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

(DS523)

FIRST EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

March 20, 2018

EXECUTIVE SUMMARY OF THE UNITED STATES' FIRST WRITTEN SUBMISSION

I. PRELIMINARY RULING REQUEST

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

1. DSU Article 4.4 provides that a request for consultations must state the reasons for the request, "including identification of the measures at issue and an indication of the legal basis for the complaint." Under DSU Article 6.2, a panel request must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint[.]" The panel request may neither "expand the scope" nor change the essence of a consultations request. A panel should "compare the respective parameters of the consultations request and the panel request to determine whether an expansion of the scope or change in the essence of the dispute occurred through the addition of instruments in the panel request that were not identified in the consultations request."

2. In its consultations request, Turkey identifies the specific measures at issue as the "preliminary and final countervailing duty measures imposed by the United States on Turkish imports of Certain Oil Country Tubular Goods ('OCTG'); Welded Line Pipe [WLP]; Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes [HWRP]; and Circular Welded Carbon Steel Pipes and Tubes [CWP]." The legal basis for Turkey's complaint is that USITC's "determination of injury based on cumulated imports" in the OCTG, WLP, HWRP, and CWP proceedings is inconsistent with Article 15.3 of the SCM Agreement.

3. Turkey has attempted to expand the scope of this dispute by improperly introducing in its panel request new measures and claims. First, Turkey's panel request challenges USITC's "practice of 'cross-cumulating' subsidized and non-subsidized imports" as being inconsistent with Article 15.3 of the SCM Agreement "both '*as such*,' as a practice and as applied" in the OCTG, WLP, HWRP, and CWP proceedings. Turkey had identified no "practice" of cross-cumulating in its consultation request. Moreover, Turkey failed to request consultations on this alleged practice "as such," instead limiting its claims to the injury determinations made in the specific investigations identified in its consultations request. Thus, Turkey's newly added "as such" legal claims are not within the Panel's terms of reference.

4. Second, Turkey also has attempted to expand the scope of this dispute by improperly introducing in its panel request new measures and claims with respect to benefit. Turkey claims that USDOC has a practice of rejecting in-country prices as a benchmark "based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good," and asserts that this practice is inconsistent with Article 14(d) of the SCM Agreement "both '*as such*', as a practice, and as applied in [the OCTG] proceeding." Turkey failed to request consultations on this alleged "practice" of rejecting in-country prices as a benchmark. A measure on which Turkey failed to consult cannot be included in its panel request and falls outside the Panel's terms of reference. In addition, Turkey's panel request challenges this alleged practice "as such," but this claim was not included in its consultation request. Because the consultation request was limited to claims concerning the benefit determination made in the OCTG proceeding, Turkey's newly added legal claims are not within the Panel's

terms of reference.

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

5. Article 6.2 requires two elements to be included in a panel request, namely: (a) identification of the specific measures at issue; and (b) a brief summary of the legal basis of the complaint. 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. "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."

6. First, Turkey's claim with respect to Article 12.7 of the SCM Agreement in the WLP investigation is expressly limited to the application of facts available by USDOC "[i]n connection with the alleged Provision of Hot Rolled Steel [HRS] for Less Than Adequate Remuneration [LTAR]." The other 29 subsidy programs are not the subject of any claims in Turkey's panel request, including any claims under Article 12.7, and are thus outside the Panel's terms of reference.

7. In its first written submission, however, Turkey has dramatically expanded its arguments. In addition to the application of facts available with respect to the Provision of HRS, Turkey challenges its application for all 30 subsidy programs at issue in the WLP investigation. Having failed to raise claims regarding these other 29 programs in either its consultations request or panel request, Turkey may not argue for the first time in its first written submission that the applications of facts available for these programs are inconsistent with Article 12.7.

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

9. Turkey attempts to raise independent arguments with respect to Article 19.4 and Article VI:3 in its first written submission. Since the only claims Turkey included in its panel request under Article 19.4 and Article VI:3 were expressly contingent on the Panel finding a violation of Articles 1.1(a)(1), 1.1(b), 2.1(c), 12.7, 14(d) and/or 15.3 of the SCM Agreement, these new, independent claims are not within the Panel's terms of reference.

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

10. With respect to its Articles 1.1(b) and 14(d) claims, Turkey challenges an aspect of USDOC's benefit determination in the OCTG investigation that was superseded and ceased to have any legal effect prior to the establishment of the Panel. Accordingly, it is thus outside its terms of reference.

11. When the DSB establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint." As

the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."

12. However, the measure challenged by Turkey in this dispute—USDOC's rejection of in-country benchmarks to determine whether HRS was provided to the Turkish respondents for LTAR—was no longer the legal basis for USDOC's benefit determination at the time of establishment of the Panel in this case. Rather, the benchmarks determination supporting the CVD order at the time of panel establishment was reflected in the OCTG remand determination, issued on remand pursuant to domestic litigation. On March 10, 2016, USDOC published notice of its OCTG amended final determination, which effectuated USDOC's new benchmark and benefit determination reflected in the OCTG remand determination.

13. Therefore, when the OCTG amended final determination was published on March 10, 2016, USDOC's determination to use of out-of-country benchmarks ceased to have any legal effect, and was replaced by USDOC's remand determination, in which it determined to use in-country benchmarks. The Panel subsequently was established on June 19, 2017. Because the task of a panel is to determine whether the measure at issue is consistent with the relevant obligations *at the time of establishment of the Panel*, Turkey's challenge to the benchmark and benefit determination in the OCTG final determination falls outside the Panel's terms of reference.

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

14. Turkey's "as such" claim with respect to the benchmark determination is not within the Panel's terms of reference. For completeness, the United States notes that Turkey's challenge also fails on the merits. Turkey alleges that "[t]he USDOC has a practice, in assessing whether a good is provided for less than adequate remuneration thereby conferring a benefit, of rejecting in-country prices as a benchmark based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good, with no consideration of whether in-country prices are distorted."

15. The Appellate Body explained in *US – Zeroing (EC)* that "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document." In finding the existence of a rule or norm in *US – Zeroing (EC)*, the Appellate Body noted that the "evidence consisted of considerably more than a string of cases, or repeated action, based on which the Panel would simply have divined the existence of a measure in the abstract."

16. Turkey's showing with respect to USDOC's alleged rule falls far short of its burden. In support of its claim, Turkey points only to a statement in the final benchmark determination for OCTG – which, as explained, was reversed by a U.S. domestic court and amended by USDOC – and the preliminary benchmark determinations in four other investigations, one of which also was reversed in the final benchmark determination. Turkey has not explained how these determinations support its claim, only merely citing to conclusory sentences from the determinations. Turkey also attempts to support its claim by citing to language in the preamble

of USDOC's regulations; however, Turkey concedes just two paragraphs prior in its submission that the USDOC regulation is consistent with Article 14(d) of the SCM Agreement.

17. Moreover, in none of the four cases challenged by Turkey in this dispute did USDOC "reject[] in-country prices as a benchmark based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good, with no consideration of whether in-country prices are distorted," as alleged by Turkey. Rather, as demonstrated, in each case, USDOC discussed and considered evidence relevant to the distortion of in-country prices, in addition to the government's market share, to determine whether in-country prices are an appropriate benchmark. Therefore, the United States respectfully requests that the Panel reject Turkey's "as such" claim because Turkey has not met the "high" evidentiary burden in these circumstances to establish a rule or norm of general and prospective application.

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

18. Turkey claims, "[t]he USDOC's determinations that OYAK, Erdemir, and Isdemir are public bodies is inconsistent with Article 1.1(a)(1)." Contrary to Turkey's claims, USDOC did not find, in any of the determinations, that OYAK provided a financial contribution, and thus did not find OYAK to be a public body for purposes of Article 1.1(a)(1). Such a finding was neither necessary, nor appropriate, because USDOC did not find that OYAK provided a countervailable subsidy. Rather, in determining that HRS was provided for LTAR, USDOC found Erdemir and Isdemir to be public bodies.

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

20. Regarding Erdemir and Isdemir, after consideration of the record as a whole, USDOC determined Erdemir and Isdemir to be public bodies, based on numerous considerations, including the involvement of OYAK in Erdemir. USDOC first described the legal basis for OYAK's authority as the pension fund for the Turkish military and the functions it performs pursuant to this authority. In carrying out this function, USDOC noted that Law No. 205 specifies that OYAK's property "shall enjoy the same rights and privileges as State property" and that OYAK is exempt from corporate and other taxes in parallel with the privileges granted to all actors operating within the social security system in Turkey. USDOC likewise observed that "members of the armed forces must by law contribute part of their salaries to OYAK."

21. USDOC also described the extensive overlap between OYAK's leadership structure and the Turkish Armed Forces, as well as other organs of the GOT. In the OCTG final determination, USDOC explained that a study by the Turkish Economic and Social Studies Foundation concluded that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control."

22. USDOC next examined the functions and conduct of Erdemir and Isdemir, specifically the meaningful control by the GOT. USDOC examined the ownership of Erdemir and Isdemir. USDOC then tied the stated corporate objectives and accomplishments of Erdemir and Isdemir

to certain macroeconomic goals defined by the GOT, demonstrating that Erdemir and Isdemir designed their corporate priorities to adhere to state-crafted policy. In doing so, USDOC established that Erdemir's and Isdemir's purview extends beyond that of a typical profit-oriented private firm to encompass considerations that are governmental in the legal order of Turkey. Specifically, in the OCTG final determination, USDOC explained that Erdemir's 2012 Annual Report is "in line with the GOT's…2012-2014 Medium Term Programme." Similarly, in the WLP, CWP and HWRP determinations, USDOC examined Erdemir's 2013 Annual Report, and determined that it was "in line with the GOT's stated policy in its 2012-2014 Medium Term Programme to improve Turkey's balance of payments."

23. USDOC then examined Erdemir's Annual Report and Articles of Association. USDOC found evidence indicating that "OYAK effectively decides the composition of the majority of Erdemir's board through its majority shareholder voting rights in Erdemir." In each of the determinations, USDOC also examined the role of the Turkish Prime Ministry Privatization Administration (TPA). USDOC examined Erdemir's Annual Reports, which state that OYAK and the TPA both maintain members on Erdemir's Board of Directors. In addition, USDOC cited the TPA's veto power over any decision related to the closure, sale, merger, or liquidation of Erdemir and Isdemir. Accordingly, USDOC provided reasoned and adequate explanations in each determination that the GOT, through OYAK and the TPA, exercised "meaningful control" over Erdemir and Isdemir.

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

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

26. As for the CWP determination, in attempts to undermine USDOC's finding, Turkey points repeatedly to Borusan's case brief in the proceeding. A case brief in a USDOC administrative proceeding, at which point parties are not permitted to submit new record evidence, is simply argument made by an interested party in a proceeding. Moreover, the

statements that Turkey has pulled from Borusan's case brief are themselves unsupported by record evidence, and are merely assertions presented by an interested party. Thus, by relying on administrative case briefs and the law firm position paper, Turkey does no more than proffer, in a conclusory manner, its alternative interpretation of the record facts.

27. Turkey argues that USDOC refused to consider evidence that demonstrates that OYAK operates independently of the government, and that Erdemir operates on a commercial basis. However, USDOC considered this information and provided a reasoned and adequate explanation for its rejection. As USDOC explained, "a firm's commercial behavior is not dispositive in determining whether that firm is a government 'authority.'" Specifically, USDOC explained, "this line of argument conflates the issues of the 'financial contribution' being provided by an authority and 'benefit.'" This reasoning is consistent with the approach taken by dispute settlement panels in prior proceedings, for example, in *Korea – Commercial Vessels (Panel)*. Moreover, this reasoning is supported by the structure of the SCM Agreement. Accordingly, contrary to Turkey's claims, consideration of whether a financial contribution was provided consistent with market principles is not germane to the determination of the existence of a financial contribution, as determined by USDOC.

28. As discussed above, USDOC considered the evidence that was submitted and, taking into account the totality of the evidence before it, came to a different conclusion than that for which Turkey now argues. The Panel should, as the Appellate Body has found previously, "seek to review the [USDOC's] decision on its own terms, in particular, by identifying the inference drawn by [*USDOC*] from the evidence, and then by considering whether the evidence could sustain that inference." For the reasons given above, the Panel should find that USDOC's public body determinations with respect to Erdemir and Isdemir are consistent with Article 1.1(a)(1) of the SCM Agreement.

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

29. Article 12.7 provides a Member's authority to make determinations on the basis of the facts available. The extent to which the investigating authority must evaluate the possible "facts available," and the form that evaluation may take, "depend[s] on the particular circumstances of a given case." 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. "[A]n 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."

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

30. Turkey argues that USDOC's determination to rely on facts available is inconsistent with Article 12.7 because USDOC allegedly failed to take "due account" of the difficulties Borusan experienced in gathering and reporting the requested information. Turkey claims that USDOC improperly failed to select a "reasonable replacement" for the missing information in light of these difficulties.

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

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

32. Turkey claims that USDOC acted inconsistently with Article 12.7 because its use of facts available resulted in an inaccurate subsidy calculation that has no factual connection to the programs under investigation. Turkey only included argumentation and evidence in its written submission for two categories of subsidy programs: (1) programs for which USDOC was unable to identify above-zero rates calculated for the same or similar programs in prior Turkish countervailing proceedings, and (2) income tax reduction or elimination programs.

33. For those programs where USDOC was unable to identify above-zero rates for the same or similar programs, USDOC applied the highest calculated subsidy rate for any program in a Turkish countervailing duty proceeding that could be used by Borusan. USDOC appropriately selected this rate as a reasonable replacement for necessary benefit information that was not on the record due to Borusan's failure to cooperate, and specifically excluded any rates from company-specific programs or from programs that would not benefit the industry to which Borusan belongs. USDOC thus sought to arrive at an accurate benefit determination.

34. With respect to the income tax programs, USDOC found that the programs "pertained to either the reduction of income tax paid or the payment of no income tax." USDOC inferred that Borusan had paid no income tax during the period of investigation and determined that the amount of that benefit was 20 percent, the standard income tax rate for corporations in Turkey. USDOC thus acted consistently with Article 12.7, and Turkey has not shown otherwise.

35. Turkey also claims that USDOC acted contrary to its obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 "by applying countervailing duty measures in excess of the amount of subsidization attributable to HWRP [sic]." Turkey's arguments are based upon a flawed understanding of these provisions. Consistent with Article VI:3, Article 19.4 requires that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist." There is no argument by Turkey that any amounts levied have exceeded the subsidy amount calculated. The United States has thus acted consistently with Article 19.4 and Article VI:3 by not applying countervailing duties in excess of the amount of subsidy found to exist by USDOC.

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

36. Turkey argues that USDOC's application of facts available is inconsistent with Article 12.7 because the subsidy rates applied to MMZ and Ozdemir "are not accurate and have no factual connection to the alleged subsidy programs actually investigated." Turkey disagrees with USDOC's selection of the "*highest* subsidy rate for *similar* programs" from other Turkish

countervailing duty proceedings.

37. Turkey has provided no evidence or substantive argumentation that the rate USDOC selected for the Deduction from Taxable Income program was determined contrary to Article 12.7. The rate USDOC selected is the *same* rate that USDOC calculated for Ozdemir for the *same* program in the *same* proceeding. With respect to the remaining programs — Provision of Electricity for LTAR and Exemption from Property Tax — USDOC was unable to find a rate for the same programs, and therefore turned to "facts available" for similar subsidy programs. Because the subsidy rate for each program was on a par with identical or similar subsidy programs, the rate is not a punitive one, but instead provides a reasonable estimate of the level of subsidization provided by the government consistent with Article 12.7.

38. Turkey also claims that USDOC acted contrary to its obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 "by applying countervailing duty measures in excess of the amount of subsidization attributable to HWRP." Turkey's arguments are based upon a flawed understanding of these provisions.

39. Consistent with Article VI:3, Article 19.4 requires that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist." There is no argument by Turkey that any amounts levied have exceeded the subsidy amount calculated. The United States has thus acted consistently with Article 19.4 and Article VI:3 by not applying countervailing duties in excess of the amount of subsidy that was found to exist by USDOC.

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

40. Turkey alleges that USDOC failed to identify or evidence the existence of a "subsidy programme" for the provision of HRS. In *US – Countervailing Measures (China)*, the Appellate Body considered the significance of the term "programme" in paragraph (c) of Article 2.1, and envisioned that a subsidy program, in the form of an unwritten "plan or scheme" could be evidenced by "a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises."

41. Here, the record supports USDOC's determination that the provision of HRS for LTAR is a "subsidy program" in the form of "plan or scheme" through a systematic series of actions. In particular, in each challenged proceeding, the HRS for LTAR subsidy program was first identified in the application submitted by the petitioners, which USDOC found to be substantiated by record evidence. USDOC thereafter determined to investigate the program, including by asking questions of Turkey and other interested parties and reviewing their responses, identified the program in the preliminary determinations, gave all parties the opportunity to comment, and ultimately made a final determination with respect to the program in each of the cases. Specifically, the respondents provided USDOC with a complete transaction-specific accounting of the provision of HRS for LTAR. USDOC in each proceeding relied on this evidence in identifying the subsidy program alleged by petitioners.

42. Turkey also asserts in its submission that USDOC did not consider in its specificity determination the factors listed in the final sentence of Article 2.1(c). However, Turkey has not

even asserted a *prima facie* case of inconsistency, because it fails to explain how USDOC allegedly neglected the factors set out in the third sentence of Article 2.1(c).

43. USDOC took all required factors into account in its specificity determinations. The third sentence of Article 2.1(c) does not impose a purely formalistic requirement. An authority takes a factor into account when it deals or reckons with it. Where these factors are not relevant to the authority's determination, it need not include express discussion of each factor. Rather, an authority satisfies its obligation by implicitly taking into account the factors. Accordingly, previous panels have found that "taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly." Such implicit findings are all the more reasonable where, as here, none of the parties to the countervailing duty proceedings ever argued or suggested that the factors had any bearing on the facts at issue.

44. Here, neither of the two factors identified in the third sentence of Article 2.1(c) was alleged in the proceedings at issue to have any bearing on the specificity inquiries, nor does Turkey point to any such evidence now. Accordingly, USDOC's specificity findings in each of the four challenged determinations are consistent with the SCM Agreement.

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

45. Turkey claims that "the ITC has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, *i.e.*, non-subsidized imports," and that this "practice" is inconsistent "as such" with Article 15.3. Turkey argues that this alleged practice should be considered a rule or norm of general application, subject to challenge "as such."

46. "[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." A "high [evidentiary] threshold" must be reached by a complaining party, who must clearly establish that the alleged "rule or norm" is attributable to the responding Member; its precise content; and that it does have general and prospective application.

47. Turkey's showing falls far short of its burden. First, Turkey states that the alleged "practice" it challenges is *considered by the USITC to be required by U.S. statute*. The statement cited by Turkey from each determination similarly states that "section 771(&)(G)(i) of the Tariff Act requires the Commission" to take certain action. However, Turkey has not challenged that U.S. law. Irrespective of what the U.S. statute may or may not require, Turkey has not alleged, much less demonstrated, that a "practice" autonomous from the U.S. statute exists.

48. Second, Turkey has not proven the content of the alleged practice, much less its existence. Turkey cites only to the specific injury determinations at issue. The fact that USITC cumulated the effects of subsidized and non-subsidized imports in the investigations at issue, however, does not demonstrate "systemic application" or that the alleged practice has "general and prospective application." Furthermore, the statement by the USITC in each determination to which Turkey next specifically refers does not describe the cumulation of subsidized imports and dumped, non-subsidized imports. Rather, the statement says that the relevant statute requires USITC "to cumulate subject imports from all countries as to which petitions were filed . . . on

the same day, if such imports compete with each other and with the domestic like product in the U.S. market." This statement does not indicate that both subsidized and dumped imports must be cumulated.

49. Finally, under U.S. law a U.S. investigating authority may depart from a practice as long as it explained its reasons for doing so. As the panel in *US – Export Restraints* found, this "prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action."

A. The Cumulation of Dumped and Subsidized Imports In Original Investigations

50. A proper interpretation of a provision of the WTO Agreements "must be made on the basis of a careful examination of the text, context and object and purpose of that provision." Turkey has claimed that USITC's cumulation of imports in the OCTG, WLP, and HWRP investigations is inconsistent with Article 15.3. The burden of proving those claims thus falls on Turkey. Yet Turkey has failed to engage in any analysis of Article 15.3 that would allow that burden to be met. Turkey has provided no interpretation of Article 15.3's text, context, object, or purpose. Instead, Turkey has simply quoted statements made by the Appellate Body in a previous dispute. This is not a sufficient basis upon which to make a legal showing.

51. Even in the absence of argumentation by a party, under DSU Article 11, a panel must satisfy itself that a breach has been made out by application of a covered agreement, properly interpreted, to the facts before it. A proper interpretation reveals that nothing in the text of Article 15.3 prohibits the cumulation of subsidized imports with imports that are dumped. Article 15.3 addresses the conditions under which an authority may cumulatively assess the effects of imports from multiple countries that are found to be subsidized. Article 15.3 does not address — and certainly does not set any prohibition against — an investigating authority conducting a cumulative assessment of the effects on the domestic industry of subsidized imports and dumped imports. In fact, it does not address dumped imports at all. Article 15.3 is *silent* on the issue of whether cumulation of dumped and subsidized is permissible.

52. The fact that Article 15.3 does not specifically authorize an authority to cumulate subsidized imports with imports that are dumped does not, in and of itself, indicate that such an approach is prohibited by the SCM Agreement. Turkey's claim would have the Panel read into Article 15.3 terms that are not there. Such an interpretation is not consistent with proper rules of interpretation, and should therefore be rejected by the Panel.

53. An analysis that focused solely on the injurious effects of either dumped or subsidized imports alone when both types of imports are injuring the industry at the same time would prevent the investigating authority from "adequately tak[ing] into account" the injurious effects of all unfairly traded imports, rendering the authority's injury analysis less than complete. In *US – Oil Country Tubular Goods Sunset Reviews (AB)* and *EC – Tube or Pipe Fittings*, the Appellate Body emphasized that a cumulative assessment of the effects of unfairly traded imports from multiple countries is a critical component of the injury analysis authorized in the AD Agreement. The Appellate Body's reasoning is similarly applicable to a situation where dumped *and* subsidized imports are having a simultaneous injurious impact on an industry. The AD and SCM Agreements contain nearly identical provisions governing an authority's injury

analysis, including cumulation, in original investigations. Both contemplate that an authority may consider the cumulative injurious effects of unfairly traded imports from multiple sources, given that these imports can have a cumulative injurious impact on the domestic industry.

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

55. Article VI also provides important context for considering the object and purpose of the SCM Agreement and its relationship with the AD Agreement. Article VI:6(a) provides that a Member shall not impose antidumping or countervailing duties "unless it determines that the effect of *dumping or subsidization*, as the case may be, is such as to cause or threaten to cause material injury to an established domestic industry . . . ." The phrase "as the case may be" acknowledges that cumulation of dumped and subsidized imports may be appropriate in particular injury investigations.

56. Prohibiting investigating authorities from cross-cumulating, such that the same volume of subsidized imports from a country can be countervailed in some circumstances (where exporters in other countries also happen to be subsidized) but not in others (where the unfairly traded imports from other countries are dumped but not subsidized), will impair the right afforded to Members under the SCM Agreement to countervail injurious subsidized imports. The United States urges the Panel to interpret the SCM Agreement in a way that ensures that the treatment of those imports is consistent under all the applicable provisions of the WTO agreements.

B. The Cumulation of Dumped and Subsidized Imports in Sunset Reviews

57. Turkey's "as such" challenge to USITC's alleged practice of cross-cumulation in sunset reviews must fail because Turkey has not established the existence of a rule or norm of general and prospective application. The alleged practice it challenges *is subject to USITC's discretion*. To succeed in an "as such" challenge, a complainant must show that the application of the measure necessarily leads to WTO inconsistent action. Turkey has made no such showing. Turkey does not claim that the statute itself is inconsistent with the SCM Agreement. Therefore, Turkey must prove its claim that USITC has exercised this discretion "in practice" in a manner that would constitute a "rule or norm" of "general and prospective application." Turkey's reference to the single sunset determination at issue in this dispute is insufficient to do so.

58. Turkey also has failed to show that Article 15.3 prohibited the cumulation of dumped and subsidized imports in the sunset review determination at issue. Review proceedings, including sunset review proceedings, are governed by Article 21 of the SCM Agreement — not Article 15.3. Therefore, Article 15.3 does not apply directly to the review determination at issue.

59. The provisions of the WTO Agreements governing dumping, subsidies, and injury findings in original investigations do *not* apply to an authority's likely injury analysis in sunset reviews. The Appellate Body has expressly rejected claims that the Agreements' specific requirements relating to cumulation in original investigations can be applied directly in sunset reviews.

60. Article 21 of the SCM Agreement does "not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review," nor does it "identify any particular factors that authorities must take into account in making such a determination." Accordingly, the SCM Agreement imposes no specific limitation on an authority's cumulation decisions in a sunset review.

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

I. TURKEY'S RESPONSE TO THE U.S. PRELIMINARY RULING REQUEST

61. Turkey attempts to argue in response to the U.S. Preliminary Ruling Request that it identified the injury and benefit "practices" by including the phrase "and related practices" at the end of a description of the challenged measures. This reference to "related practices" is so general that it does not identify any "practices" at issue.

62. Turkey further argues that its "identification of the measures at issue as the United States' preliminary and final countervailing duty measures imposed in the OCTG, WLP, HWRP, and CWP proceedings does not limit Turkey's legal claims to 'as applied' claims." The issue, however, is not that Turkey described its claims with respect to the alleged practices as "as such" claims, but that Turkey failed to identify those alleged measures in its consultations request.

63. With respect to its claims under Article 12.7, Turkey attempts to draw a distinction between the "claims" being asserted and the "arguments put forth by a party in support of its claims." For purposes of DSU Article 6.2, a "claim" refers to an "allegation that the respondent party has violated . . . an identified provision of a particular agreement," whereas "arguments . . . are statements put forth by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision." Here, Turkey *alleged* that the U.S. application of facts available in connection with the Provision of HRS for LTAR breached Article 12.7 of the SCM Agreement. Turkey's *arguments* with respect to that allegation would be any "statements put forth . . . to demonstrate" that the application of facts available in connection with the Provision of HRS for LTAR did indeed breach Article 12.7. If Turkey had intended to raise legal claims regarding the application of facts available with respect to subsidy programs other than the Provision of HRS for LTAR program, it should have identified those claims in its panel request.

64. By contrast, with respect to the HWRP proceeding, Turkey not only identified two claims under the SCM Agreement "[i]n connection with the alleged Provision of Hot Rolled Steel for Less than Adequate Remuneration," Turkey also raised a separate claim under Article 12.7 regarding the application of facts available "[i]n connection with 'other subsidies' not previously reported to the USDOC." In contrast to the HWRP proceeding, in the WLP proceeding Turkey failed to raise any claims regarding subsidy programs other than the Provision of HRS for LTAR program.

65. Turkey also claims that USDOC's determination to apply facts available in the WLP proceeding was not a "program-specific determination," but was based on respondent Borusan's decision not to participate in verification. However, Turkey's characterization of USDOC's

findings regarding Borusan cannot have the effect of curing the deficiencies in its panel request, and does not change the fact that the only claim Turkey raised in its panel request regarding Article 12.7 was with respect to the Provision of HRS for LTAR subsidy program.

66. Turkey also claims that the United States was not "prejudiced" by its deficient panel request. However, the Panel need not make a finding of prejudice to the United States in order to find the additional claims under Article 12.7 to be outside its terms of reference.

67. Regarding the challenge to USDOC's use of benchmarks, Turkey "acknowledges that the USDOC reversed its benefit determination on remand, but disputes that the measures at issue has {sic} ceased to have legal effect." Turkey claims that because of potential subsequent domestic litigation, there was still the possibility that the OCTG remand determination still *could have been* reversed at the time of its panel request. This is both factually inaccurate and legally irrelevant.

68. As a result of the U.S. Court of International Trade sustaining USDOC's remand determination, USDOC issued an amended final determination on March 10, 2016, which effectuated USDOC's remand determination to use in-country benchmarks. On that date, the OCTG final determination with respect to the use of out-of-country benchmarks ceased to have any legal effect. The potential for a subsequent appeal did not alter the legal effect of the amended OCTG final determination, which changed the subsidy rates and served as the legal basis for the collection of cash deposits on entries at the time of the Panel's establishment.

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

70. Turkey has also claimed that the OCTG benefit determination "continues to have legal effect because it reflects the USDOC's long-standing practice of rejecting in-country or 'tier one' benchmarks based on evidence of government ownership or control of domestic producers," which Turkey has also attempted to challenge in this dispute. Contrary to Turkey's claims, not only has the United States demonstrated that no such practice exists, Turkey's suggestion that the existence of a "practice" would preserve the legal effect *under U.S. law* of a superseded USDOC countervailing duty determination makes no sense. A U.S. court determined that USDOC's use of out-of-country benchmarks in the OCTG proceeding was *not* consistent with U.S. law, and remanded the determination to USDOC for that reason.

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

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

U.S. RESPONSE TO PANEL QUESTION 7

72. In its determinations, USDOC did not make a legal finding regarding the status of OYAK for purposes of Article 1.1(a)(1) of the SCM Agreement. Therefore, the U.S. statement concerning USDOC's examination of OYAK "as an organ of the GOT" does not require the Panel to determine whether USDOC's findings with respect to OYAK comply with any legal standard regarding a "government organ" under the SCM Agreement. In making this statement in its first written submission, the United States was distinguishing USDOC's factual assessment of OYAK from the legal standard of "government or any public body" found in Article 1.1(a)(1) of the SCM Agreement. As the United States explained in its first written submission, because USDOC did not determine that a financial contribution was provided by OYAK, there is no legal issue before the Panel with respect to OYAK's status under Article 1.1(a)(1).

73. Instead, USDOC found that Erdemir and Isdemir are public bodies by virtue of the meaningful control exercised over the two entities by the GOT, including, through OYAK. Therefore, the inquiry for the Panel with respect to OYAK is a factual one that must be examined as part of the Panel's analysis of whether USDOC properly found Erdemir and Isdemir to be public bodies within the meaning of Article 1.1(a)(1).

74. The text of Article 1.1(a)(1) does not define "government or any public body within the territory of a Member," nor does it prescribe the relationship between these two types of entities. The United States has explained that a proper interpretation of the text, in context, demonstrates that a public body is any entity that has the ability or authority to transfer government financial resources, including, for example, because that entity is meaningfully controlled by the government. 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 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).

75. USDOC having found the GOT's meaningful control through OYAK of Erdemir and Isdemir (which were then found to be "public bodies"), 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). Nothing in the text of that provision, or in the interpretations described above, suggests that only a particular type of governmental entity, such as a government "organ," could exercise such control over another entity. Rather, the characteristics of such an entity might be consistent with those of a government "organ" or "agency," or they might be consistent with those of a "public body," for example, or any other "governmental" entity.

76. While no legal standard under the SCM Agreement would apply to USDOC's findings with respect to OYAK, the Panel may find relevant to its factual assessment of OYAK's status in Turkey the characteristics examined by other panels or the Appellate Body with respect to

"government," "public body," and other governmental entities in other contexts. As discussed, the record evidence concerning OYAK before USDOC exhibits the attributes associated with "government" in this broader sense. Therefore, this record evidence provided a sufficient factual basis for USDOC to examine OYAK as an entity through which the GOT meaningfully controlled Erdemir and Isdemir, and supported its determination that Erdemir and Isdemir are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement.

U.S. RESPONSE TO PANEL QUESTION 59

77. There is no provision in the DSU or the covered agreements that establishes a system of "case-law" or "precedent," or otherwise requires that a panel apply the provisions of the covered agreements consistently with the adopted findings of the Appellate Body absent "cogent reasons" to depart from those findings. Indeed, were a panel to decide to apply the reasoning in prior Appellate Body reports alone, and decline to fulfill its duty under Article 11 to make an objective assessment of the matter before it, the panel would risk creating additional obligations for Members that are beyond what has been provided for in the covered agreements – an act strictly prohibited under Article 3.2.

78. To the extent a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel of course may rely on that reasoning in conducting its own objective assessment of the matter. But that is very different from a conclusion that the interpretation is *controlling* in a later dispute. To say that an Appellate Body interpretation in one dispute is controlling for later disputes would appear to convert that interpretation into an authoritative interpretation of the covered agreement.

79. Such an approach would directly contradict the agreed text of the Marrakesh Agreement, which provides in Article IX:2 that: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." The DSU confirms that panel and Appellate Body reports do not set out authoritative interpretations in Article 3.9.

80. The Appellate Body itself has recognized that prior reports may not bind future adjudicators in its report in *Japan – Alcohol*. According to the Appellate Body, a *negative* consensus report adoption procedure *by the DSB* cannot supplant the "exclusive authority" of *the Ministerial Conference and the General Council* to adopt, by *positive* consensus, an "authoritative interpretation" of a covered agreement, as explicitly established in DSU Article 3.9 and WTO Agreement Article IX:2.

81. The United States refers the Panel to its first written submission, in which it set out a proper interpretation of the text of Article 15.3 of the SCM Agreement in accordance with the ordinary meaning of the text, in context, and in the light of the object and purpose of the SCM Agreement. If the Panel agrees that a proper interpretation of that provision leads to a different conclusion regarding whether "cross-cumulation" is prohibited under Article 15.3 in original investigations, that would provide all the reason the Panel needs not to concur with the interpretation in *US – Carbon Steel (India) (AB)*.