

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

(DS523)

**APPELLEE SUBMISSION
OF THE UNITED STATES OF AMERICA**

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SERVICE LIST

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	EXECUTIVE SUMMARY	1
III.	ARTICLE 11 OF THE DSU DOES NOT SUPPORT AN APPEAL BASED ON THE FALSE EXERCISE OF JUDICIAL ECONOMY	1
IV.	TURKEY REQUESTS AN ADVISORY OPINION NOT PERMITTED BY THE DSU.....	2
V.	THE PANEL ACTED WITHIN ITS DISCRETION TO NOT REACH A FINDING ON TURKEY’S CLAIM UNDER ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT AGAINST USDOC’S EXAMINATION OF OYAK.....	4
VI.	THE APPELLATE BODY SHOULD DECLINE TO COMPLETE THE LEGAL ANALYSIS BECAUSE THERE ARE NOT SUFFICIENT PANEL FINDINGS OR UNCONTESTED RECORD FACTS	6
VII.	CONCLUSION.....	6

TABLE OF REPORTS

Short Form	Full Citation
<i>Australia – Salmon (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010
<i>US – Wool Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

TABLE OF ABBREVIATIONS

Abbreviation	Definition
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
Erdemir	Eregli Demir ve Celik Fabrikalari T.A.S.
I&D Memo	Issues and Decisions Memorandum
Isdemir	Iskenderun Iron & Steel Works Co.
OYAK	Ordu Yardimlasma Kurumu
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USDOC	United States Department of Commerce

I. INTRODUCTION

1. Turkey conditionally appeals under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) the Panel’s determination to exercise judicial economy with respect to Turkey’s claim that the alleged USDOC determination that Ordu Yardimlasma Kurumu (“OYAK”) was a public body is inconsistent with Article 1.1(a)(1) of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”).¹ Turkey’s appeal must be rejected because it lacks a legal basis and could not alter the findings of the Panel that will assist the DSB in making its recommendations.

II. EXECUTIVE SUMMARY²

2. Turkey’s conditional appeal lacks merit for several reasons. First, Article 11 does not impose an obligation on a panel that is subject to appellate review. Second, given the structure of Turkey’s conditional appeal, even if the condition was met, Turkey’s appeal would be purely advisory in nature because Turkey has not set out any basis on which the outcome under Article 1.1(a)(1) could be altered. Third, in addition to the lack of a legal basis, Turkey has not shown that resolution of Turkey’s claim was necessary to resolve the dispute between the parties or that it could alter the recommendations of the DSB, because USDOC did not make a public body determination in respect of OYAK to which Article 1.1(a)(1) applied. Finally, Turkey’s appeal also could not alter the recommendation of the DSB because the Appellate Body does not have a sufficient factual basis to complete the legal analysis.

III. ARTICLE 11 OF THE DSU DOES NOT SUPPORT AN APPEAL BASED ON THE FALSE EXERCISE OF JUDICIAL ECONOMY

3. Turkey appeals the Panel’s decision to not make a finding with respect to OYAK under Article 1.1(a)(1) on the ground that this was an exercise of false judicial economy in breach of Article 11 of the DSU. However, Article 11 does not impose an obligation on a panel subject to appellate review. Turkey’s appeal may be rejected on this basis alone.

4. Article 11 of the DSU states that “a panel should . . . make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” The decision of Members to use the term “should” indicates that Members did not intend to create a legal obligation under Article 11 subject to appellate review. Of note, although sometimes reference is made to a panel’s “duty” under Article 11 of the DSU, the title of the article is “Function of Panels,” not duty. Similarly, Article 11 begins: “The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter

¹ Turkey’s appeal is conditional upon the Appellate Body’s reversal of the Panel’s findings regarding OYAK, as requested by the United States. Turkey’s Other Appellant Submission, para. 1.

² Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 203 words (including footnotes), and this U.S. appellee submission (not including the text of the executive summary) contains 3,370 words (including footnotes).

before it . . .” That is, the “objective assessment” is made to carry out (“accordingly”) the “function” the DSU assigns to a panel.

5. The use of “should make,” therefore, was deliberate and carries meaning. Members are all familiar with the difference between “should” and “shall” and choose carefully whether to use “should” or “shall” in particular parts of the agreements they negotiate. In the text of the DSU, Members chose to use “should” in 21 instances, and to use the word “shall” in 259 instances.³

6. The decision of WTO Members to use the term “should” indicates that Members did not intend to create a legal obligation subject to review. This conclusion is directly reinforced by the limitation of appeals to issues of law in Article 17.6 of the DSU. Therefore, the DSU does not provide for the Appellate Body to conduct any such review under Article 11, and Turkey has no basis for its claim that the Panel “breached” its function (“should make”) under Article 11 of the DSU. A proper basis for a claim of false judicial economy would be one where a panel has erred as a matter of law in not making a legal finding in relation to a claim. Turkey has made no such claim.

IV. TURKEY REQUESTS AN ADVISORY OPINION NOT PERMITTED BY THE DSU

7. In addition to the fact that Turkey has not presented a valid claim of error in its appeal, there is also no basis for the Appellate Body to review Turkey’s conditional appeal because a finding in respect of OYAK would have no necessary implication for the Panel’s finding on Eregli Demir ve Celik Fabrikalari T.A.S. (“Erdemir”) and Iskenderun Iron & Steel Works Co. (“Isdemir”). Any findings made on Turkey’s appeal would therefore be purely advisory in nature and thus contrary to the DSU.

8. The Appellate Body’s task under the DSU is limited to assisting the DSB in discharging its functions under the DSU. Under Article 17.6 of the DSU, an appeal is “limited to issues of law covered in the panel report and legal interpretations developed by the panel.” Further, under Article 17.13, the Appellate Body is only authorized to “uphold, modify or reverse the legal findings and conclusions of the panel.” Since a panel’s function under Article 11 of the DSU is “to assist the DSB in discharging its responsibilities” under the DSU, the Appellate Body, in reviewing a panel’s legal conclusion or interpretation, is thus also assisting the DSB in discharging its responsibilities to find whether the responding Member’s measure is inconsistent with WTO rules. And so, just as a panel must respect its terms of reference as established by the

³ These differences are reflected in the dictionary definitions of “should” and “shall.” “Shall” is defined (in relevant part) as “expressing an instruction or command, or obligation.” Oxford English Dictionary online, third definition of “shall,” available at <<http://www.en.oxforddictionaries.com>>, accessed 12 February 2019. “Should” is “used to indicate obligation, duty, or correctness, typically when criticizing someone’s actions”; indicating a desirable or expected state; used to give or ask advice or suggestions; used to give advice.” Oxford English Dictionary online, first definition of “should,” available at <<http://www.en.oxforddictionaries.com>>, accessed 12 February 2019. The first part of this definition may be misconstrued as expressing that “should” is used to indicate an obligation, but the remainder of the definition clarifies that this “obligation” is in the context of criticism or advice – as in when a parent says (politely) to their child: “You should make your bed.” WTO Members collectively “express[] an instruction or command” (shall) when they choose to create and take on legal obligations.

DSB under Article 7.1 of the DSU only to “make such findings as will assist the DSB in making [its] recommendations,” so too is the Appellate Body not authorized to go beyond the panel’s terms of reference to issue findings on issues that cannot assist the DSB in making its recommendations.

9. In this appellate proceeding, the United States has requested that the Appellate Body reverse, on several independent grounds, the Panel’s conclusion that the United States acted inconsistently with Article 1.1(a)(1) through its findings concerning Erdemir and Isdemir. In Section III of the U.S. Appellant Submission, the United States explains its appeal of the Panel’s interpretation and application of Article 1.1(a)(1) as it relates to the Panel’s findings on Erdemir and Isdemir only. In Section IV, the United States provides an additional independent basis to reverse the Panel’s findings concerning Erdemir and Isdemir, by appealing the Panel’s findings related to OYAK in the context of its assessment of Erdemir and Isdemir. Turkey has conditioned its appeal on a reversal of the Panel’s findings on the basis of the U.S. appeals in Section IV of the U.S. Appellant Submission. If the condition is met, Turkey requests the Appellate Body to reverse the Panel’s exercise of judicial economy with respect to its claim against USDOC’s alleged finding that OYAK was a public body, and to complete the legal analysis to find that USDOC acted inconsistently with Article 1.1(a)(1) in finding OYAK to be a public body.⁴

10. Regardless of the outcome of the U.S. appeals on *any* ground, however, Turkey’s conditional appeal could not alter the ultimate outcome under Article 1.1(a)(1). First, if the U.S. appeals fail, the Panel’s conclusions will be upheld, and there is no basis to reach Turkey’s appeal. Second, if the United States *prevailed* on its appeal of the Panel’s findings regarding Erdemir and Isdemir on a ground set out in Section III of its Appellant Submission (*i.e.*, a ground not related to OYAK), then Turkey’s appeal is advisory because USDOC’s determination with respect to Erdemir and Isdemir would stand even if the findings with respect to OYAK also were reversed. Turkey’s appeal with respect to OYAK only requests a finding that OYAK was not properly found to be a public body. Turkey’s appeal would not resuscitate the Panel’s findings regarding Erdemir and Isdemir that would have been found (in this scenario) to have failed for independent reasons.

11. Third, if the United States prevailed and the Appellate Body reverses the Panel’s findings under Article 1.1(a)(1) on the basis of the Panel’s findings regarding OYAK alone (as set out in Section IV of the U.S. Appellant Submission), Turkey’s conditional appeal also is advisory. As discussed in Section V of this submission, USDOC did not attribute a financial contribution to OYAK and therefore Article 1.1(a)(1) does not apply to it. And, even had USDOC allegedly erred in finding OYAK to be a public body, such a finding has no necessary implication for the Panel’s findings on Erdemir and Isdemir (which, in this scenario, would have been reversed), the entities that did make the financial contributions at issue. Again, Turkey’s appeal would not resuscitate the Panel’s findings regarding Erdemir and Isdemir. A finding by the Appellate Body as to whether OYAK was properly found to be a public body, therefore, could not assist the DSB

⁴ Turkey’s Other Appellant Submission, paras. 14-15.

in recommending the United States to bring the U.S. measures into compliance with that provision.

12. Therefore, the requested findings under Turkey’s conditional appeal are advisory in nature and would not assist the DSB in making the recommendations provided for in Article 19.1 of the DSU. If the condition upon which Turkey’s appeal is made should be met, the Appellate Body must decline to make findings on Turkey’s appeal.

V. THE PANEL ACTED WITHIN ITS DISCRETION TO NOT REACH A FINDING ON TURKEY’S CLAIM UNDER ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT AGAINST USDOC’S EXAMINATION OF OYAK

13. For completeness, we also address Turkey’s argument that the Panel failed to make an objective assessment of the matter before it in accordance with Article 11 of the DSU by exercising false judicial economy regarding Turkey’s claim that USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in finding that OYAK is a public body.⁵ Turkey is mistaken.

14. Article 11 states that panels should make such findings as “will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”⁶ This task is related to Article 3.4 of the DSU (the “[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this understanding and under the covered agreements”); and Article 3.7 of the DSU (“[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”).⁷ As the Appellate Body set forth in *US – Wool Shirts and Australia – Salmon*, Articles 3.4 and 3.7 provide both the basis for and the constraint on a panel’s exercise of judicial economy.⁸

15. Thus, while the Panel’s findings are made to assist the DSB in the performance of its duties under Article 3.4 so as to help achieve the aim of the dispute settlement mechanism as set out in Article 3.7, there is nothing in Article 11 that requires a panel to examine all legal claims made by the complaining party.⁹ Rather, “[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.”¹⁰ And, it is for the panel to determine which claims those would be.¹¹

⁵ Turkey’s Other Appellant Submission, paras. 2-15.

⁶ DSU, Art. 11.

⁷ DSU, Art. 3.4, 3.7.

⁸ *US – Wool Shirts (AB)*, p. 19; *Australia – Salmon (AB)*, para. 223.

⁹ *US – Wool Shirts (AB)*, p. 18.

¹⁰ *US – Wool Shirts (AB)*, p. 19; *see also* n. 30 (“[t]he ‘matter at issue’ is the ‘matter referred to the DSB’ pursuant to Article 7 of the DSU.”).

¹¹ *See US – Poultry (China)*, para. 7.306 (“[t]he Appellate Body has consistently ruled that panels are not required to address all the claims made by a complaining party but rather a panel has discretion to determine which claims it must address in order to resolve the dispute between the parties.”).

16. Turkey has not shown that the Panel’s use of judicial economy would prevent the DSB from making the recommendations necessary to help achieve a satisfactory resolution of the dispute. As the United States explained before the Panel, “the USDOC never attributed a financial contribution to OYAK, and therefore never made a public body determination in respect of that entity.”¹² Rather, in determining that hot-rolled steel was provided for less than adequate remuneration, USDOC found Erdemir and Isdemir to be public bodies.¹³ While USDOC found that the provision of hot-rolled steel by Erdemir and Isdemir was a financial contribution, USDOC did not attribute a financial contribution to OYAK. Indeed, because of OYAK’s relationship with Erdemir, USDOC’s examination of OYAK was for the purposes of discussing the Government of Turkey’s meaningful control over Erdemir and Isdemir and the financial contribution provided by *those* two entities.¹⁴ It was in the context of this analysis that USDOC discussed OYAK itself, and it did not make a legal finding with respect to OYAK.

17. Nor was it necessary, or appropriate, for USDOC to make a legal finding that OYAK is a public body. 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” 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. USDOC did not find that OYAK made a financial contribution, and did not find that OYAK provided a countervailable subsidy. Therefore, the requirements of Article 1.1(a)(1) do not apply.

18. This being the case, the Panel could not have made a finding of inconsistency with respect to Turkey’s claim under Article 1.1(a)(1) concerning OYAK, and the Panel’s decision to exercise judicial economy with respect to this claim did not affect the ability of the DSB to make sufficiently precise recommendations. Accordingly, the Panel properly determined to not reach a finding under Article 1.1(a)(1) with respect to Turkey’s OYAK claim, and Turkey’s claim to the contrary is without merit.

¹² See United States’ First Written Submission, para. 79. See also OCTG Final I&D Memo, pp. 21-22 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, pp. 11-12 (Exhibit TUR-46).

¹³ OCTG Final I&D Memo, p. 35 (“[W]e find Erdemir and Isdemir to be public bodies, and hence ‘authorities,’ Consequently, we find that the HRS Erdemir and Isdemir supplied to Borusan and Toscelik is a financial contribution in the form of a governmental provision of a good”) (Exhibit TUR-85); HWRP Final I&D Memo, p.23 (“[W]e continue to find Erdemir and Isdemir to be public bodies, and hence ‘authorities,’ Consequently, we find that the HRS Erdemir and Isdemir supplied to the respondents is a financial contribution in the form of a governmental provision of a good”) (Exhibit TUR-46); CWP Final I&D Memo, p. 30 (“[W]e continue to find Erdemir and Isdemir to be public bodies, and hence ‘authorities,’ Consequently, we find that the HRS Erdemir and Isdemir supplied to the Borusan Companies is a financial contribution in the form of a governmental provision of a good”) (Exhibit TUR-22); WLP Final I&D Memo, p. 36 (“[W]e continue to find Erdemir and Isdemir to be public bodies, and hence ‘authorities,’ Consequently, we find that the HRS Erdemir and Isdemir supplied to Toscelik is a financial contribution in the form of a governmental provision of a good”) (Exhibit TUR-122).

¹⁴ OCTG Final I&D Memo, p. 35 (Exhibit TUR-85); HWRP Final I&D Memo, p. 23 (Exhibit TUR-46); CWP Final I&D Memo, p. 30 (Exhibit TUR-22); WLP Final I&D Memo, p. 36 (Exhibit TUR-122).

VI. THE APPELLATE BODY SHOULD DECLINE TO COMPLETE THE LEGAL ANALYSIS BECAUSE THERE ARE NOT SUFFICIENT PANEL FINDINGS OR UNCONTESTED RECORD FACTS

19. Given that Turkey’s claim on appeal is without merit, there is no basis for the Appellate Body to complete the legal analysis of Turkey’s claim that USDOC’s determination regarding OYAK is inconsistent with Article 1.1(a)(1) of the SCM Agreement, as Turkey requests.¹⁵

20. The Appellate Body also does not have a basis to complete the legal analysis because there are not sufficient uncontested facts or panel findings on whether USDOC determined OYAK to be a public body. That is, it remains a disputed fact whether USDOC reached a finding that OYAK was a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. Before the Panel, and as discussed above, the United States explained that USDOC did not find OYAK to be a public body, nor did it need to.¹⁶ Turkey disagreed.¹⁷ The Panel, as the trier of fact, did not resolve this disputed fact between the parties, and it did not reach a finding as to whether USDOC found OYAK to be a public body. Rather, the Panel evaluated USDOC’s findings with respect to OYAK in the context of its assessment of USDOC’s determination that Erdemir and Isdemir were public bodies.¹⁸

21. In addition, as Turkey’s appeal and request for completion of the legal analysis is *conditional* upon the Appellate Body’s reversal of the Panel’s findings concerning OYAK at paragraphs 7.37 through 7.40 of its report,¹⁹ the Appellate Body could not rely upon those findings in completing the legal analysis.

22. Therefore, the Appellate Body does not have a sufficient factual basis to complete the legal analysis as to whether an alleged USDOC determination that OYAK is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

VII. CONCLUSION

23. For the foregoing reasons, the United States respectfully requests that the Appellate Body reject Turkey’s conditional claim on appeal.

¹⁵ Turkey’s Other Appellant Submission, para. 15.

¹⁶ Panel Report, para. 7.17.

¹⁷ Panel Report, paras. 7.18-7.19.

¹⁸ *E.g.*, Panel Report, paras. 7.21-7.22.

¹⁹ Turkey’s Other Appellant Submission, paras. 1, 15.