is thus not appropriate for the Panel to consider.[28] In addition, Turkey's reliance on one sentence in OYAK's Annual Reports does not undermine USDOC's examination of the totality of the record evidence concerning OYAK as an entity through which the GOT exercises meaningful control over Erdemir and Isdemir.[29]

13. Throughout this dispute, Turkey has attempted to introduce evidence that was not before USDOC in an effort to undermine USDOC's determination, or has isolated specific facts and assertions to attempt to draw the Panel away from its standard of review and from considering the totality of the record evidence.[30] Turkey essentially asks for the Panel to reweigh the record evidence and conduct a *de novo* review.[31]

14. However, a panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as reviewer of agency action."[32] Moreover, the Appellate Body has found previously that "[w]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the totality of the evidence, how the interaction of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation."[33]

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[25] United States' First Written Submission, para. 80.
[26] United States' Second Written Submission, para. 74.
[27] United States' Second Written Submission, para. 75; United States' Opening Statement at the Second Panel Meeting, para. 22.
[28] Turkey's Second Written Submission, para. 37 n.62-64 (citing Turkey's First Written Submission, paras. 12-13, which relies on a World Bank Report and OECD report, which were not before USDOC); *see also* United States' First Written Submission, para. 83.
[29] Turkey's Second Written Submission, para. 38 n.67.
[30] United States' Second Written Submission, paras. 85-86.
[31] United States' Second Written Submission, para. 94.
[32] United States' First Written Submission, para. 5; United States' Second Written Submission, para. 86 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188).
[33] United States' Second Written Submission, para. 86 (citing *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted)).

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."[34]

15. Therefore, Turkey's isolation of certain sentences from the record does not alter or undermine the facts on which USDOC relied in demonstrating that OYAK is an entity through which the GOT exercises meaningful control over Erdemir and Isdemir. As previously detailed, USDOC, in reviewing OYAK's Annual Report, also considered the text of Law No. 205, which established it as "an institution related to the Ministry of National Defense" (Law No. 205, Article 1); OYAK's mandatory membership and contribution requirements (Law No 205, Articles 17 and 18); the property and tax treatment accorded to OYAK under Turkish law (Law No. 205, Articles 35 and 37); and the fact that OYAK's member benefits are suspended during times of war (Law No. 205, Article 39).[35] USDOC also examined the fact that Law No. 205 provides that OYAK's governing bodies (the Representative Assembly, General Assembly, and Board of Directors) contain officials from various components of the GOT (*e.g.*, the Ministry of Finance and Ministry of Defense).[36] As highlighted by USDOC, the significant involvement of the GOT in OYAK's governance resulted in a majority of OYAK's Board of Directors, which "administer[s] the activities of the Fund on a continuous basis," being constituted by members of the Turkish Armed Forces.[37] Therefore, in considering all of this evidence, USDOC appropriately determined that the text of Law No. 205 outweighed one statement in OYAK's Annual Reports.

b. Does this evidence contradict the statement at paragraph 88 of the United States' second written submission that "Turkey relies upon documents that were not on the record before USDOC", when arguing 'that 'management of a pension fund and the provision of retirement and other benefits are not functions that are inherently 'governmental' in character'"?

Response:

16. In paragraph 88 of its second written submission, the United States identified certain evidence on which Turkey has relied in this dispute, which was not before USDOC.[38] Specifically, in that paragraph, the United States was referring to Turkey's reliance on certain documents from the World Bank and OECD concerning occupational pension funds in Turkey and other countries, as well as a July 6, 2010 Ministry of National Defense letter referenced in

[34] United States' Second Written Submission, para. 86 (citing *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted)).
[35] United States' First Written Submission, paras. 97-100, 105-106; United States' Second Written Submission, paras. 95-103; *see also* 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).
[36] United States' First Written Submission, para. 99; United States' Response to First Panel Questions, paras. 59-67; United States' Second Written Submission, paras. 98-101.
[37] United States' Response to First Panel Questions, para. 69.
[38] United States' Second Written Submission, para. 88.

the law firm position paper.[39] None of these documents were on the record before USDOC.[40] Accordingly, the Panel should decline to consider Turkey's arguments that are supported by such evidence because "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."[41]

Question 67 (*To the United States*): Did the USDOC make any finding in its published determinations as to the nature of OYAK's pension plan as formally part of the governmental social security scheme as opposed to a private or supplemental fund?

Response:

17. See U.S. response to Question 66(a), above.

Question 68 (*To the United States*): Please comment on Turkey's statement at paragraph 42 of its second written submission that "[t]he suspension of benefits during times of war thus … does not demonstrate that OYAK possesses, exercises, or is vested with governmental authority or otherwise carries out governmental functions."

Response:

18. As explained in U.S. response to Question 65, Article 1.1(a)(1) does not apply to USDOC's examination of OYAK, and the Panel's review of Turkey's arguments concerning OYAK should end there. However, for the purposes of rebutting Turkey's claims against Erdemir and Isdemir, the United States notes that the question before the Panel is whether the evidence on which USDOC relied supports its examination of OYAK as an entity through which the GOT exercises meaningful control over Erdemir and Isdemir.

19. Turkey's statement that "[t]he suspension of benefits during times of war thus reflects the integral role that OYAK's members play in its governing bodies"[42] concedes the importance of the Turkish Armed Forces in OYAK's leadership, and thus supports USDOC's examination of OYAK as an entity through which the GOT exercised meaningful control. Indeed, as previously discussed, the fact that Article 39 of Law No. 205 provides that OYAK's member benefits are necessarily halted during times of military engagement by the Turkish state demonstrates the integral role of the GOT in OYAK, and provides further support for USDOC's examination of OYAK.[43]

Question 69 (*To the United States*): The USDOC evaluated evidence in concluding that the GOT "meaningfully controls" OYAK in the same way that it evaluated evidence in

[39] United States' Second Written Submission, para. 88.
[40] United States' Second Written Submission, para. 88.
[41] United States' Second Written Submission, para. 88 (citing *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97).
[42] Turkey's Second Written Submission, para. 42.
[43] United States' Response to First Panel Questions, para. 35.

concluding that the GOT "meaningfully controls" Erdemir and Isdemir. In light of this, how is it consistent to assert that the USDOC's assessment of OYAK was solely a factual one, while the assessment of Erdemir and Isdemir was a legal one? Please explain.

Response:

20. As the United States has previously explained in response to Question 65, USDOC did not make, nor was it necessary for it to make, a legal finding that OYAK is a public body.[44] This is because USDOC did not find a countervailable subsidy to be attributable to OYAK. Although the determinations contain a factual statement by USDOC that GOT exercised meaningful control over OYAK, those determinations are noticeably devoid of any legal finding with respect to OYAK. Indeed, while USDOC explicitly examined evidence concerning OYAK, and subsequently found that "[t]he record evidence [ ] shows that the GOT exercises meaningful control over Erdemir and Isdemir through its control of OYAK,"[45] USDOC's determinations do not go any further and do not reach a finding that OYAK is a public body. In contrast, after USDOC found that the GOT exercised meaningful control over Erdemir and Isdemir, it then went on to state that it found Erdemir and Isdemir to be public bodies, and determined that Erdemir and Isdemir provided a financial contribution.[46]

21. To be clear then, Article 1.1 applies to USDOC's determinations concerning Erdemir and Isdemir because USDOC found: (1) the entities to be public bodies, (2) the provision of a financial contribution, and (3) the conferral of a benefit. In contrast, Article 1.1 does not apply to USDOC's examination of OYAK because USDOC did not find any of those three elements to exist with respect to its examination of OYAK.

22. Because USDOC did not reach a public body finding concerning OYAK and its determinations are devoid of any such finding, the Panel therefore cannot reach a finding under Article 1.1(a)(1) with respect to OYAK because its role is as a "reviewer of agency action."[47]

Question 70 (*To the United States*): In citing the statement in the TESEV study that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control", the USDOC appears to infer that military equates to government. Elsewhere, the TESEV study refers to OYAK's "core function as a holding company", further noting that OYAK's mission statement identifies the goals to "protect[] first and foremost the actuarial balance in its operations" and to "offer the highest rates of return to its members".[48] The TESEV study also explicitly indicates that OYAK investments and profits are never used for military spending and projects.[49] Do these statements not

[44] United States' First Written Submission, paras. 77-80; United States' Response to First Panel Questions, paras. 28-32; United States' Second Written Submission, para. 68.
[45] United States' Second Written Submission, para. 70.
[46] United States' Second Written Submission, para. 70.
[47] United States' First Written Submission, para. 5; United States' Second Written Submission, para. 86 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188).
[48] TESEV study, p. 10 (Exhibit USA-4).
[49] TESEV study, p. 10.

support the view that OYAK's goals are essentially those of a private company, i.e. making investments that achieve the highest return for its members? Please explain.

Response:

23. These statements concerning OYAK's goals of making investments do not undermine USDOC's determination to examine OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir. Rather, as detailed in response to Question 66(a) and previous submissions, USDOC examined the totality of the record evidence concerning OYAK, which demonstrated the extensive overlap between OYAK's leadership structure and the Turkish Armed Forces.[50] Indeed, in the OCTG final determination, USDOC explained that the TESEV study concluded that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control."[51] Therefore, the Panel should find that an objective and unbiased investigating authority, upon reviewing the totality of the record evidence concerning OYAK, could have certainly examined OYAK as an entity through which the GOT exercised meaningful control over Erdemir and Isdemir.[52]

Question 71 (*To the United States*): Turkey argues that OYAK's tax status under Law No. 205 is no different than that of any other private occupational pension fund in Turkey. Turkey further argues that the grant to OYAK of the same status as state property is limited and relates only to criminal offenses, leaving OYAK subject to commercial law. Even if OYAK's property and tax status is different from those of other pension fund entities in Turkey, how would such advantages support the conclusion that that OYAK pursues Turkish industrial policies to improve the balance of payments?

Response:

24. As an initial matter, the United States would like to clarify that USDOC did not reach a conclusion that OYAK pursues Turkish industrial policies to improve the balance of payments. This statement, "improve the balance of payments," is from the Medium Term Programme, and is one that USDOC highlighted in its determinations concerning Erdemir and Isdemir.[53]

25. Turkey's assertions referenced by the Panel's question are ones that were premised on the law firm position paper.[54] As previously detailed, given the circumstances of the law firm position paper's creation, and the fact that USDOC was not given access to the underlying analysis the paper sought to rebut, the paper was of very little probative value for USDOC's analysis, and USDOC weighed the evidence accordingly.[55] Specifically, the law firm position paper was commissioned by OYAK in response to a report entitled, "Advanced assessment of

[50] United States' Response to First Panel Questions, paras. 59-67.
[51] United States' First Written Submission, para. 99.
[52] *US –Coated Paper (Indonesia)* (*Panel),* paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.
[53] United States' First Written Submission, para. 103.
[54] Turkey's First Written Submission, paras. 266-269 n.631-639.
[55] United States' First Written Submission, para. 110; United States' Response to First Panel Questions, paras. 74-76; United States' Second Written Submission, para. 90.

Turkish State aids to the steel industry" by WYG, a consulting firm for the European Commission ("WYG Report").[56] The WYG Report apparently concluded that OYAK qualified as a public undertaking and therefore that "the acquisition by OYAK of a controlling stake of Erdemir in 2005 could not be a privatization."[57] The position paper states that its "legal analysis . . . should result in rectifying any erroneous statements, especially as to any misrepresentations contained in the WYG report that could potentially be very damaging to OYAK if further relied upon by the Commission."[58]

26. Although the GOT submitted the law firm position paper, the GOT declined to submit the underlying WYG report on the record of the determinations at issue, precluding an independent assessment of the report by USDOC. In response to repeated requests by USDOC for that document, the GOT indicated that it was confidential and could not be provided, even in summary form, due to a confidentiality agreement with the European Union.[59]

27. The law firm position paper itself does not refer to any record evidence to substantiate its assertions, and on which USDOC could have relied in making its findings. Therefore, the document reflects the unsupported positions of a law firm, and as a result, USDOC determined that the law firm position paper carried little weight when reviewed in the context of the totality of the evidence before it.

28. Regardless, to be of assistance to the Panel, the United States observes that the fact that OYAK was accorded distinct tax and property status as a matter of law provided relevant evidence of the GOT's exercise of meaningful control over Erdemir and Isdemir through OYAK.[60] With respect to OYAK's property status, even if Turkey's assertion is that OYAK's property only receives legal treatment akin to state property under the criminal laws of Turkey, this nonetheless demonstrates that OYAK's property is treated differently and favorably compared with private entities in Turkey that are wholly devoid of GOT involvement. With respect to OYAK's tax status, the question is not whether OYAK's tax status is the same as other pension funds in Turkey. Rather, the question is whether OYAK's favorable tax status, as part of the totality of the record evidence, supports USDOC's examination of OYAK as an entity through which the GOT exercises meaningful control of Erdemir and Isdemir. In the United States' view, an objective and unbiased investigating authority could have certainly reached such a determination.[61]

Question 73 (*To the United States*): At paragraph 108 of its second written submission, the United States cites Turkey's arguments pertaining to whether Erdemir exhibits commercial, profit-maximizing behaviour and regarding Erdemir's structure and

[56] United States' Second Written Submission, para. 90.
[57] The position paper defines "public undertaking" as "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it." The WYG Report also apparently concluded that State aid rules are applicable to OYAK's investment decisions. *See* United States' Second Written Submission, para. 90 n.155.
[58] United States' Second Written Submission, para. 90
[59] United States' Second Written Submission, para. 91.
[60] United States' First Written Submission, para. 98.
[61] *US –Coated Paper (Indonesia)* (*Panel),* paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

organization. The United States then states at paragraph 109 that it "agrees that such evidence may be relevant to an investigating authority's analysis". Does the United States consider such evidence may be relevant to the "public body" analysis, or only in respect of the benefit analysis?

Response:

29. Turkey has argued that both evidence concerning Erdemir's structure and organization, and evidence concerning Erdermir's commercial, profit-maximizing behavior are relevant to USDOC's public body analysis.[62] The United States agrees that evidence concerning an entity's structure and organization in certain circumstances may be relevant to an investigating authority's public body analysis. However, evidence concerning an entity's commercial, profit-maximizing behavior is not dispositive of or necessarily relevant to whether a government exercises meaningful control over an entity and its conduct.[63] The panel in *Korea – Commercial Vessels* likewise recognized that "it is not clear to us that an entity will cease to act in an official capacity simply because it intervenes in the market on commercial principles if that intervention is ultimately governed by that entity's obligation to pursue a public policy objective."[64]

30. Moreover, Turkey's suggestion that the United States does not consider evidence of conduct to be germane to a public body analysis is false.[65] Rather, as the United States has explained, Turkey has conflated the concepts of a company operating independently and/or autonomously from the government, with a company exhibiting commercial, profit-maximizing behavior.[66] These two concepts are distinct, and while at most Turkey has proffered evidence with respect to commercial behavior, that in and of itself does not demonstrate that Erdemir and Isdemir operate autonomously from, and are not meaningfully controlled by the GOT.[67]

31. Thus, as previously detailed in prior submissions, in the challenged determinations, although the evidence concerning commercial behavior was considered by USDOC, USDOC ultimately determined that such evidence carried little weight when examining the totality of the record evidence concerning Erdemir and Isdemir.[68]

Question 74 (*To the United States*): At paragraph 117 of its second written submission, the United States argues that TPA's veto power related to close down, sale, merger or liquidation, as well as capacity adjustments, "affords the GOT, through the TPA, an *ability* to determine critical aspects of Erdemir's and Isdemir's operations" (emphasis added).

[62] Turkey's Response to First Panel Questions, paras. 64-65.
[63] United States' First Written Submission, paras. 114-116.
[64] *Korea – Commercial Vessels (Panel)*, para. 7.48.
[65] Turkey's Opening Statement at the Second Panel Meeting, para. 38.
[66] United States' Response to First Panel Questions, para. 84.
[67] United States' Response to First Panel Questions, para. 84.
[68] United States' First Written Submission, para. 114; United States' Second Written Submission, paras. 111-119.

a. Was the USDOC aware of any time that that the TPA exercised its veto power since Erdemir's privatization? Is there evidence on record that the TPA has exercised its veto power? Please explain.

b. Please comment on the statement at paragraph 56 of the United States' response to Panel question No. 17 that "it was not necessary for USDOC to also determine that the TPA directed the pricing of hot-rolled steel or exercises its authority over specific capacity or sales decisions."

Response (subparts a & b):

32. As detailed in response to Question 64, in the United States' view, under a proper interpretation of Article 1.1(a)(1), an investigating authority need not demonstrate that a government is "in fact actually" exercising meaningful control over an entity and its conduct.

33. Furthermore, as explained in previous submissions, in the United States' view, an investigating authority also need not demonstrate that a government is exercising control over the conduct that is the basis for the financial contribution finding.[69] Rather, in a public body analysis, the appropriate analysis hinges on whether the entity in question is capable of transferring governmental resources through, for example, the government's meaningful control over the entity. If an investigating authority finds this to be the case, then any conduct engaged in by the entity is tantamount to governmental conduct.

34. This is also true under the approach advocated by the Appellate Body. 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."[70] 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.

35. Therefore, requiring that USDOC must demonstrate that the TPA in fact directed the provision or pricing of hot-rolled steel would change the public body analysis – which is an analysis concerning the status of an entity – into an analysis of specific conduct, which is only required when examining whether a government or public body entrusted or directed a private body under Article 1.1(a)(1)(iv) of the SCM Agreement.[71] To require such a demonstration would therefore be inconsistent with the text of Article 1.1(a).

36. 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)*. As the Appellate Body stated in that case:

[69] United States' Response to First Panel Questions, paras. 53-56.
[70] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.
[71] United States' Response to First Panel Questions, para. 56.

> [A] government's exercise of "meaningful control" over an entity and its conduct, including control such that the government can use the entity's resources as its own, may certainly be relevant evidence for purposes of determining whether a particular entity constitutes a public body. Similarly, government ownership of an entity, while not a decisive criterion, may serve, in conjunction with other elements, as evidence. Significantly, however, in its consideration of evidence, an investigating authority must "avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant.[72]

37. In its previous submissions, the United States has detailed the evidence that USDOC relied on in determining that Erdemir and Isdemir are public bodies, and that indeed, contrary to *US – Carbon Steel (India)*, USDOC "avoid[ed] focusing exclusively or unduly on any single characteristic," but rather examined the totality of the record evidence concerning Erdemir and Isdemir.

38. In the chart below, the United States presents the Appellate Body's descriptions of the evidence before the panel in *US – Carbon Steel (India)* and its findings concerning such evidence. Presented next to the Appellate Body's descriptions are selected examples of evidence and analysis on which USDOC relied in the challenged determinations in this dispute, and which the United States has previously presented. As the chart demonstrates, the record evidence and analysis supporting USDOC's public body determinations in the challenged determinations is substantially more than the record evidence and analysis at issue in *US – Carbon Steel (India)*. The selected evidence below also demonstrates that upon review of the totality of the record, an unbiased and objective investigating authority could have found that the GOT, in fact, exercises meaningful control over Erdemir and Isdemir.[73]

Appellate Body's Statements Concerning the Evidence and Analysis before USDOC in *US – Carbon Steel (India)*	**Selected Examples of Evidence and Analysis Supporting USDOC's Public Body Determinations At Issue Here**
"At the same time, the Panel did not, in our view, give proper consideration to India's argument that the USDOC failed to consider evidence before it regarding the NMDC's status as a *Miniratna* or *Navratna* company."[74] "The Panel's failure to consider whether the USDOC properly assessed the implications of	In contrast, the record before USDOC did not contain evidence of the government expressly granting Erdemir and Isdemir autonomy. Rather, Turkey proffers an unsubstantiated diagram that purportedly illustrates Erdemir's decision-making process with respect to pricing. Turkey has not demonstrated that USDOC failed to consider this evidence, nor does this diagram demonstrate that Erdemir

[72] *US – Carbon Steel (India) (AB)*, para. 4.20.
[73] *US – Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.
[74] *US – Carbon Steel (India) (AB)*, para. 4.40.

Appellate Body's Statements Concerning the Evidence and Analysis before USDOC in *US – Carbon Steel (India)*	**Selected Examples of Evidence and Analysis Supporting USDOC's Public Body Determinations At Issue Here**
the status of the NMDC in the legal order of India is troubling . . . ."[75]	made autonomous, and market-based pricing decisions.[76]
"[T]he Panel examined evidence that would, in our view, more properly be seen as evidence of mere 'formal indicia of control', such as the GOI's ownership interest in the NMDC, the GOI's power to appoint and nominate directors, and the reference on the NMDC's website indicating that the NMDC is under "administrative control" of the GOI. Those indicia, insofar as they were discussed by the USDOC in its determinations, are certainly relevant to the question at issue. Yet, without further evidence and analysis, they do not provide a sufficient basis for a finding that the NMDC is a public body."[77]	In contrast, in the determinations at issue, USDOC provided "further evidence and analysis,"[78] as follows: 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. Therefore, USDOC determined that OYAK is the majority owner of Erdemir. Erdemir, in turn, owns a 92.91% stake in its subsidiary, Isdemir.[79] USDOC observed that OYAK's majority shareholder status meant that it effectively decided the composition of Erdemir's Board of Directors.[80] USDOC explained that Erdemir's Annual Report states, "[e]ach shareholder or the representative of the shareholder attending…Ordinary or…Extraordinary General Assembly Meetings shall have one voting right for each share."[81] 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

[75] *US – Carbon Steel (India) (AB)*, para. 4.41.
[76] United States' Response to First Panel Questions, para. 103.
[77] *US – Carbon Steel (India) (AB)*, para. 4.43.
[78] *US – Carbon Steel (India) (AB)*, para. 4.43.
[79] United States' First Written Submission, para. 100; United States' Response to First Panel Questions, para. 112.
[80] United States' First Written Submission, para. 104.
[81] United States' First Written Submission, para. 104.

Appellate Body's Statements Concerning the Evidence and Analysis before USDOC in *US – Carbon Steel (India)*	**Selected Examples of Evidence and Analysis Supporting USDOC's Public Body Determinations At Issue Here**
	Shareholders under the provisions of Turkish Commercial Code and Capital Markets Board Law."[82] As a result, USDOC determined that OYAK controls the selection of Erdemir's board.[83] The evidence on the records demonstrates that during the periods of investigation, this in fact resulted in OYAK and TPA being present on the board.[84] In the OCTG investigation, for instance, of the nine members of Erdemir's Board of Directors, Erdemir's 2012 Annual Report only listed three as "independent" board members.[85] Of the remaining six members, one was a representative of the TPA, one was a representative of Ataer Holding (OYAK's wholly-owned holding company), and four were representatives of companies that are a part of OYAK.[86] Erdemir's Annual Reports include numerous statements that indicate clearly that Erdemir acted pursuant to state-crafted economic policy, *i.e.*, not consistent with the scope of activities typical of a private, profit-maximizing firm.[87] USDOC also cited the TPA's veto power over any decision related to the closure, sale, merger, or liquidation of Erdemir and Isdemir, reflected in both Erdemir's 2012 Annual Report and Articles 21, 22, and 37 of Erdemir's Articles of Association.[88]

[82] United States' First Written Submission, para. 104.
[83] United States' First Written Submission, para. 104.
[84] United States' Second Written Submission, para. 116.
[85] United States' Second Written Submission, para. 116.
[86] United States' Second Written Submission, para. 116.
[87] Unites States' Response to First Panel Questions, para. 89.
[88] United States' First Written Submission, para. 106; United States' Second Written Submission, para. 117.

Appellate Body's Statements Concerning the Evidence and Analysis before USDOC in *US – Carbon Steel (India)*	**Selected Examples of Evidence and Analysis Supporting USDOC's Public Body Determinations At Issue Here**
	In the WLP investigation, USDOC also examined evidence submitted by Maverick that the GOT directed OYAK to implement Turkish industrial policy directives or objectives in the process of Erdemir's privatization.[89]
"The Panel failed to evaluate whether the USDOC had properly considered . . . the extent to which the GOI in fact 'exercised' meaningful control . . . over its *conduct*."[90]	In contrast, USDOC examined several pieces of evidence demonstrating that the GOT exercises meaningful control over Erdemir's and Isdemir's conduct: USDOC cited the TPA's veto power over any decision related to the closure, sale, merger, or liquidation of Erdemir and Isdemir, reflected in both Erdemir's 2012 Annual Report and Articles 21, 22, and 37 of Erdemir's Articles of Association.[91] USDOC considered language from Erdemir's 2012 and 2013 annual reports that demonstrates that Erdemir designed and executed policies and objectives that are consistent with the GOT's macroeconomic policies, representing action that transcends mere commercial behavior.[92] • Erdemir "implemented policies which promoted the customers to engage in export-oriented production."[93] (2012 Annual Report) • Erdemir "supports the use of domestically mined resources for raw

[89] United States' Response to First Panel Questions, para. 52.
[90] *US – Carbon Steel (India) (AB)*, para. 4.43.
[91] United States' First Written Submission, para. 106; United States' Second Written Submission, para. 117.
[92] United States' First Written Submission, paras. 101-103; Unites States' Response to First Panel Questions, para. 89.
[93] Unites States' Response to First Panel Questions, para. 89.

Appellate Body's Statements Concerning the Evidence and Analysis before USDOC in *US – Carbon Steel (India)*	**Selected Examples of Evidence and Analysis Supporting USDOC's Public Body Determinations At Issue Here**
	materials in view of…the added value created by the domestic suppliers in favor of the local industries."[94] (2012 Annual Report) • "Producing flat steel products is crucial for the development of Turkish steel industry, and Isdemir plays a significant role in enhancing the capacity of flat steel production . . . ."[95] (2012 Annual Report) • Erdemir "made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013" and "continues to create value added for Turkish industry through its initiatives to increase the use of domestic sources of raw materials."[96] (2013 Annual Report) • Erdemir's "goal is to meet the country's ever-growing need for flat steel and pave the way for the development and growth of Turkish industry."[97] (2013 Annual Report) • "Isdemir also began manufacturing flat products in 2008 with the Modernization and Transformation Capital Investments undertaken after Isdemir's acquisition by Erdemir that year. This largest single investment in the history of the Republic of Turkey served to mitigate the imbalance between long and flat steel production

[94] Unites States' Response to First Panel Questions, para. 89.
[95] Unites States' Response to First Panel Questions, para. 89.
[96] Unites States' Response to First Panel Questions, para. 89.
[97] Unites States' Response to First Panel Questions, para. 89.

Appellate Body's Statements Concerning the Evidence and Analysis before USDOC in *US – Carbon Steel (India)*	**Selected Examples of Evidence and Analysis Supporting USDOC's Public Body Determinations At Issue Here**
	in the country."[98] (2013 Annual Report) Erdemir's conduct adhered to the Medium Term Programme's stated objective to "decrease high dependency of production and exports on imports" through "policies and supports enhancing domestic production capacity."[99]

39. 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."[100] Accordingly, USDOC's determinations demonstrate the extensive evidence it considered, establishing that the GOT in fact exercised meaningful control over Erdemir and Isdemir and their conduct.

Question 75 (*To the United States*): In its response to Panel question No. 26, at paragraph 89, the United States excerpted passages from Erdemir's 2012 and 2013 Annual Report, which it considers demonstrate that Erdemir effectuates governmental interests. Were the third, fifth and sixth bulleted statements in paragraph 89 explicitly identified in the determinations at issue? If not, how might the Panel assess what conclusions that the USDOC might have drawn from them?

Response:

40. Although the third, fifth and sixth bulleted statements were not explicitly identified in the determinations at issue, the statements were considered by USDOC when it reached its determination that Erdemir's Annual Reports aligned with GOT policy. As the United States has previously stated, the Panel should consider the totality of the record evidence before USDOC, as USDOC did.[101] 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

[98] Unites States' Response to First Panel Questions, para. 89.
[99] Unites States' Response to First Panel Questions, para. 89.
[100] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317. *See also US – Carbon Steel (India) (AB)*, paras. 4.9, 4.29, 4.42.
[101] United States' Second Written Submission, para. 86 ("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." (citing *Japan – DRAMs (Korea) (AB)*, para. 131)).

agency from the evidence, and then by considering whether the evidence could sustain that inference."[102]

41. Turkey has attempted to claim that the United States has presented such statements as *post hoc* arguments.[103] The Panel, however, should reject Turkey's arguments that where USDOC referred to specific language in a record document, USDOC's 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.[104] Turkey's position is untenable and has no basis in the SCM Agreement or DSU.[105] 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 determinations.[106]

42. Nor does the limitation on *ex post* rationalization preclude a party from identifying evidence on the record before the investigating authority. In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body expressly did not apply the *ex post* limitation to evidence that was on the investigating authority's record, but not cited in the investigating authority's final determination.[107]

43. Here, contrary to Turkey's arguments, the United States in its submissions cited to documents that were explicitly relied upon by USDOC in its determinations. The additional statements from Erdemir's Annual Reports were considered by USDOC, and provide further support for USDOC's finding that the GOT exercised meaningful control over Erdemir and Isdemir and their conduct.

44. As previously detailed, the statements from the Annual Reports clearly demonstrate that Erdemir (a) promoted its customers to engage in export-oriented production; and (b) sourced inputs locally to support local industry.[108] As Erdemir acknowledged, Erdemir "made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013" and "continues to create value added for Turkish industry through its initiatives to increase the use of domestic sources of raw materials."[109] The statements from the Annual Reports also show that Erdemir conceived of its conduct, *i.e.*, production of flat steel products, as "crucial for the development of [the] Turkish steel industry"[110] and that Erdemir established goals to "meet the country's every-growing need for flat steel and pave the way for the development and growth of Turkish industry."[111] Relevantly, these statements by Erdemir pertain to in general to the Turkish industry and are not confined to Erdemir's own operations.

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[102] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted).
[103] Turkey's Second Written Submission, para. 64.
[104] United States' Opening Statement at the Second Panel Meeting, para. 26.
[105] United States' Opening Statement at the Second Panel Meeting, para. 26.
[106] United States' Opening Statement at the Second Panel Meeting, para. 26.
[107] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 159-165.
[108] United States' Response to First Panel Questions, para. 89.
[109] United States' Response to First Panel Questions, para. 89.
[110] United States' Response to First Panel Questions, para. 89.
[111] United States' Response to First Panel Questions, para. 89.

45. Thus, all of these statements support USDOC's determination that the GOT exercised meaningful control over Erdemir and its conduct because they demonstrate that Erdemir aligned its conduct with the GOT's policies to "decrease high dependency of production and exports on imports" through "policies and supports enhancing domestic production capability."[112]

Question 76 (*To the United States*): At paragraph 37 of its oral statement, Turkey argues that "a government's power to appoint directors to the board of an entity, and the issue of whether those directors are independent" are "distinct factors". Turkey submits that the USDOC made no effort to address the second factor, i.e. whether OYAK's governing bodies act independently in making investment decisions. Did the USDOC consider evidence that OYAK's directors did not act independently? Please explain.

Response:

46. For the reasons detailed in response to Question 65, because USDOC did not find OYAK to be a public body, the United States disagrees that the requirements under Article 1.1(a)(1) and the Appellate Body's approach concerning "public body" apply with respect to USDOC's examination of OYAK.

47. With respect to the Panel's questions concerning OYAK's governing bodies, as previously detailed, USDOC explained that the record evidence demonstrated that – across OYAK's governing bodies – individuals serve either because of their status as GOT officials or because they were selected by GOT officials.[113]

Question 77 (*To the United States*): Please comment on Turkey's argument at paragraph 45 of its oral statement at the second meeting that the panel in Korea - Commercial Vessels "applied the conditions of Article 1.1(a)(1) of the SCM Agreement to entities which did not themselves directly provide a countervailable subsidy". Does this contradict the United States' argument that the requirements of Article 1.1(a)(1) do not apply to the USDOC's consideration of OYAK?

Response:

48. The circumstances of *Korea – Commercial Vessels* differs. The determination at issue in that case concerned a finding that the Export-Import Bank of Korea ("KEXIM") was a public body, and was owned by the Government of Korea, the Bank of Korea ("BOK) and the Korea Development Bank ("KDB").[114] The panel in *Korea – Commercial Vessels* found that KEXIM, the public body at issue in the dispute, was owned by other public bodies, BOK and KDB. But, the panel in that case called BOK and KDB public bodies because Korea had acknowledged that BOK was a public body,[115] and because the panel elsewhere had been required to make a finding that KDB was a public body since it was the provider of a different financial contribution at

[112] United States' Response to First Panel Questions, para. 89.
[113] United States' Response to First Panel Questions, paras. 59- 67.
[114] *Korea – Commercial Vessels (Panel)*, para. 7.33.
[115] *Korea – Commercial Vessels (Panel)*, para. 7.50 n.44.

issue.[116] In other words, the finding that KDB was a public body was a required finding for another subsidy at issue in that case. It was not required for the finding regarding KEXIM; rather, the panel simply carried over its characterization of KDB from elsewhere to the KEXIM finding.

49. Nor has the United States taken the position that a public body cannot control another public body. As the panel in *Korea – Commercial Vessels* recognized, "[i]f an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government."[117] That is, a public body is any entity that has the ability or authority to transfer government financial resources, including, for example, because that entity is meaningfully controlled by the government.[118]

50. This view, however, does not contradict the United States' arguments that Article 1.1(a)(1) does not apply to USDOC's examination of OYAK. As explained in response to Questions 65 and 69, the requirements of Article 1.1(a)(1), and previous panel and Appellate Body reports concerning "public body" are applicable only when an investigating authority determines that a subsidy exists – *i.e.*, where a government or a public body provides a financial contribution that provides a benefit. Here, USDOC's determinations are devoid of any finding that OYAK provided a countervailable subsidy, and thus the requirements of Article 1.1(a)(1) cannot apply.

51. Moreover, Turkey's arguments that the United States is attempting to shield OYAK from examination are misleading.[119] As the United States has previously stated in response to Question 66(a), as a procedural matter, Turkey has only raised arguments concerning OYAK under its claim that USDOC found OYAK to be a public body. Because USDOC did not, and did not need to, make that finding, Turkey's claims under Article 1.1(a)(1) with respect to OYAK must fail. Certainly, based on the factual circumstances of a case, such as in *Korea – Commercial Vessels*, an investigating authority may find that a public body controls another public body. However, here, the facts of these investigations did not require USDOC to make such a finding.

52. Therefore, the United States has not suggested that USDOC's examination of OYAK could not be reviewed by a panel. Rather, as a procedural matter, Turkey has failed to present its arguments in relation to a finding that USDOC did make (namely, the Erdemir and Isdemir determinations). Because Turkey chose to only raise claims against OYAK under Article

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[116] *Korea – Commercial Vessels (Panel)*, para. 7.50 n.44, referring to para. 7.172 where the panel discusses the proposal to use advance payment refund guarantees provided by KDB as a benchmark.
[117] *Korea – Commercial Vessels (Panel)*, para. 7.50.
[118] United States' Opening Statement at the First Panel Meeting, para. 39 (citing to U.S. Opening Oral Statement, *US – Carbon Steel (India)*, paras. 11-12 (available at https://ustr.gov/sites/default/files/US.Oral_.Stmt%20as%20delivered.Public.pdf)); U.S. Other Appellant Submission, *US – Carbon Steel (India)*, paras. 5-8, 23-91 (available at https://ustr.gov/sites/default/files/US.Other_.Appellant.Sub_.Fin_.Public.pdf).
[119] Turkey's Second Written Submission, para. 27.

1.1(a)(1), Turkey's claims with respect to OYAK – claims relating to a "finding" that USDOC did not make – must be rejected.

Question 79 (*To the United States*): Does the United States accept that, in order for the provision of HRS for LTAR to be countervailable, the relevant actions of Erdemir, Isdemir and OYAK had to be attributable to the Government of Turkey?

Response:

53. As the United States explained in response to Question 74, once an entity is a public body, then any conduct engaged in by the entity is considered a financial contribution to the extent it falls within Article 1.1(a), and in that sense is attributable to the government. Indeed, 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.[120] 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)."[121] Therefore, the question is whether Erdemir and Isdemir are public bodies; if so, then they can be providers of financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement.

54. Moreover, the United States does not agree that USDOC determined that in order for the provision of HRS for LTAR to be countervailable, the relevant actions of OYAK had to be attributable to the GOT. Indeed, as previously explained in response to Questions 65 and 69, USDOC did not find OYAK to be a public body. Rather, as detailed in response to Question 74, although USDOC considered the role of OYAK in Erdemir and Isdemir, USDOC also examined the role of the TPA, as well as Erdemir's own conduct as reflected in its Annual Reports, and the alignment of those statements with GOT policy.[122]

Question 80 (*To the United States*): Does the United States accept that the relationship between the GOT and OYAK, and the relationship between OYAK and Erdemir, was considered by the USDOC to be attributable to the GOT?

Response:

55. See U.S. response to Question 79, above.

Question 81 (*To the United States*): At page 33 of Exhibit TUR-85, the USDOC states that "the GOT exercised meaningful control over OYAK" and that "the GOT's meaningful

[120] United States' Response to First Panel Questions, para. 56 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284).
[121] United States' Response to First Panel Questions, para. 56 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284).
[122] United States' First Written Submission, paras. 105-106; United States' Second Written Submission, paras. 116-118.

control of OYAK extends to Erdemir (and its subsidiary Isdemir)". In light of this, could the United States explain why it considers that the USDOC did not analyse OYAK as a "public body"?[123]

Response:

56. See U.S. responses to Questions 65 and 69, above.

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

Question 82 (*To the United States*): At paragraph 11 of its oral statement at the second meeting, Turkey argues that evidence regarding "practices" challenged in this dispute falls within the scope of Paragraph 7 of the Panel's Working Procedures "because this evidence is necessary to rebut arguments by the United States and to answer questions posed by the Panel". Please comment. (*To the United States*) Please comment on Turkey's statement at paragraph 20 of its oral statement at the second meeting that "a complainant is not required to submit *all* factual evidence in its First Submission in order to make a *prima facie* case", specifically taking into account Turkey's references to *Canada – Aircraft, EC – Fasteners (China), EC – Sardines,* and *China – Rare Earths*.

Response:

57. As the United States has previously explained, the Panel should reject Turkey's new evidence because it is untimely and contrary to the Panel's Working Procedures.[124] Turkey, as the complaining party, bears the burden of demonstrating that USDOC has a "practice" of rejecting in-country benchmarks solely based on evidence of government ownership or control. Having failed to make its affirmative case in its first written submission, or even during the first Panel meeting, that such a "practice" exists, Turkey should not be permitted to make such a case at this late stage of the panel proceedings when the parties are to present rebuttal evidence, or evidence necessary for purposes of answering clarifying questions.[125]

58. Indeed, contrary to Turkey's claim, the inclusion of the 28 new determinations was not necessary to answer Question 34 from the Panel. Specifically, Question 34 stated:

> Does the USCIT ruling in the OCTG investigation along with the final benefit determinations in the challenged WLP, HWRP and CWP proceedings establish that there is no on-going practice of rejecting in-country prices as a benchmark in cases where the

[123] See, for example, United States' Second Written Submission, para. 70.
[124] United States' Second Written Submission, para. 52 (citing Working Procedures of the Panel, para. 7 ("Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party.")).
[125] United States' Second Written Submission, para. 52 (citing Working Procedures of the Panel, para. 7 ("Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party.")).

> government owns or controls the majority or a substantial portion of the market? If not, what evidence has Turkey presented that shows the practice continues?

59. The panel distinctly used the past tense to ask Turkey what evidence "has [it] presented." The question did not solicit additional evidence from Turkey, nor was it an invitation for Turkey to then subsequently add 28 new determinations purportedly demonstrating the existence of a "practice." Nor does the evidence rebut the United States' argument that Turkey has failed to raise a *prima facie* case establishing a USDOC practice that is a rule or norm of general and prospective application.[126]

60. Moreover, the United States has also previously explained that Turkey also failed 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.[127] In its response to Panel Question 34, Turkey merely listed the titles of these 28 determinations, without more.[128] Turkey provided no examination or argumentation of how these new determinations supported its claim.[129] Moreover, many of the determinations contain multiple subsidy programs, and Turkey did not identify which of the subsidy program analyses was alleged to support its claims, or even include a page number or section heading in its footnotes.[130] The Appellate Body in *Canada – Wheat* and *US – Gambling* has similarly found that a complainant cannot succeed in making a *prima facie* case by submitting evidence without explaining how its content is relevant to the claims before the panel.[131]

61. Even aside from the fact that Turkey's evidence is inappropriate and untimely, Turkey is also incorrect to suggest that the United States has had a full and adequate opportunity to respond to the newly added evidence.[132] Because Turkey failed to demonstrate how the determinations it listed supported its claim, the United States in its second written submission was left to guess as to what Turkey was attempting to allege.[133] Other panels have similarly found that presenting substantial new evidence at a late stage of the proceeding, when that evidence could have been presented earlier, undermines the fair and logical development of arguments in a panel proceeding.[134] Here, the United States was belatedly presented with 28 USDOC determinations that could have been provided in Turkey's First Written Submission. Indeed, Turkey has not explained why it waited until after the first substantive meeting to present this evidence. Nor

[126] United States' Second Written Submission, paras. 57-67.
[127] United States' Second Written Submission, paras. 53-67.
[128] United States' Second Written Submission, para. 53.
[129] United States' Second Written Submission, para. 53.
[130] United States' Second Written Submission, paras. 53, 62-63.
[131] United States' Second Written Submission, paras. 55-56.
[132] Turkey's Opening Statement at the Second Panel Meeting, para. 23.
[133] United States' Second Written Submission, paras. 54, 62-63.
[134] *China – Rare Earths (Panel)*, para. 7.23 ("the submission by any party of a large bundle of evidence at a very late stage in the proceedings, especially when such evidence could have been provided earlier, raises due process issues for the opposing party . . . whose opportunity to make its defense could be undermined").

was the United States able to provide a full defense against such evidence because Turkey failed to provide any argumentation or explanation as to how the new evidence supports its claim.[135]

62. Lastly, the other cases cited by Turkey in the Panel's question are also unavailing and do not support its contention that previous panels or the Appellate Body has found that "a complainant is not required to submit all factual evidence in its First Submission in order to make a *prima facie* case."[136] Rather, the cases cited by Turkey pertain to certain circumstances where additional evidence has been permitted or rejected. None of those circumstances apply here. Indeed, Turkey's reliance on both *Canada – Aircraft* and *EC – Fasteners (China)* are misplaced,[137] because as discussed above, contrary to the circumstances of those cases, Question 34 did not request for the submission of additional evidence, nor did the evidence rebut the United States' argument that Turkey failed to establish a practice that is a rule or norm of general and prospective application. As for *EC – Sardines*, the Appellate Body rejected evidence that was submitted at the interim review stage,[138] but the case does not provide guidance with respect to evidence that is presented after a first panel meeting, contrary to the Panel's Working Procedures, and where such evidence is unaccompanied by any explanation or argumentation, depriving the responding party of the ability to provide a full defense.

63. Accordingly, the Panel should decline to review the new evidence because it is inappropriate, untimely, contrary to the Panel's Working Procedures, and therefore undermines the procedural fairness of this panel proceeding.[139]

Question 86 (*To both parties*): At paragraph 58 of its oral statement at the second meeting, Turkey argues that the USDOC's reference to low or insignificant import penetration in certain cases were not made in the context of a market analysis or whether government ownership or control of domestic producers results in distortion. Does this establish that the USDOC determines that a market is distorted by government involvement solely based on evidence of control of a majority or a substantial portion of the market?

Response:

64. As the United States has explained in its prior submissions and in response to Question 85, Turkey's "as such" claim under Article 14(d) fails for multiple reasons. First, Turkey failed to include a claim against the alleged U.S. "practice" regarding the rejection of in-country benchmarks in its request for consultations.[140] Turkey's inclusion of this claim in its panel request thus impermissibly expands the scope of the dispute and falls outside the Panel's terms of reference.

[135] United States' Second Written Submission, paras. 53-57.
[136] Turkey's Opening Statement at the Second Panel Meeting, para. 20.
[137] Turkey's Opening Statement at the Second Panel Meeting, paras. 19-20.
[138] Turkey's Opening Statement at the Second Panel Meeting, para. 23.
[139] United States' Second Written Submission, paras. 52, 57.
[140] United States' First Written Submission, paras. 18-24.

65. Second, in addition to falling outside the Panel's terms of reference, Turkey failed in its initial submission to raise a *prima facie* case demonstrating the alleged "practice" as a rule or norm of general and prospective application.[141]

66. Then, in response to the Panel's questions after the first panel meeting, Turkey attempted to remedy its failure by submitting 28 USDOC determinations.[142] As explained above in response to Question 85, this evidence should not be considered by the Panel because the Panel's Working Procedures prohibit a complainant from making its case at such a late stage in the proceeding,[143] and the Panel should therefore decline to review the belated evidence that undermines the procedural fairness and logical development of this panel proceeding.

67. The Panel therefore need not and should not consider Turkey's belated and inappropriate "evidence". For completeness, and to be of assistance to the Panel, the United States notes that, in any event, Turkey's evidence still fails to establish that that 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."[144]

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.[145] In those determinations, USDOC considered import penetration in relation to examining market distortion. Turkey appears to argue that USDOC does not consider whether in-country prices are distorted because "evidence of import penetration is largely irrelevant, unless used to confirm that domestic producers' prices are, or are not, distorted by reference to actual import prices."[146] As the Panel's question notes, Turkey then argues that USDOC's references in its determinations to import penetration were not made in the context of determining whether domestic producer prices were distorted, citing to *Certain New Pneumatic Off-The-Road Tires from the PRC* as an example.[147]

69. Turkey's reliance on *New Pneumatic Off-The-Road Tires from the PRC* is confused, however. As the United States previously explained, in that case, despite finding that there was substantial government involvement in the market for synthetic and natural rubber, USDOC ultimately determined the market was not distorted because of high import penetration, and used import prices as an in-country benchmark.[148] Import prices <u>are</u> in-country prices, because they are actual prices received for sales of imports in the domestic market. The panel in *US – Coated Paper* has likewise recognized this, stating, "In our view, import prices could also be used as the

[141] United States' First Written Submission, paras. 50-72.
[142] Turkey's Response to First Panel Questions, para. 69.
[143] United States' Second Written Submission, para. 184.
[144] Turkey's Panel Request, p. 3.
[145] Turkey's Opening Statement at the Second Panel Meeting, paras. 57-58.
[146] Turkey's Opening Statement at the Second Panel Meeting, para. 57.
[147] Turkey's Opening Statement at the Second Panel Meeting, para. 58.
[148] United States' Second Written Submission, para. 63.

basis for establishing an in-country benchmark under Article 14(d)."[149] A case in which USDOC used in-country benchmark prices cannot support Turkey's allegation that USDOC has a practice of rejecting in-country prices without considering whether in-country prices are distorted.

70. 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."[150] The panel in *US – Coated Paper (Indonesia)* also recognized the relevance of import penetration to the distortion analysis.[151]

71. 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. The United States has previously explained that *Certain Tool Chests and Cabinets from the People's Republic of China* and *Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States*, two cases cited by Turkey in its response to panel questions, demonstrate this fact.[152] Indeed, both cases illustrate that USDOC engages in an evaluation of the record evidence concerning distortion, including examining import penetration, and does not reject in-country prices "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."[153]

72. Thus, as discussed above and in previous submissions, contrary to Turkey's argument, USDOC analyzes whether in-country prices are distorted, and does not rely solely on evidence that the government owns or control the majority or a substantial portion of the market.

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

Question 88: At paragraph 227 of its first written submission, the United States refers to Erdemir's 2012 Annual Report, which states that Erdemir "implemented policies which promoted . . . customers to engage in export-oriented production", and "supports the use of domestically mined resources for raw materials in view of . . . the added value created by the domestic suppliers in favor of the local industries." The USDOC stated in its determination that these policies are in line with the GOT's stated policy in its 2012-2014 Medium Term Programme.

[149] *US – Coated Paper (Indonesia) (Panel)*, para. 7.80.
[150] *US – Carbon Steel (India) (Panel)*, para. 7.62.
[151] *US – Coated Paper (Indonesia) (Panel)*, paras. 7.80-7.81.
[152] United States' Second Written Submission, paras. 65-66; Turkey's Opening Statement at the Second Panel Meeting, para. 58 n.115.
[153] Turkey's Panel Request, p. 3.

a. (*To both parties*): Must an investigating authority set out its analysis of the existence of a subsidy programme in its determination of *de facto* specificity?

Response:

73. An investigating authority's analysis of the existence of a subsidy programme and the evidence relied upon need not be separately set out in one specific section of its determination. In *US – Countervailing Measures (China)*, the Appellate Body recognized that the "existence of a subsidy is to be analysed under Article 1.1 of the SCM Agreement. By contrast, 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."[154] Thus, the Appellate Body in *US – Countervailing Measures (China)* recognized that "the . . . 'subsidy programme'. . . at issue . . . often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1."[155]

74. Contrary to Turkey's arguments, USDOC's analysis of the existence of a subsidy programme need not have been separately set out in the specificity section of its determinations.[156] Indeed, an investigating authority may organize evidence relating to different issues without excluding appreciation of that evidence for other issues. The terms of Article 2.1(c) do not include an obligation for the investigating authority to expound upon the meaning of the term "programme" at the level of detail required by Turkey's restrictive approach. The Panel should therefore dismiss Turkey's arguments that the explanations provided by the United States are "*post hoc*."[157]

75. The United States has explained in its submissions that USDOC's determinations with respect to the existence of a subsidy programme were based on both the transaction-specific accountings of the sale of hot-rolled steel, which were 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.[158] It is these two findings in conjunction that formed the basis of USDOC's finding that a subsidy programme existed.

b. (*To the United States*): Does either the Annual Report or the Medium Term Programme refer to the provision of HRS for LTAR? If not, how do these statements establish the existence of the provision of HRS for LTAR programme? Please explain.

[154] *See US – Countervailing Measures (China) (AB)*, para. 4.144.
[155] *US – Countervailing Measures (China) (AB)*, para. 4.144.
[156] *US – Countervailing Measures (China) (AB)*, para. 4.144 ("It stands to reason, therefore, that the relevant 'subsidy programme', under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1.").
[157] Turkey's Second Written Submission, para. 104.
[158] United States' First Written Submission, paras. 223-230; United States' Response to First Panel Questions, paras. 130-133.

Response:

76. Neither Erdemir's Annual Reports nor the Medium Term Programme refers explicitly to the provision of HRS for LTAR. However, as the United States previously explained, the evidence relied upon to demonstrate "a systematic series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises" need not expressly refer to the financial contribution and benefit that constitute the particular subsidy at issue.[159] Indeed, the utility of the *de facto* specificity provision of the SCM Agreement is to allow investigating authorities to take action against specific subsidies precisely where such written evidence is lacking.[160]

77. As we have previously explained, USDOC's determinations were based on both the transaction-specific accountings of the sale of hot-rolled steel, which were 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.[161] Thus, the issue for the Panel is not whether the statements in Erdemir's 2012 and 2013 Annual Reports alone establish the existence of the HRS subsidy program. Instead, the issue is whether an objective and unbiased investigating authority could have relied upon these statements and the relevant provisions of the Medium Term Programme in conjunction with the transaction-specific accountings of HRS provided by the respondent parties to establish the existence of the HRS subsidy program as "a systematic series of actions pursuant to which financial contributions that confer a benefit has been provided to certain enterprises," as USDOC did.[162]

Question 89 (*To both parties*): The compliance panel in *US – Countervailing Measures (Article 21.5 – China)* stated that "an investigating authority may demonstrate the existence of a subsidy programme based on evidence of: (a) the existence of a subsidy within the meaning of Article 1.1 of the SCM Agreement; and (b) the existence of a "plan or scheme" pursuant to which this subsidy has been provided to certain enterprises"[163].

a. If an investigating authority fails to establish the existence of a subsidy under Article 1.1 of the SCM Agreement, does this necessarily mean that the investigating authority would also fail to establish the existence of a "subsidy programme" that is used "by a limited number of certain enterprises"? Please explain.

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[159] United States' Opening Statement at the Second Panel Meeting, paras. 32-33.
[160] *US – Countervailing Measures (China) (AB)*, para. 4.149 ("We agree with the Panel to the extent it suggested that, in the absence of any written instrument or explicit pronouncement, evidence of a "systematic activity or series of activities" may provide a sufficient basis to establish the existence of an *unwritten* subsidy programme in the context of assessing de facto specificity under the first factor of Article 2.1(c) of the SCM Agreement." (emphasis added)).
[161] United States' First Written Submission, paras. 223-230; United States' Response to First Panel Questions, paras. 130-133.
[162] *US – Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.
[163] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.267.

b. If an investigating authority acted inconsistently with Article 1.1 of the SCM Agreement in its determination of the existence of a subsidy, does it necessarily mean that the investigating authority also acted inconsistently with Article 2.1 (c) in establishing the existence of a "subsidy programme" that is used "by a limited number of certain enterprises"? Please explain.

Response (subparts a & b):

78. The United States responds to subparts a and b together. As we have previously explained, 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."[164] In turn, the "central inquiry" under Article 2.1 of the SCM Agreement 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 authority.[165] Thus, were USDOC to find that a financial contribution under Article 1.1 of the SCM Agreement does not exist, USDOC would then decline to complete a specificity analysis under Article 2.1(c).

79. In contrast, if a panel were to find that an investigating authority acted inconsistently with Article 1.1 of the SCM Agreement in determining the existence of a subsidy, it does not follow that the panel must then necessarily find that the investigating authority acted inconsistently with Article 2.1(c) in establishing the existence of a "subsidy programme" that is used "by a limited number of certain enterprises." That is, a finding of inconsistency under Article 1.1 does not automatically result in a finding of inconsistency under Article 2.1(c). Indeed, how a Member may choose to comply with an adverse ruling is not a matter at issue before this Panel.

Question 90 (*To the United States*): At paragraph 117 of its second written submission, Turkey argues that the GOT did not provide complete transaction data (for instance, data on transaction values) for Erdemir and Isdemir for the two years preceding the POI. Turkey argues that such data therefore cannot serve as evidence of the duration of time for which Erdemir and Isdemir have allegedly been providing HRS for LTAR. Please comment.

Response:

80. As the United States explained in its previous submissions,[166] in evaluating the length of time factor, USDOC examined Erdemir's 2012 and 2013 Annual Reports, which identify Erdemir as "Turkey's iron and steel power,"[167] as well as evidence that Erdemir has been in existence since 1960 and Isdemir has been in existence since 1970.[168] Moreover, USDOC in each proceeding requested and received from the GOT information regarding the production and

[164] United States' First Written Submission, para. 211.
[165] United States' First Written Submission, para. 212.
[166] United States' First Written Submission, para. 234; United States' Response to First Panel Questions, para. 126; United States' Second Written Submission, para. 174.
[167] United States' Response to First Panel Questions, para. 126.
[168] United States' Response to First Panel Questions, para. 126.

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.[169] Therefore, USDOC took into account the totality of this record evidence, which did not indicate that the length of time in which the subsidy program had existed gave rise to the issues that would accompany a new subsidy program.[170]

81. Turkey argues that the information provided by the GOT in the HWRP investigation did not include values for hot rolled coil and did not provide company-specific production figures for these years.[171] However, neither of the shortcomings identified by Turkey materially affect the inquiry at issue. That is, knowing the aggregate value figures associated with the production quantities and company-specific figures is not probative of the immediate question at hand, namely, the length of time in which Erdemir and Isdemir were providing HRS for LTAR. As previously explained, the GOT's data demonstrated that the program usage data for the period of investigation was not anomalous in comparison to data for past years,[172] and therefore, this piece of record evidence supported USDOC's determination that there was no evidence on the record with respect to the length of time in which the subsidy program had existed that undermined USDOC's specificity finding.

Question 92 *(To the United States)*: At paragraph 77 of its oral statement at the second substantive meeting, Turkey argues that "having failed to properly determine the existence of a 'subsidy programme', the USDOC could not have properly taken into account the length of time during which the 'subsidy programme' had been in operation". As a matter of principle, do you agree that, if an investigating authority failed to determine the existence of a "subsidy programme" existed, it could not have properly taken into account the length of time during which the "subsidy programme", and thus it could not have acted consistently with the last sentence of Article 2.1(c) of the SCM Agreement?

Response:

82. The United States disagrees with Turkey that if an investigating authority failed to determine the existence of a "subsidy programme," it could not have properly taken into account the length of time during which the "subsidy programme" has been in existence in accordance with Article 2.1(c) of the SCM Agreement. Certainly, if an investigating authority failed to properly determine the existence of a "subsidy programme," its broader specificity determination would, of course, fail for this reason. That does not mean, however, that the "subsidy programme" at issue does not, in fact, exist, nor does it mean that an investigating authority cannot have properly accounted for the factors identified in the third sentence of Article 2.1(c) in conducting its inquiry. Whether or not the inquiry in the second sentence of Article 2.1(c) results

[169] United States' Response to First Panel Questions, para. 126.
[170] *US – Large Civil Aircraft (2nd Complaint) (Panel)*, para. 7.747) ("[T]he 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.").
[171] Turkey's Second Written Submission, para. 117.
[172] United States' Response to First Panel Questions, para. 126.

in finding a "subsidy programme" does not bear on whether an investigating authority complied with its obligation to take account of the factors in the third sentence when conducting that inquiry.

83. In the United States' view, a proper interpretation of Article 2.1(c) does not support the transposition of the function from the second sentence of Article 2.1(c), which refers to identifying "use of a subsidy programme" as part of a broader *de facto* inquiry, to the third sentence of Article 2.1(c), which refers only to certain factors the investigating authority shall take into account in conducting that inquiry. Specifically, the third sentence provides for certain factors of which "account shall be taken" "[i]n applying . . . subparagraph [(c)]." The reference to identifying "use of a subsidy programme" is not contained in that provision, but rather appears in the second sentence of Article 2.1, subparagraph (c). The third sentence elaborates that "[i]n applying [Article 2.1(c)], account shall be taken of . . . the length of time during which *the* subsidy programme has been in operation" (emphasis added). The transition from the indefinite article "a" in the second sentence to the definite article "the" in the final sentence makes this clear.[173] In other words, the drafting of Article 2.1(c) of the SCM Agreement indicates that whereas the subsidy program at issue has not been determined prior to a consideration of the limited use factor provided in the second sentence of this provision, the subsidy program at issue *is* already known prior to consideration of the factors identified in the final sentence of Article 2.1(c) of the SCM Agreement.

84. Taken together, the terms of subparagraph (c) describe a process in which "use of a subsidy programme" is assessed in conducting the broader *de facto* inquiry and, as a part of that process, an investigating authority should take account of the length of time in considering the "other factors" referred to in the first and second sentences. Thus, to comply with the first and second sentence requires that an investigating authority has taken account of the considerations in the third sentence, but, conversely, compliance with the third sentence cannot be determined by reference to the first and second sentences. To read a requirement to establish the existence of "*a* subsidy programme" in applying the third sentence misinterprets that provision to require an investigating authority to identify a subsidy program <u>for a second time</u>.

85. Therefore, the existence of a program is not a question that is to be resolved within the confines of the third sentence of Article 2.1(c). Rather, the third sentence of Article 2.1(c) serves to inform the broader inquiry found in the second sentence, i.e., whether "use of a subsidy programme by a limited number of certain enterprises" indicates specificity or not. Thus, if an investigating authority failed to adequately substantiate the existence of a "subsidy programme," it does not follow that it could not have properly taken into account the length of time during which the "subsidy programme" has been in existence.

[173] Whereas the indefinite article "a" marks "an indefinite noun phrase referring to something not specifically identified (and, frequently, mentioned for the first time)," the definite article "the" marks "an object as before mentioned or already known. *See* Online Oxford English Dictionary.

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

Question 93 (*To both parties*): The parties disagree as to whether the USDOC's selection of facts available in the challenged proceedings was "punitive". Please explain how a panel should assess whether the selection of facts available by an investigating authority is punitive or not.

Response:

86. As the United States has demonstrated in its submissions, the selection of the facts available rates in each of the challenged proceedings was not punitive, but rather replaced necessary information that was missing from the record, consistent with Article 12.7. Turkey has attempted to argue that USDOC's selection of facts available was "punitive" for a myriad of reasons, including: that USDOC failed to take "due account" of the difficulties of Borusan in the OCTG investigation;[174] that USDOC improperly failed to select a "reasonable replacement" for the missing information in light of those difficulties;[175] and that the rate selection was inaccurate and had no factual connection to the subsidy programs under investigation for the WLP and HWRP investigations.[176] However, the United States has demonstrated at length why each of these claims is false, and that Turkey has failed to establish that USDOC's selection of facts available is inconsistent with Article 12.7.

87. Moreover, as the United States has previously explained, 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.[177] The Appellate Body has 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.[178] 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."[179]

88. That a particular fact may result in an outcome less favorable than had the responding party cooperated with the investigation does not mean that the selected fact is not reasonable, or punitive, however. To the contrary, as previously explained, Annex II of the Antidumping Agreement, which provides relevant context for the interpretation of Article 12.7, expressly acknowledges this possibility.[180] Therefore, simply because, *e.g.*, one subsidy rate is higher than

[174] Turkey's First Written Submission, para. 196.
[175] Turkey's First Written Submission, para. 273.
[176] Turkey's First Written Submission, paras. 328, 440.
[177] United States' First Written Submission, para. 131.
[178] United States' First Written Submission, para. 133 (citing *US – Carbon Steel (India) (AB)*, para. 4.426).
[179] United States' First Written Submission, para. 133 (citing *US – Carbon Steel (India) (AB)*, para. 4.426).
[180] United States' Second Written Submission, paras. 146, 152.

another does not mean that the higher subsidy rate is not a reasonable replacement for missing rate information or that its use would result in an inaccurate benefit determination. Rather, in reviewing an investigating authority's selection of facts available, a panel must assess whether an "objective and unbiased" investigating authority could have found the chosen information to be a reasonable replacement for the missing information in the particular circumstances of the case, including by taking into account the non-cooperation of the party at issue.[181]

89. In addition, Turkey has not provided any evidence that these rates are not a reasonable replacement for necessary information missing from the record.[182] Turkey also has pointed to no verified evidence on the record that contradicts or raises questions about the subsidy rates that were selected as facts available.[183] That the outcome is less favorable than Turkey would have liked does not mean the selection of facts available was punitive or otherwise inconsistent with Article 12.7.[184] 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."[185]

90. Therefore, the Panel should find that an objective and unbiased investigating authority could have selected the facts available in each of the challenged proceedings, as USDOC did, consistent with Article 12.7 of the SCM Agreement.[186]

Question 94 (*To both parties*): Turkey argues that, in the WLP investigation, Borusan decided not to participate in the verification, and instead requested the USDOC to use the verification report and exhibits from the CWP review proceeding, which covered *the same programs* and *the same time period* as the WLP investigation. The USDOC rejected this request.

a. Please explain the USDOC procedures through which facts are introduced to the written records. Does it suffice if an interested party introduce or refer to certain facts, such as the verification report and exhibits from the CWP review proceeding, or must such facts be physically placed on the record? What about public information such as the subsidy rates determined in previous investigations?

b. As a matter of fact, were the CWP verification report and exhibits on the written record of the WLP investigation? Please explain.

[181] United States' Response to First Panel Questions, para. 152; United States' Second Written Submission, para. 146 (citing *US – Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193).
[182] United States' Second Written Submission, para. 147.
[183] United States' Second Written Submission, para. 147.
[184] *See US – Carbon Steel (India) (AB)*, para. 4.426.
[185] *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").
[186] *US – Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

Response (subparts a & b):

91. As an initial matter, as the United States has previously explained, 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.[187] Therefore, any claims raised with respect to the other 29 programs examined in the WLP investigation fall outside the Panel's terms of reference.[188] 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 the Panel's analysis with respect to the WLP investigation may therefore end here.[189]

92. Even if Turkey had properly raised claims with respect to the other subsidy programs in its panel request, Turkey's claims are then limited to the original 13 programs that it challenged in its first written submission. As the United States has previously explained, Turkey's belated introduction of new arguments and evidence with respect to 14 additional subsidy programs in its response to panel questions is contrary to the Panel's Working Procedures and basic procedural fairness as it impairs the United States' ability to defend its interests.[190] The Panel should therefore decline to make any findings with respect to the 14 additional subsidy programs that Turkey for the first time raised in its response to panel questions.

93. However, to be of assistance to the Panel, the United States provides the following comments. The written record of a USDOC administrative proceeding consists of a copy of all factual information presented to or obtained by USDOC, including governmental memoranda pertaining to the case, and a copy of the determination, transcripts or records of conferences or hearings, and notices published in the Federal Register.[191]

94. USDOC's regulation at 19 CFR § 351.301 provides for the procedures for submitting factual information on the written record of USDOC's administrative proceedings.[192] Pursuant to the regulation, all factual information must be submitted onto the written record of the proceeding. This ensures that all parties have an opportunity to not only comment, but also to place rebuttal information on the record of an administrative proceeding. An interested party cannot simply refer to factual information from another proceeding; rather, the information must be placed on the written record of the administrative proceeding.

95. USDOC's determinations contain the final subsidy rates for the programs at issue, and while the determinations are part of the written record, they are not themselves considered factual information. Rather, the determinations summarize the underlying factual information on which USDOC relies, as well as USDOC's findings and conclusions concerning such

[187] United States' First Written Submission, paras. 30-33.
[188] United States' First Written Submission, paras. 30-31.
[189] United States' First Written Submission, para. 161; United States' Second Written Submission, paras. 136, 143.
[190] United States' Second Written Submission, paras. 140-141.
[191] Section 516A(b)(2)(A) of the Tariff Act of 1930, as amended (Exhibit USA-48).
[192] *See* 19 CFR § 351.301 (Exhibit USA-49).

information. These determinations are publicly available and are readily available to all Members and interested parties participating in a proceeding.[193]

96. In contrast to the accessibility of past USDOC determinations, factual information obtained by one party to a proceeding may not be easily accessible or available to other parties in the proceeding. For instance, in the WLP investigation, the parties were different from the parties in the CWP proceeding, so all the parties in the WLP investigation could not access the confidential CWP verification report and exhibits without the information being placed on the record of the WLP investigation.

97. With respect to subpart b of the Panel's question, in the WLP investigation, the CWP verification report and exhibits were not on the record of the WLP investigation. Borusan requested USDOC to place the CWP verification report on the record after it determined not to participate in the WLP verification because "the U.S. line pipe market is not commercially significant for Borusan. Specifically, during the investigation period, Borusan was a very small participant in the U.S. market for line pipe and, thus, the expense of preparing for and participating in a duplicative verification does not make economic sense for the company."[194]

98. As previously explained, however, USDOC noted that it could not transfer proprietary information from one record to another record across different, unrelated proceedings.[195] Indeed, the two cases were completely separate proceedings, involving different products, different programs, and different parties.[196]

99. Moreover, contrary to Turkey's assertion referenced in the Panel's question, the records of the CWP administrative review and the WLP investigation were not the same.[197] For example, a number of subsidy programs examined in the WLP investigation were not examined in the CWP proceeding, 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.[198] Thus, the CWP verification report would not have assisted USDOC in confirming the accuracy of the information reported with respect to the aforementioned programs. In addition, the petitioners in the two proceedings were also not the same.[199] Thus, the petitioners in the WLP proceeding were unable to comment on the CWP record and USDOC's conclusions regarding Borusan in that administrative review.[200]

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[193] Specifically, they are available at USDOC's website at https://enforcement.trade.gov/frn/index.html
[194] 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); *see also* United States' First Written Submission, para. 165.
[195] United States' First Written Submission, para. 168.
[196] United States' First Written Submission, para. 168.
[197] United States' First Written Submission, para. 169.
[198] United States' First Written Submission, para. 169.
[199] United States' First Written Submission, para. 169.
[200] United States' First Written Submission, para. 169.

100. Lastly, as previously discussed, to require USDOC to rely on findings in the CWP verification report would effectively allow Borusan to select the proceeding in which it decided to participate, prejudicing the ability of petitioners and other interested parties to engage on issues in that proceeding.[201] The respondent could therefore attempt to affect the outcome by selecting a proceeding for non-participation on the basis of the subsidies involved, the petitioner, other interested parties, or the product. This would be in contrast with the Appellate Body's recognition 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.[202]

Question 95 (*To the United States*): How are the subsidy rates determined from previous proceedings that were used as facts available in the challenged proceedings (i.e. WLP and HWRP proceedings) part of the written records in those proceedings? Please explain by reference to Article 12.2 of the SCM Agreement.

Response:

101. With respect to the Panel's question concerning the use of subsidy rates from previous proceedings, see U.S. response to Question 94 concerning the written record of a USDOC administrative proceeding.[203] Further, the United States respectfully notes that Turkey has not raised a claim under Article 12.2 of the SCM Agreement.

Question 97 (*To the United States*): At paragraph 107 of its response to Panel question No. 51(a), Turkey argues that a subsidy determination made on the basis of facts available is "accurate" when there is a factual connection between the necessary information missing from the record and the facts available relied upon by the investigating authority. Please comment.

Response:

102. As the United States has previously explained, 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."[204] 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."[205]

103. Therefore, although the Appellate Body has stated that an investigating authority should have "a view to arriving at" an accurate determination, it has not equated "accurate" with there being a connection between the missing information and the facts available relied upon by the

[201] United States' First Written Submission, para. 170.
[202] United States' First Written Submission, para. 133 (citing *US – Carbon Steel (India) (AB)*, para. 4.426).
[203] United States' Response to Second Panel Questions, paras. 93-96.
[204] United States' First Written Submission, para. 129 (citing *US – Carbon Steel (India) (AB)*, para. 4.416).
[205] United States' First Written Submission, para. 129 (citing *US – Carbon Steel (India) (AB)*, para. 4.416).

investigating authority. Indeed, in light of the fact that the necessary information is missing, it is not possible to say, in the abstract, that using information that "reasonably replaces" the missing information results in an "accurate" determination; rather, the determination is one an unbiased and objective authority could reach based on all of the circumstances of the proceeding.

Question 98 (*To both parties*): In the OCTG investigation, was information concerning the production and capacity utilisation rate of the Gemlik facility on the record? Please explain. If so, what was the capacity utilization rate of the Gemlik facility? Were the capacity figures that were used for the non-responding facilities nominal or effective?

Response:

104. In the OCTG investigation, there was information on the record concerning the actual production and capacity utilization rate of the Gemlik facility.[206] Specifically, Borusan submitted a product brochure showing the level at which the Gemlik, Halkali, and Izmit mills could operate at their full capacity.[207] Borusan requested that the capacity utilization rate of the Gemlik mill be treated as business confidential. As for the Halkali and Izmit mills, Borusan failed to provide further information concerning these mills, and the record, therefore, did not contain information with respect to the capacity utilization rate for the Halkali and Izmit mills.

105. Because Borusan failed to provide information concerning the Halkali and Izmit mills, USDOC had to rely upon the facts that were available. With respect to the capacity figures used by USDOC for the Halkali and Izmit mills, the figures used were nominal, that is, the final quantities of HRS were based on the actual yearly production capacity of the Halkali and Izmit mills, as well as the ratio of HRS purchased from Erdemir and Isdemir for the Gemlik mill.[208]

106. Moreover, as previously explained, based on Borusan's comments, USDOC reduced the hot-rolled steel purchase quantity figures for the Halkali and Izmit mills used in the subsidy calculations in its post-preliminary determinations to derive the subsidy calculation in its final determination.[209] Thus, the quantities selected reflect a reasonable replacement for the data that Borusan failed to provide. Indeed, no evidence on the record contradicted or raised questions about the quantity and its reasonableness as a replacement for the missing data.[210]

107. Thus, in reviewing an investigating authority's application of facts available, a panel must assess whether an objective and unbiased investigating authority could have found the chosen information to be a reasonable replacement for the missing information in the particular circumstances of the case, including by taking into account the non-cooperation of the party at issue.[211] In this case, USDOC selected a reasonable replacement for the missing information by

[206] United States' First Written Submission, para. 155; United States' Second Written Submission, para. 132.
[207] OCTG Final I&D Memo, p. 52 n.303 (Exhibit TUR-85).
[208] United States' First Written Submission, para. 155.
[209] United States' First Written Submission, para. 156.
[210] United States' First Written Submission, para. 125.
[211] United States' Second Written Submission, para. 133 (citing *US – Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193).

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.[212] Since an unbiased and objective investigating authority could have found the chosen HRS data to be a reasonable replacement for the missing information, there is no basis for the Panel to overturn that assessment.[213]

Question 99 (*To the United States*): At paragraph 103 of its response to Panel question No. 51(a), Turkey refers to the Appellate Body's statement in *US – Carbon Steel* that, "there 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."[214] The USDOC used subsidy rates determined from previous proceedings in the HWRP investigation. Does the United States agree with the Appellate Body's statement in *US – Carbon Steel*? If so, what is the connection between the missing information and the subsidy rates that the USDOC relied upon in the HWRP investigation?

Response:

108. As the United States has previously explained, 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."[215] 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."[216]

109. In the HWRP investigation, as a result of respondents' failure to provide an accurate response to USDOC's questions regarding the subsidy programs at issue, USDOC relied upon the facts available to determine a countervailable subsidy rate for three programs: (1) Deduction from Taxable Income for Export Revenue ("Deduction from Taxable Income") for MMZ, (2) Provision of Electricity for Less Than Adequate Remuneration ("Provision of Electricity for LTAR") for MMZ , and (3) Exemption from Property Tax for Ozdemir.[217]

110. As the United States has previously explained,[218] USDOC established a connection by first searching the record of the HWRP proceeding for above-zero subsidy rates calculated for another respondent for the identical program.[219] For the Deduction from Taxable Income program for MMZ, USDOC was able to use the same rate that USDOC calculated for Ozdemir for the same program in the same proceeding.[220] For the Provision of Electricity for LTAR and

[212] United States' Second Written Submission, para. 134.
[213] United States' Second Written Submission, para. 134.
[214] *US – Carbon Steel (India) (AB)*, para. 4.416.
[215] United States' First Written Submission, para. 129.
[216] United States' First Written Submission, para. 129.
[217] United States' First Written Submission, paras. 191, 198.
[218] United States' First Written Submission, paras. 201-202; United States' Response to First Panel Questions, para. 153.
[219] United States' First Written Submission, para. 201; United States' Response to First Panel Questions, para. 153.
[220] United States' First Written Submission, para. 201; United States' Second Written Submission, para. 157.

Exemption from Property Tax programs, USDOC was unable to find a rate for the same programs in the HWRP proceeding. Thus, for each program, USDOC then searched for a non-*de minimis* rate calculated for the identical program in another countervailing duty proceeding involving Turkey.[221] Because it could not find such a rate, USDOC then searched for a non-*de minimis* rate calculated for a similar program used in any countervailing duty proceeding involving Turkey.[222] USDOC was able to match 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.[223] Therefore, each step of USDOC's analysis is grounded in the calculated subsidy rates of cooperating companies and reflect the actual subsidy practices of the Turkish government.

111. Therefore, USDOC reasonably replaced information that MMZ and Ozdemir had failed to provide with information from the same or similar programs."[224] Importantly, 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.[225]

112. Therefore, because information concerning identical or similar subsidy programs was used to calculate the subsidy rate for each of the three HWRP programs challenged by Turkey, these rates provided a reasonable estimate of the level of subsidization provided by the government. This is exactly what an objective and unbiased investigative authority could have determined to use, and this is what USDOC did.[226]

V. CLAIMS UNDER ARTICLE 15.3 OF THE SCM AGREEMENT

Question 100 (*To the United States*): Are there specific examples of cases in which the USITC, in assessing material injury in original countervailing duty investigations, did not cross-cumulate imports of subsidized products with imports subject to anti-dumping duty investigations initiated on the same day, when subject imports competed with each other and with the domestic like product in the US market? If yes, what were the reasons not to cross-cumulate imports?

Response:

113. The United States understands the Panel's question to concern Turkey's assertion that the United States has a "practice," in assessing material injury, of "cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, i.e., non-subsidized imports, from all countries with respect to which

[221] United States' First Written Submission, para. 202; United States' Response to First Panel Questions, para. 153.
[222] United States' First Written Submission, para. 202; United States' Response to First Panel Questions, para. 153.
[223] United States' First Written Submission, para. 202; United States' Second Written Submission, para. 158.
[224] United States' First Written Submission, para. 201 (citing *US – Carbon Steel (India) (AB)*, para. 4.426).
[225] United States' Second Written Submission, para. 156.
[226] United States' Second Written Submission, para. 159 (citing *US – Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193).

antidumping or countervailing duty petitions are filed on the same day."[227] Turkey asserts this alleged "practice" is inconsistent "as such" with Article 15.3 of the SCM Agreement. As the United States has demonstrated in its prior submissions, Turkey's "as such" claim fails for multiple reasons. The response to this question provides further confirmation of Turkey's failure to demonstrate the existence of an alleged "practice."

114. Before responding to the Panel's question, it is important to recall that there is a critical threshold issue that must be resolved before the Panel even needs to consider whether Turkey has demonstrated the existence of a practice. As the United States has demonstrated, and as is clear on the face of Turkey's request for consultations and request for the establishment of a panel, the challenged measure – an alleged "practice" of cumulating imports – and Turkey's claim – an "as such" challenge to such "practice" – were not identified in Turkey's consultations request. Despite expressly limiting its consultations request to the United States' preliminary and final injury determinations in specific countervailing duty proceedings, Turkey sought to introduce this new measure and new claim in its panel request. For the reasons the United States has explained in its prior submissions, the inclusion of this new claim and new measure in Turkey's panel request would impermissibly expand the scope of the dispute and falls outside the Panel's terms of reference.[228] Therefore, the Panel's analysis of this claim and measure should begin and end here. No further analysis is necessary.

115. Although the Panel's analysis need not and should not extend beyond confirming that Turkey failed to include this claim and measure within this Panel's terms of reference, for completeness, the United States notes that Turkey's claim would have failed for a second, independent reason: Turkey failed to demonstrate that a "practice" regarding cumulation actually exists. Turkey has not established the existence of a rule or norm of general and prospective application. In this regard, the United States recalls that there is a "high [evidentiary] threshold" that must be reached by the complaining party, and "[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."[229] Despite its repeated attempts to remedy the deficiencies in its argument and evidence throughout this dispute, Turkey has failed to satisfy this high evidentiary threshold.

116. In Turkey's first written submission, in support of its claim, Turkey pointed to the three original injury determinations at issue in this dispute and statements, which refer to the requirements of a U.S. statute that Turkey has not challenged in this dispute.[230] The United States explained in detail, in its first written submission and oral statement at the first panel meeting,[231] that the fact that USITC cumulated the effects of subsidized and non-subsidized

[227] Panel Request, paras. 8.(A).5.a, 8.(B).4.a, 8.(C).4.a, and 8.(D).3.a.
[228] United States' First Written Submission, paras. 16, 21-22; United States' Second Written Submission, paras. 9-12.
[229] United States' First Written Submission, para. 242 (citing *US – Zeroing (EC) (AB)*, para. 196).
[230] Turkey's First Written Submission, paras. 223, 343, 456 (citations omitted).
[231] United States' First Written Submission, para. 246; *see also* United States' Opening Statement at the First Panel Meeting, para. 31.

imports in the three investigations Turkey identified did not demonstrate that the alleged practice had been "systemic[ally] appli[ed]" or that it has general and prospective application.[232]

117. After the first panel meeting, the Panel asked Turkey the following question concerning the sufficiency of Turkey's evidence:

> Q.56 (To Turkey) In support of the existence of a practice of "cross-cumulation" in original investigations, Turkey only refers to statements in injury determinations in the OCTG, WLP and HWRP original investigations. How is this sufficient proof to demonstrate systemic application of a USDOC practice? Please explain.

118. In other words, the Panel asked Turkey how the evidence it had referred to in its first written submission "was sufficient proof to demonstrate" the existence of the practice it alleged existed. Turkey was unable to answer this question based on the evidence it had submitted. In light of the showing by the United States that Turkey had failed to make out its affirmative case in its first written submission, or even during the first Panel meeting, that such a "practice" exists, Turkey failed to carry its burden as the complaining party to make out a necessary element of its claim (as it had defined that claim): the existence of the alleged "practice". And on this second basis, Turkey's claim also fails.

119. In implicit recognition of its failure to make out its claim, Turkey responded to the Panel's question by submitting 35 USITC determinations in original investigations. The United States has explained that the Panel should reject Turkey's evidence because it was both untimely and unpersuasive.[233] The evidence is untimely as it is contrary to the Working Procedures, procedural fairness, and the orderly resolution of this dispute. The evidence is also unpersuasive, as Turkey failed to provide any explanation or argumentation as to how each of these determinations supported its claims.[234] Instead, Turkey appears to consider it to be the Panel's job to make the case for Turkey. It is not, and it would be error for the Panel to do so.[235] Turkey bears the burden of demonstrating its claims and satisfying the high evidentiary burden of demonstrating a practice, and of doing so in a timely manner. And it is not for the United States to rebut a case that Turkey has not made. Rather, having failed to provide the evidence or argumentation necessary to sustain its claims, Turkey's claims must fail.

120. While the United States need not put forward evidence to disprove an aspect of Turkey's claim that Turkey has not made out, in response to the Panel's specific question, the United

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[232] United States' First Written Submission, para. 242 (citing *US – Zeroing (EC) (AB)*, para. 198).
[233] United States' Second Written Submission, paras. 180-189.
[234] United States' Second Written Submission, paras. 53, 62-63, 67. The deficiencies in Turkey's approach are further underscored by the fact that two of the determinations cited by Turkey (those provided as Exhibits TUR-181 and TUR-185) involve cases in which the USITC's injury analysis rested only on a threat of material injury. Given that the panel request references only the USITC's alleged practice "in assessing material injury" (See Turkey's Panel Request, p. 4, para. 5.a.; p. 6, para. 4.a., p. 7, pars. 4.a.), determinations that are based on threat of material injury are outside the scope of the panel request.
[235] *See, e.g., US – Gambling (AB)*, paras. 151-54; *Japan – Agricultural Products II (AB)*, para. 129.

States notes there are several examples where the USITC has not cumulated imports of subsidized products with imports subject to anti-dumping duty investigations initiated on the same day, when subject imports competed with each other and with the domestic like product in the U.S. market,[236] including:

- *Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan*, Inv. Nos. 701-TA-373 and 731-TA-769-775 (Final) USITC Pub. 3126, pp. 9-12 (Sept. 1998);

- *Certain Cut-to-Length Steel Plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia*, Inv. Nos. 701-TA-387-392 and 731-815-822 (Preliminary) USITC Pub. 3181, pp. 16-20 (Apr. 1999);

- *Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela*, Inv. Nos. 701-TA-417-421 and 731-TA-953-963 (Preliminary) USITC Pub. 3456, pp. 11-15 (Oct. 2001); and

- *Oil Country Tubular Goods from India, Korea, the Philippines, Taiwan, Thailand, Turkey, Ukraine, and Vietnam*, Inv. Nos. 701-TA-499-500 and 731-TA-1215-1217 and 1219-1223 (Final) USITC Pub. 4489, pp. 19-23 (Sept. 2014).

121. These examples provide further confirmation that Turkey has failed to demonstrate a practice of cumulation in assessing material injury. They also show that the measure challenged by Turkey does not necessarily result in what Turkey alleges to be WTO-inconsistent application. As the United States has previously noted, in an "as such" challenge to a rule or norm, a complaining party must demonstrate that the challenged measure will "necessarily" result in WTO-inconsistent application.[237] Turkey has not done so here, nor has it even demonstrated that such a practice exists.

Question 101 (*To both parties*): At paragraph 103 of its oral statement at the second meeting, Turkey argues that "the cumulative assessment of subsidized and dumped, *non-subsidized* imports for purposes of determining injury is fundamentally inconsistent with Article 15.3 and the SCM Agreement as a whole". In light of Turkey's panel request, how is the Panel to take into account the argument that cross-cumulation in sunset reviews is inconsistent with "the SCM Agreement as a whole"?

[236] As discussed above, the ITC's "practice" in threat of material injury determinations is not within the scope of the panel request. Therefore, the United States has not included in the text of its response to the Panel's question the various examples of cases where the USITC did not cross-cumulate in the context of a threat of material injury analysis, such as *Chlorinated Isocyanurates from China and Japan*, Inv. Nos. 701-TA-501 and 731-TA-1226 (Final), USITC Pub. 4494, pp. 33-35 (Nov. 2014), *Sodium Gluconate, Gluconic Acid, and Derivative Products from China and France*, Inv. Nos. 701-TA-590 and 731-TA-1397-1398 (Preliminary), USITC Pub. 4756 at pp. 34-36 (Feb. 2018), and others.

[237] *E.g.*, United States' First Written Submission, para. 55.

Response:

122. The Panel should reject Turkey's argument that cross-cumulation in sunset reviews is inconsistent with "the SCM Agreement as a whole" because that claim is not within the Panel's terms of reference. As the United States has previously explained,[238] Article 6.2 of the DSU requires the following two elements to be included in a panel request: (a) identification of the specific measures at issue; and (b) a brief summary of the legal basis of the complaint.[239] 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.[240] "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."[241]

123. In this case, the second element is missing. Turkey's panel request does not identify "inconsistency with the SCM Agreement as a whole" as a legal basis for challenging the USITC's cross-cumulation in sunset reviews. Instead, Turkey's panel request only asserts that the USITC's practice of cross-cumulation in sunset reviews is inconsistent with Article 15.3 of the SCM Agreement.[242]

Question 102 (*To the United States*): At paragraph 104 of its oral statement at the second meeting, Turkey submits that "there may well be circumstances in which, for example subsidized imports have no price effects whatsoever, unlike dumped imports" and thus, "cross-cumulation . . . has a significant potential to result in attribution to the former of effects and injury caused only by the latter". Please comment.

Response:

124. Turkey's new argument regarding attribution would appear to relate to the obligations in Article 15.5 of the SCM Agreement. Turkey did not raise a claim under Article 15.5 in its panel request, and such a claim is therefore not within the Panel's terms of reference. In any event, Turkey's new claim ignores that Article 15 of the SCM Agreement, like Article 3 of the Antidumping Agreement, requires authorities to evaluate more than just price, and instead to examine three prongs for an injury investigation: volume, price effects and impact.[243] Effects presuppose a certain volume, as reflected in Article 15.3, and the concept of competition takes into account whether the imports are price competitive.

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[238] *E.g.*, United States' First Written Submission, paras. 25-29.
[239] *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.
[240] *Australia – Apples (AB)*, para. 416 (emphasis omitted).
[241] *Australia – Apples (AB)*, para. 416.
[242] Panel Request, pp. 7-8, para. 3.
[243] *See, e.g.*, Articles 15.1 and 15.2 of the SCM Agreement. The United States additional notes that, as set out in the U.S. response to panel question 100, the USITC has declined to cumulate imports that have no discernible adverse impact.

VI. CLAIMS UNDER ARTICLE 19.4 OF THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994

Question 103 (*To both parties*): At paragraphs 329 and 441 of its first written submission, Turkey cites the Appellate Body statement from *US - Countervailing Measures on Certain EC Products* that, under Article 19.4, "investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation".[244] Beyond this statement, the Appellate Body also stated in the same paragraph of that report that "Article 19.4 of the SCM Agreement, consistent with the language of Article VI:3 of the GATT 1994, requires that '*[n]o countervailing duty* shall be levied on any imported product in excess of the amount of the subsidy *found to exist*'".[245] Reading these statements together, what is the obligation in Article 19.3 and Article VI:3? Must an investigating authority simply ensure that it does not collect countervailing duties in excess of the amount of the subsidy that the investigating authority *had actually determined to exist* in the investigation?

Response:

125. See U.S. response to Question 105, below.

Question 104 (*To both parties*): In respect of the *chapeau* of Article 9.3 of the Anti-Dumping Agreement, the Appellate Body stated in *EU – Biodiesel (Argentina)* that the burden is on a complainant to "show that anti-dumping duties are imposed at a rate that is higher than the dumping margin that would have been established had the authority acted consistently with Article 2"?[246] What is the relevance of this reasoning for purposes of addressing Turkey's Article 19.4 and Article VI:3 claims? Does this mean that any error made in calculating the subsidy amount arising from violations of other SCM provisions would not necessarily lead to a violation of Article 19.4 or Article VI:3? Please explain.

Response:

126. See U.S. response to Question 105, below.

Question 105 (*To both parties*): Is it self-evident that a breach of Articles 1.1(a)(1), 1.1(b), 2.1(c), 12,7, 14(d) and 15.3 of the SCM Agreement would necessarily lead an investigating authority to calculate and impose a higher subsidy rate? Please explain in respect of each provision concerned, e.g. Article 1.1(a)(1), 1.1(b), 2.1(c), 12.7, 14(d) and 15.3 of the SCM Agreement.

Response:

[244] *US - Countervailing Measures on Certain EC Products (AB)*, para. 139.
[245] *US - Countervailing Measures on Certain EC Products (AB)*, para. 139 (emphasis original)
[246] *EU – Biodiesel (Argentina) (AB)*, para. 6.104.

127. The United States responds to questions 103, 104, and 105 together, and refers the Panel to our response to Question 4.[247]

128. Article 19.4 of the SCM Agreement requires that "no countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist." Similarly, Article VI:3 of the GATT 1994 provides that "no countervailing duty shall be levied . . . in excess of an amount equal to the estimated bounty or subsidy determined to have been granted . . . ." In other words, no countervailing duty may be levied on an imported product if no countervailable subsidy is found by the investigating authority to exist with respect to that imported product; and the countervailing duty levied may not exceed the subsidy amount calculated by the investigating authority. Therefore, based on the text of Articles 19.4 and VI:3, if the duty rate applied by USDOC was consistent with its calculation of subsidization in the underlying proceeding, no breach of Articles VI:3 or 19.4 may be found.

129. The Panel's question asks about Articles 1.1(a)(1), 1.1(b), 2.1(c), 12.7, 14(d), and 15.3 of the SCM Agreement. We would recall that in its panel request, Turkey only included 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 a breach of those provisions. As we explained in our first written submission, any new independent claims under Articles 19.4 and VI:3 are not within the Panel's terms of reference.[248] Moreover, Turkey has only argued before the Panel that the United States acted contrary to Articles 19.4 and VI:3 with respect to USDOC's application of facts available under Article 12.7 of the SCM Agreement.[249] Therefore, the question of whether a breach of Articles 1.1(a)(1), 1.1(b), 2.1(c), 14(d), and 15.3 would necessarily lead to a breach of Articles 19.4 and VI:3 does not arise in this dispute.

130. With regard to Article 12.7, a breach of that provision does not constitute a breach of Articles 19.4 and VI:3. Turkey suggests that, because a Member's application of facts available may be found inconsistent with Article 12.7, such a finding necessarily would mean that the Member has levied a countervailing duty "in excess of the amount of subsidy found to exist." That is not the case. That there may have been errors in the method of calculation does not lead to the conclusion that the duty was applied "in excess of the amount of the subsidy found to exist." Nor could the Panel make such a determination based on the record of these proceedings. An authority relies on facts available when the actual information needed to calculate a duty rate is not available on the record. Neither the Panel, nor the investigating authority, has the ability to determine the actual rate of subsidization. Therefore, while an investigating authority's implementation of an adverse finding under Article 12.7 could lead to a change in the amount of subsidization found, a panel could not determine that using other information as facts available necessarily means an authority would find a *lower* rate of subsidization. How a Member may choose to comply with an adverse ruling is not in any event a matter at issue before this Panel.

[247] United States' Response to First Panel Questions, paras. 19-24.
[248] United States' First Written Submission, paras. 34-35.
[249] United States' Response to First Panel Questions, para. 19.