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

(DS523)

APPELLANT SUBMISSION
OF THE UNITED STATES OF AMERICA

January 25, 2019

SERVICE LIST

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Brazil – Aircraft (AB)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
Canada – Dairy (AB)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999
Chile – Price Band System (Article 21.5 – Argentina) (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
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Korea – Dairy (AB)	Appellate Body Report, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, adopted12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
Mexico – Anti-Dumping Measures on Rice (AB)	Appellate Body Report, Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice, WT/DS295/AB/R, adopted 20 December 2005
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted 25 March 2011
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US – Carbon Steel (India) (AB)	Appellate Body Report, United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, WT/DS436/AB/R, adopted 19 December 2014
US – Coated Paper (Indonesia) (Panel)	Panel Report, United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia, WT/DS491/R and Add.1, adopted 22 January 2018
US – Continued Zeroing (AB)	Appellate Body Report, United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R, adopted 4 February 2009
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea, WT/DS296/AB/R, adopted 20 July 2005

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US – Zeroing (EC) (AB)	Appellate Body Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R, adopted 9 May 2006

TABLE OF ABBREVIATIONS

Abbreviation	Definition
AD Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
Borusan	Borusan Istikbal Ticaret and Borusan Mannesmann Boru Sanayi
CVD	Countervailing Duty
CWP	Circular Welded Carbon Steel Pipes and Tubes
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
Erdemir	Eregli Demir ve Celik Fabrikalari T.A.S.
GOT	Government of Turkey
HRS	Hot-Rolled Steel
HWRP	Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes
I&D Memo	Issues and Decisions Memorandum
IEP	Investment Encouragement Program
Isdemir	Iskenderun Iron & Steel Works Co.
LTAR	Less Than Adequate Remuneration
MMZ	MMZ Onur Boru Profil uretim San Ve Tic. A.S.
OCTG	Oil Country Tubular Goods
OYAK	Ordu Yardimlasma Kurumu
Ozdemir	Ozdemir Boru Profil San ve Tic. Ltd. Sti.
R&D	Research and Development
SCM Agreement	Agreement on Subsidies and Countervailing Measures

Toscelik	Toscelik Profil ve Sac Endustrisi A.S.
TESEV	Turkish Economic and Social Studies Foundation
TPA	Turkish Prime Ministry Privatization Administration
USDOC, Commerce	United States Department of Commerce
USITC, ITC	United States International Trade Commission
VAT	Value-Added Tax
WLP	Welded Line Pipe

I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. The United States presents this appellant submission pursuant to Rule 21 of the Working Procedures for Appellate Review. The United States appeals certain legal findings and interpretations under the *Agreement on Subsidies and Countervailing Measures (*"SCM Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") in the *United States – Countervailing Measures on Certain Pipe and Tube Products from Turkey* panel report. The Panel's findings are not based on proper interpretations and applications of the legal provisions at issue as they pertain to the determinations of the United States Department of Commerce ("USDOC") and the United States International Trade Commission ("USITC"). For these and the other reasons identified in this submission, the Panel's findings must be reversed.

2. First, the Panel erred in finding that certain measures and claims – directed to alleged U.S. injury and benefit "practices" – are within the scope of the Panel's terms of reference. These measures and claims were not identified in Turkey's consultations request, but were set forth for the first time in Turkey's request for establishment of a panel. Since it is impossible to determine from the face of the consultations request that Turkey identified any U.S. "practices," much less what is the legal basis for any claims raised against those practices, the request fails to meet the requirements of DSU Article 4.4. Moreover, since these measures and claims were not identified in Turkey's consultations request, they could not form part of the matter identified in Turkey's panel request under DSU Article 6.2 and referred to the Panel under DSU Article 7.1. By finding that these measures and claims fell within its terms of reference, the Panel therefore erred in its application of DSU Articles 4.4, 6.2, and 7.1. These issues are addressed in Section II of this submission.

3. Second, the Panel erred in finding that USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in determining Eregli Demir ve Celik Fabrikalari T.A.S. ("Erdemir") and Iskenderun Iron & Steel Works Co. ("Isdemir") to be public bodies. As demonstrated below, the Panel erred in its interpretation and application of Article 1.1(a)(1). The Panel's erroneous interpretation in this dispute illustrates the potential hazard introduced by the Appellate Body's approach to public body in *US – Carbon Steel (India)*, and in particular a suggestion in that report that there must be a demonstration that the government "in fact *exercised* control over the [entity] *and its conduct*."[2] Specifically, the Panel found that the *ability* of the government to intervene in an entity's critical operations and key decisions was not relevant to a public body determination, and required evidence that the government actually *had exercised* that control.[3] However, such a requirement conflates the analysis of entrustment and direction of a private body with a public body analysis – an approach that cannot find support in the text, context or structure of Article 1.1(a)(1). The Panel also misinterpreted and misapplied Article 1.1(a)(1)

[1] 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 1349 words (including footnotes), and this U.S. appellant submission (not including the text of the executive summary) contains 36,861 words (including footnotes).
[2] *US – Carbon Steel (India) (AB)*, para. 4.37 (first emphasis in original, second emphasis added).
[3] Panel Report, para. 7.42.

when it found that an entity's engagement in commercial behavior is necessarily relevant to a finding that the entity is a public body. The Panel's errors suggest that the Appellate Body should take this opportunity to clarify its articulation of its approach to Article 1.1(a)(1), and if necessary, modify that approach in conformity with considerations discussed in this submission. Lastly, the Panel erred in its application of Article 1.1(a)(1) by reviewing each piece of record evidence in isolation from one another. The Panel committed the same error as the panel in *US – Countervailing Duty DRAMS (Korea)* in testing whether each piece of evidence *in and of itself* could demonstrate that Erdemir and Isdemir are public bodies, and never considering whether the record, *taken together*, could support the conclusion that USDOC found and demonstrate that Erdemir and Isdemir are public bodies.[4] These issues are discussed in Section III of this submission.

4. Third, the Panel erred by assessing evidence concerning OYAK in its findings under Article 1.1(a)(1) with respect to Erdemir and Isdemir. Specifically, the Panel erred by "making the case" for Turkey and evaluating Turkey's claim against USDOC's public body determinations concerning Erdemir and Isdemir while incorporating Turkey's arguments concerning OYAK from its separate claim against OYAK. The Panel also applied an erroneous approach in its evaluation when it assessed the evidence concerning OYAK in isolation, and failed to consider the evidence in totality, as USDOC did. These issues are discussed in Section IV of this submission.

5. Fourth, the Panel erred in its interpretation and application of Article 2.1(c) and 2.4 when it found that USDOC acted inconsistently by failing to properly identify and substantiate the existence of a subsidy programme in the form of the provision of hot-rolled steel ("HRS") for less than adequate remuneration ("LTAR").[5] Specifically, we the Panel erred in its assessment of the existence of a "subsidy programme" by interpreting the term "programme" in a manner that is inconsistent with the ordinary meaning of the term in Article 2.1 and the object and purpose of the SCM Agreement.[6] In particular, the Panel misconstrued the Appellate Body's guidance in a manner that read into the text a requirement that investigating authorities demonstrate "systematic" *subsidization* to substantiate the existence of a "subsidy programme," rather than a systematic *series of actions* pursuant to which subsides are provided. The Panel also erred in its application of Article 2.1(c) because *for a third time* it viewed the record evidence in isolation and not in its *totality*, as USDOC did. Further, because the Panel's finding under Article 2.4 is dependent on its analysis under Article 2.1(c),[7] its finding under Article 2.4 must also be reversed. These issues are discussed in Section V of this submission.

6. Fifth, the Panel erred in finding that USDOC's application of facts available during the Oil Country Tubular Goods ("OCTG"), Welded Line Pipe ("WLP"), and Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes ("HWRP") investigations was inconsistent with Article 12.7 of the SCM Agreement. Specifically, the Panel erred in applying Article 12.7 when it found that USDOC had not engaged in a "process of reasoning and evaluation" in

[4] *See US – Countervailing Duty Investigating on DRAMS (Korea) (AB)*, para. 154.
[5] Panel Report, para. 7.161.
[6] Panel Report, paras. 7.137-7.162.
[7] Panel Report, para. 7.162.

selecting facts available during these proceedings. As will be explained below, USDOC *did* engage in reasoning and evaluation, consistent with Article 12.7, in selecting among the facts available to find reasonable replacements for missing information that was necessary to reach a subsidization determination in each investigation. In addition, with regards to the WLP investigation, the Panel also erred by making findings regarding USDOC's application of facts available with respect to the Provision of HRS for LTAR program, as Turkey provided *no* substantive argumentation regarding that program during the course of panel proceedings. Since Turkey provided no argumentation, there is no basis for the Panel's finding that USDOC's application of facts available with respect to this program is inconsistent with Article 12.7. These issues are discussed in Section VI of this submission.

7. Finally, the Panel erred in finding that USITC has a "practice" of cumulatively assessing the effects of subsidized imports with those of non-subsidized imports, and that "cross-cumulation" is inconsistent with Article 15.3 of the SCM Agreement both "as such" as a practice and "as applied" in the OCTG, WLP, and HWRP investigations. The Panel erred in its interpretation and application of Article 15.3 in three respects. First, the Panel erred in its application of Article 15.3 because it found that USITC had a "practice" of cumulating the effects of subsidized imports with the effects of dumped, non-subsidized imports. Second, the Panel erred in its interpretation because it found that "cross-cumulation" is inconsistent with Article 15.3. Third, the Panel erred in its application of Article 15.3 because its findings were based on its erroneous interpretation of Article 15.3. These issues are discussed in Section VII of this submission.

8. For each of these reasons, we request for the Appellate Body to reverse the Panel's findings on these issues.

II. THE PANEL ERRED IN FINDING THAT MEASURES AND CLAIMS DIRECTED TO ALLEGED U.S. INJURY AND BENEFIT "PRACTICES" WERE WITHIN THE PANEL'S TERMS OF REFERENCE

9. The United States appeals the Panel's finding that certain measures and claims – directed to alleged U.S. injury and benefit "practices" – are within the scope of the Panel's terms of reference. These measures and claims were not identified in Turkey's consultations request, but were set forth for the first time in Turkey's request for establishment of a panel. By finding that these measures and claims fell within its terms of reference, the Panel erred in its application of DSU Articles 4.4, 6.2, and 7.1.

10. The DSB established the panel with standard terms of reference. Under Article 7.1 of the DSU, the panel's terms of reference were thus to examine "the matter" identified in Turkey's panel request and to make such findings as would assist the DSB in making the recommendation under the SCM Agreement.[8] The "matter" identified in the panel request comprises those measures and claims that are set out in that request and must be the same "matter" on which the parties consulted.

[8] DSU, Article 7.1.

11. Article 4.4 of the DSU 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."[9] As the Appellate Body stated in *Brazil – Aircraft*:

> Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.[10]

12. 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."[11] Thus, the wording of Article 6.2 differs slightly from Article 4.4. In particular, the identification of the "measures at issue" must be more "specific," indicating a narrowing and not an expansion of the measures identified. But while the legal basis in the consultation request was an "indication" (a "sign or piece of information that indicates something"), in the panel request a "summary" (a "brief statement or account of the main points of something") is required, which may well be more comprehensive than the "piece of information" previously given.

13. Consistent with the plain meaning of these terms, the Appellate Body has noted that the panel request may neither "expand the scope"[12] nor change the essence of a consultations request.[13] While an additional claim may be included in the panel request that grows out of the matter in the consultations request, new measures may not. Accordingly, in determining the matter before it, 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 [measures] in the panel request that were not identified in the consultations request."[14]

14. In this dispute, Turkey sought to add to its panel request two measures that it had not identified in its consultation request. These two measure are: (i) 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 antidumping or countervailing duty petitions are filed on the same day"[15]; and (ii) that the United States has a "practice" of rejecting in-country prices as a benchmark "based solely on evidence that the government owns

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[9] DSU, Article 4.4 (emphasis added).
[10] *Brazil – Aircraft (AB)*, para. 131.
[11] DSU, Article 6.2 (emphasis added).
[12] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (emphasis omitted) (quoting *US – Upland Cotton (AB)*, para. 293).
[13] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (emphasis omitted) (citing *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 137 (other citations omitted)).
[14] *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 294.
[15] Panel Request, paras. 8.(A).5.a, 8.(B).4.a, 8.(C).4.a, 8.(D).3.a.

or controls the majority or a substantial portion of the market for the good."[16] Turkey then claimed that these two additional measures were inconsistent "as such" with Article 15.3 and Article 14(d) of the SCM Agreement, respectively.[17]

15. Neither of these alleged practices was identified in Turkey's request for consultations, and therefore neither could form part of the matter identified in Turkey's panel request.

16. In Section A of the consultation request, entitled "Specific Measures at Issue," Turkey identified "preliminary and final countervailing duty measures imposed by the United States on Turkish imports of Oil Country Tubular Goods ('OCTG'); Welded Line Pipe; Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes; and Circular Welded Carbon Steel Pipes and Tubes."[18] The only use of the term "practice" is a reference to "related practices" in connection with "the measures identified in Annex 1,"[19] where Annex 1 is simply a list of various documents related to the OCTG, WLP, HWRP, and Circular Welded Carbon Steel Pipes and Tubes ("CWP") investigations.[20] Thus, this reference to "practices" is so general that it does not *identify* any practices, let alone the specific "practices" Turkey identified for the first time in its panel request.[21]

17. Indeed, the Panel *agreed* that Section A of Turkey's consultation request does not identify the contested U.S. practices. As the Panel explained in its report: "We do not consider the reference to 'related practices' is particularly clear, as it *does not identify* which are the practices that were followed in connection with the measures in Annex 1 that are the focus of Turkey's concerns."[22] The Panel also found the generic modifier "related" to not be informative.[23] As the Panel observed, "When read in isolation, the reference to 'related practices' in section (A) can *at most* be understood as related to any preliminary or final countervailing duty or injury determination issued in the four proceedings at issue, or any definitive countervailing duty imposed resulting from those proceedings."[24]

18. The Panel then proceeded to analyze Turkey's consultations request "on the whole," paying particular attention to Section B of the request, which sets forth the "Legal Basis of the Complaint."[25] The Panel noted Turkey's statement in that section that its "concerns relate to both the aspect of the measures and underlying administrative proceedings cited above as well as ongoing practices applied in administrative proceedings more generally."[26] The Panel found that

[16] Panel Request, para. 8.(A).2.a.
[17] Panel Request, paras. 8.(A).5.a-b, 8.(B).4.a-b, 8.(C).4.a-b, 8.(D).3.a-b.
[18] Consultations Request, section A.
[19] Consultations Request, section A.
[20] Consultations Request, Annex 1.
[21] *Compare* Consultations Request, sections A-B, *with* Panel Request, paras. 8.(A).2, 8.(A).5, 8.(B).4, 8.(C).4, 8.(D).3.
[22] Panel Report, para. 7.86.
[23] Panel Report, para. 7.86.
[24] Panel Report, para. 7.86 (emphasis added).
[25] Panel Report, paras. 7.87-7.92.
[26] Panel Report, para. 7.88.

this "reference to 'ongoing practices' may be linked to Turkey's identification of each the different aspects of the identified 'legal basis' of its consultations request," which include the rejection of in-country prices for HRS as a benchmark for LTAR and the use of cross-cumulation in determining injury.[27] The Panel thus found that, despite the problems it had found in Section A of the panel request, Turkey's concerns under Section B related not only to the four challenged proceedings, but also to ongoing practices applied in connection with benefit determinations and injury determinations.[28] Thus, the Panel concluded that Turkey's reference to "related practices" in Section A may be understood to include "ongoing practices" related to injury and benefit determinations.[29]

19. The Panel's attempt to "link" Turkey's general reference to "ongoing practices" to two of Turkey's legal claims in Section B is flawed. In Section B, Turkey claims that "the measures *identified above* [in Section A] … are inconsistent with the United States' obligations under the WTO Agreements," and identifies specific "aspects of the measures and underlying administrative proceedings" that it is concerned with.[30] Since the only measures "identified" in Section A of the consultations request are the U.S. preliminary and final determinations in the OCTG, WLP, HWRP, and CWP proceedings, each of the claims identified in Turkey's request is expressly limited to challenging the determinations made in those four proceedings. Turkey's claims regarding benefit are further limited to *one proceeding* only: footnote 5 to the consultations request states that Turkey's claim regarding USDOC's benefit determination "*is limited to* the countervailing duty determinations related to OCTG (C-489-817)."[31]

20. Turkey's general reference to "ongoing practices applied in administrative proceedings more generally" does not "identify" *any* contested measures. And any attempt to "link" Turkey's reference to "ongoing practices" with a listed aspect of Turkey's concerns regarding the challenged proceedings fails on a further ground: the request still fails to identify *which* of these aspects has an associated "practice" that forms the legal basis of Turkey's complaint, or *what the content* of such a practice was alleged to be. There are *five* "aspects" listed in the consultations request – relating to the United States' "Public Body Determination," "Benefit Determination," "Specificity Determination," "Use of Facts Available," and "Injury Determination" in the challenged proceedings. The consultation request makes no link to and describes no content of any alleged practice at all. In its panel request, Turkey included "as such" claims directed to only *two* of these aspects.[32] The United States had no way of knowing which, if any, of these aspects Turkey would bring "as such" claims against, much less the content of what such a practice would be alleged to comprise, since Turkey did not actually connect its general reference to "ongoing practices" to any specific measure.

21. Thus, reading Turkey's consultations request "on the whole" does not remedy its legal defects. It is impossible to determine from the face of the request that Turkey has identified any

[27] Panel Report, para. 7.90.
[28] Panel Report, paras. 7.92, 7.278.
[29] Panel Report, paras. 7.92, 7.278.
[30] Consultations Request, section B.
[31] Consultations Request, n. 5.
[32] *Compare* Consultations Request, section B, *with* Panel Request, paras. 8.(A).2, 8.(A).5, 8.(B).4, 8.(C).4, 8.(D).3.

U.S. "practices," much less what is the legal basis for any claims raised against those practices. Turkey therefore failed to identify any "practice" as a measure at issue in its consultations request, nor did it give any "indication of the legal basis of the complaint" with respect to any alleged U.S. practice. Accordingly, the "practice" measures and any claims relating to them could not form part of the matter the DSB charged the panel with examining as part of Turkey's panel request. The Panel's findings that the "practice" measures and corresponding claims were within its terms of reference are incorrect and should be reversed.[33]

III. THE PANEL ERRED IN ITS INTERPRETATION AND APPLICATION OF ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

22. The United States appeals the Panel's findings that USDOC's public body determinations concerning Erdemir and Isdemir are inconsistent with Article 1.1(a)(1) of the SCM Agreement. The Panel's findings are based on both an erroneous interpretation and an erroneous application of Article 1.1(a)(1) of the SCM Agreement.

23. The Panel's erroneous interpretation in this dispute illustrates the potential hazard introduced by the Appellate Body's approach to public body in *US – Carbon Steel (India)*, and in particular a suggestion in that report that there must be a demonstration that the government "in fact *exercised* control over the [entity] *and its conduct*."[34] As we will discuss below, the Panel found that the *ability* of the government to intervene in an entity's critical operations and key decisions was not relevant to a public body determination, and required evidence that the government actually *had exercised* that control.[35] However, to require a demonstration that the government had exercised control over an entity and its conduct would conflate the analysis of entrustment and direction of a private body with a public body analysis – an approach that cannot find support in the text, context or structure of Article 1.1(a)(1). Thus, the Panel's error suggests that the Appellate Body should to take this opportunity to clarify its articulation of its approach to Article 1.1(a)(1), and if necessary, modify that approach in conformity with the considerations discussed in Section III.A., below.

24. In Section III.A., we also explain that the Panel erred in its interpretation and application of Article 1.1(a)(1) when it found that an entity's engagement in commercial behavior is necessarily relevant to a finding that the entity could be a public body. As we demonstrate below, the Panel's interpretation of Article 1.1(a)(1) does not comport with the text, context, and structure of that provision.

25. In Section III.B., we explain that the Panel also erred in its application of Article 1.1(a)(1) because it failed to consider whether USDOC's determination could be supported by the evidence taken together, in light of the totality of the record, and instead reviewed each piece of record evidence in isolation to determine whether each piece, *in and of itself*, proved that Erdemir and Isdemir were public bodies. We explain why, under a proper interpretation and application of Article 1.1(a)(1), an objective and unbiased investigating authority could have

[33] Panel Report, paras. 7.92-7.93, 7.278-7.279, 8.1.a, 8.1.b.
[34] *US – Carbon Steel (India) (AB)*, para. 4.37 (first emphasis in original, second emphasis added).
[35] Panel Report, para. 7.42.

determined, based on the totality of the record evidence, that Erdemir and Isdemir are public bodies within the meaning of Article 1.1(a)(1).

A. The Panel's Findings Do Not Accord With the Proper Interpretation of Article 1.1(a)(1) of the SCM Agreement

26. This section demonstrates that the Panel erred in its interpretation of Article 1.1(a)(1) of the SCM Agreement, and also misunderstood the approach articulated by the Appellate Body in *US – Carbon Steel (India)*. We first explain the legal framework governing public body findings, and then demonstrate why the Panel's findings are neither supported by the text of Article 1.1(a)(1), nor supported by prior Appellate Body reports. The Panel's understanding of the Appellate Body's suggestion that there must be a demonstration that the government "in fact *exercised* control over the [entity] *and its conduct*"[36] conflates the analysis of entrustment and direction of a private body with a public body analysis. The Panel also erred in its interpretation when it determined that evidence of commercial behavior of an entity is necessarily relevant to a public body analysis. The Panel's errors suggest that the Appellate Body should take this opportunity to clarify its articulation of its approach to Article 1.1(a)(1), and if necessary, modify that approach in conformity with the considerations discussed below.

1. The Proper Interpretation of Article 1.1(a)(1) of the SCM Agreement Indicates That a Public Body Is Any Entity That the Government Meaningfully Controls, Such That When the Entity Conveys Economic Resources, It Is Transferring the Government's Own Resources

27. Article 1.1(a)(1) of the SCM Agreement concerns whether there is a "financial contribution" by a government or any public body – that is, where there is a "a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)," foregone or uncollected "government revenue," "provid[ing] goods or services other than general infrastructure", "purchas[ing] goods," and "mak[ing] payments to a funding mechanism." The broad language used and multiple methods of conveying value described in this article reveal an intention to capture within the meaning of "financial contribution" a broad array of transfers of value.[37]

28. That is, the purpose of the financial contribution analysis is to determine whether a transfer of value was made and can be attributed to the government. As the Appellate Body has found, Article 1.1(a):

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[36] *US – Carbon Steel (India) (AB)*, para. 4.37 (first emphasis in original, second emphasis added).

[37] The dictionary definition of "contribution" is "something paid or given (voluntarily) to a common fund or stock," and that of "financial" is "of or pertaining to revenue or money matters. Similarly, "finance" is defined as "the monetary resources of a monarch, State, company, or individual" or "the management of (esp. public) money." The New Shorter Oxford English Dictionary, Volume I, pp. 498-499 ("contribution"), 950 ("finance" and "financial") (1993). Thus, the composite of the term "financial contribution" of the dictionary definitions is "of or pertaining to revenue or money matter" that is "paid or given to a common fund or stock."

> defines and identifies the governmental conduct that constitutes a financial contribution. It does so both by listing the relevant conduct, and by identifying certain entities and the circumstances in which the conduct of those entities will be considered to be conduct of, and therefore be attributed to, the relevant WTO Member.[38]

29. If the entity is "a government or any public body," and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there can be a financial contribution.[39] The use of distinct terms in Article 1.1(a)(1) to describe the relevant entities – "a government" and "any public body" – suggests that these terms have distinct meanings.[40] That both entities are referred to collectively as "government" and are capable of making a "financial contribution" suggests the core attribute they share is the ability to convey the economic resources of the state.

30. The term "government," means, among other things: "The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry."[41] In *Canada – Dairy*, the Appellate Body explained that a "'government agency' is, in our view, an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens."[42]

31. With respect to the term "public body," the Appellate Body considers that "the term public body in Article 1.1(a)(1) of the SCM Agreement means 'an entity that possesses, exercises or is vested with governmental authority.'"[43] While this articulation is uncomfortably similar to that the Appellate Body had provided for "government agency",[44] the Appellate Body correctly understood that a public body need not have the "power to regulate, control, or supervise individuals, or otherwise restrain conduct of others."[45] The Appellate Body also has acknowledged, where there is evidence that a government meaningfully controls an entity, such that the government can use that entity's resources as its own, such evidence may be relevant for purposes of determining whether a particular entity constitutes a public body.[46] In light of the text of Article 1.1(a)(1) explained above, if a public body is understood to be an entity "vested with governmental authority or exercising a governmental function,"[47] then the core authority or

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[38] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[39] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[40] *See US – Countervailing Duty Measures on Certain Products from China (Panel)*, para. 7.68.
[41] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.57 (citing Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1123).
[42] *Canada – Dairy (AB)*, para. 97.
[43] *US – Carbon Steel (India) (AB)*, para. 4.37.
[44] *Canada – Dairy (AB)*, para. 97.
[45] *US – Carbon Steel (India) (AB)*, para. 4.17 (rejecting India's argument that in order to be a public body, an entity must have the power to regulate, control, or supervise individuals, or otherwise restrain conduct of others).
[46] *US – Carbon Steel (India) (AB)*, para. 4.20.
[47] *US – Carbon Steel (India) (AB)*, para. 4.17

function at issue for purposes of Article 1.1(a)(1) is whether the entity can convey the economic resources of the state.[48]

32. The context supplied by "financial contribution" further suggests a different common concept between "government" and "public body." As discussed above, the list of actions described in the subparagraphs of Article 1.1(a)(1) demonstrate that a "financial contribution" is to convey value. Thus, if a "financial contribution" means to convey something of value, this suggests that the concept sought to be captured by the SCM Agreement term is the use by a government of its resources, or resources it controls, to convey value to economic actors. If a government undertakes the activities described in Article 1.1(a)(1)(i)-(iii), there is a conveyance of value from a Member to a recipient. Equally, when there is an entity whose resources the Member can control and use, and the entity engages in the same activities, there is a conveyance of value from a Member to a recipient.

33. Thus, anytime an economic value is transferred, through one of the actions described in Article 1.1(a)(1) of the SCM Agreement, and that value belongs to, or is ultimately controlled by, the government, that transfer is necessarily, in the Appellate Body's words, an "exercise of governmental authority." That is, an entity that is meaningfully controlled by the government and engaged in conduct described in Article 1.1.(a)(1) has "authority" over government resources.[49] Thus, in such circumstances, when an entity controlled by the government transfers the government's resources, it is making a financial contribution, just as the government (in the narrow sense) makes a financial contribution by engaging in the identical conduct described in Article 1.1(a)(1), subparagraphs (i)-(iii) and the first clause of subparagraph (iv).

34. Therefore, a proper interpretation of the text of Article 1.1(a)(1), in context, demonstrates that a public body is any entity a government meaningfully controls, such that when the entity conveys economic resources, it is transferring the government's own resources. The financial contribution flowing to a recipient through the economic activity of an entity meaningfully controlled by the government conveys value from a Member to a recipient in the same way as if the government had provided the financial contribution directly. Under such circumstances, the transfer of financial resources would constitute a "financial contribution" attributable to the government.

[48] The United States recalls that the ordinary meaning of the composite term "public body" according to dictionary definitions would be "an artificial person created by legal authority; a corporation; an officially constituted organization" that is "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." The New Shorter Oxford English Dictionary, pp. 253 ("body"), 2404 ("public") (1993).

[49] As the Appellate Body has acknowledged, where there is evidence that a government meaningfully controls an entity, such that the government can use that entity's resources as its own, such evidence may be relevant for purposes of determining whether a particular entity constitutes a public body. *See US – Carbon Steel (India) (AB)*, para. 4.20.

2. The Panel Erred in Its Interpretation and Application of Article 1.1(a)(1) by Requiring Evidence of Actual Control of an Entity's Operations, Collapsing the Analyses of "Public Body" and Entrustment or Direction of a Private Body

35. The Panel erred in finding that the USDOC's determinations that Erdemir and Isdemir were public bodies were contrary to Article 1.1(a)(1) of the SCM Agreement. The Panel's error followed from its erroneous interpretation and application of Article 1.1(a)(1). The Panel considered that the USDOC failed to demonstrate that the Government of Turkey meaningfully controls Erdemir and Isdemir because USDOC failed to point to evidence that the Prime Ministry Privatization Administration (TPA) actually *exercised* its veto power or *sought to influence* Erdemir's pricing, production or financial decisions.[50] The *ability* of the TPA to determine critical aspects of Erdermir's and Isdemir's operations, the Panel found, was not sufficient.[51]

36. Contrary to the Panel's interpretation, Article 1.1(a)(1) does not require an investigating authority to determine that the government in question actually *exercised* its authority over specific actions or decisions. Requiring evidence that the government is "in fact" exercising control over the entity and its conduct conflates the public body analysis with the examination of whether a government entrusted or directed a private body under Article 1.1(a)(1)(iv).

37. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* 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).[52] The Appellate Body further 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.[53] 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)."[54]

38. The Appellate Body in *US – Carbon Steel (India)* similarly stated that "a government's exercise of 'meaningful control' over an entity and its conduct, includ[es] control such that the government can use the entity's resources as its own."[55] Thus, the Appellate Body has recognized that a government's exercise of meaningful control over an entity includes evidence

[50] Panel Report, para. 7.42.
[51] Panel Report, para. 7.42 ("[A]lthough the United States has emphasized the *ability* of the TPA to determine critical aspects of Erdemir and Isdemir's operations, as Turkey argues, the USDOC has not pointed to evidence on the record that TPA has at any point since Erdemir's privatization exercised its veto power or sought to influence Erdemir's pricing, production or financial decisions.") (emphasis in original).
[52] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.
[53] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[54] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[55] *US – Carbon Steel (India) (AB)*, para. 4.20.

that "the government can use the entity's resources" – that is, has the ability to use an entity's resources.

39. Indeed, the issue under Article 1.1(a)(1) is not whether the *conduct* of the entity is governmental. Rather, the question is whether the *entity* engaging in the conduct is governmental or pertaining or belonging to the people, i.e., whether the entity is "*a government* or any *public body*."[56] This logic accords with the Appellate Body's approach to "public body," in which the focus is on the "core features of the entity concerned, and its relationship with the government in the narrow sense."[57]

40. Focus on the specific *conduct* of an entity would be relevant when examining whether there was government entrustment or direction of a *private body* under Article 1.1(a)(1)(iv) of the SCM Agreement. Specifically, it is important to recall that Article 1 is defining a subsidy by a Member and begins by identifying those entities which may make a "financial contribution." A Member can make the financial contribution directly through its "government" or through a "public body." In this way, the relevant conduct of the entity is attributable to the Member because of the governmental or "public" nature of the entity.

41. On the other hand, a "private body" may be found to provide a financial contribution attributable to a Member through the conduct described in Article 1.1(a)(1)(i)-(iii) only when it is "entrust[ed] or direct[ed]" by the government to do so. That is, a private body may make a financial contribution if the government entrusts or direct the private body "*to carry out* one or more of the functions illustrated in (i) to (iii)". Accordingly, as the Appellate Body has correctly explained, the entrustment or direction must be linked to the private body's *conduct*.[58]

42. By requiring specific evidence that the Prime Ministry Privatization Administration (TPA) in fact *exercised* its veto power or sought to influence Erdemir's pricing, production or financial decisions,[59] the Panel considered that an investigating authority must find the government (TPA) directed the conduct (pricing, production, and other decisions) of the entity in question (Erdemir). The Panel's approach conflates the public body analysis with that of entrustment and direction, which would render the term "public body" meaningless. Under the Panel's interpretation, to find a financial contribution involving any entity other than the government in the narrow sense, an investigating authority would need to show the government's control *over the conduct* in question. The Panel's approach effectively denies that any analysis of the entity or its core attributes is necessary to analyze whether the entity is a public body. The

[56] The New Shorter Oxford English Dictionary, p. 2404 (1993) (definition of "public": "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation").
[57] *US – Carbon Steel (India) (AB)*, para. 4.24 (emphasis added). *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 317, 345.
[58] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284 (a private body is found to have made a financial contribution when there is "an affirmative demonstration of the link between the government and the specific *conduct*" (emphasis in original); "*all conduct* of a governmental entity constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause subparagraph (iv)" (emphasis added)).
[59] Panel Report, para. 7.42.

Panel's interpretation is not consistent with the text, context, and structure of Article 1.1(a)(1), and must be reversed.

43. Therefore, the Panel erred in its interpretation of Article 1.1(a)(1) by requiring that USDOC demonstrate that the Prime Ministry Privatization Administration (TPA) directed the provision or pricing of hot-rolled steel or in fact *exercised* its veto power. This would convert the public body analysis – which concerns the nature of an entity – into an analysis of specific conduct, such as that required under Article 1.1(a)(1)(iv) of the SCM Agreement. Rather, the government's meaningful control of an entity (such as the evidence here of "the *ability* of the Prime Ministry Privatization Administration (TPA) to determine critical aspects of Erdemir and Isdemir's operations") is evidence that the entity is a public body and can transfer the government's economic resources – that is, resources the government views as its own.

44. The United States therefore respectfully requests the Appellate Body to reverse the Panel's interpretation and application of Article 1.1(a) of the SCM Agreement. The United States further requests that the Appellate Body reverse the Panel's conclusion that the United States acted inconsistently with Article 1.1(a) in finding that Erdemir and Isdemir were public bodies. To the extent the Appellate Body considers that the Panel's errors grew out of its understanding of the Appellate Body's approach to public body in *US – Carbon Steel (India)*, the Appellate Body should take this opportunity to clarify its articulation of its approach to Article 1.1(a)(1), and if necessary, modify that approach in conformity with the considerations discussed above.

3. The Panel Erred in Its Interpretation of Article 1.1(a)(1) Because the Commercial Behavior of an Entity Is Not Necessarily Relevant to Determining Whether an Entity Is a Public Body

45. The Panel also erred in its interpretation of Article 1.1(a)(1) by finding that commercial behavior is necessarily relevant to a public body analysis. However, nothing in the text of Article 1.1(a)(1) suggests that a "public body" cannot engage in "commercial behavior." Rather, the Panel's finding appears to be based on a misunderstanding of a statement by the Appellate Body in *US – Carbon Steel (India)*.

46. The Panel found that:

> In light of the Appellate Body's guidance that evidence that an entity conducts its operations and business on commercial principles may be relevant to the public body assessment, we are of the view that the USDOC's failure to consider this information in any meaningful way runs contrary to an investigating

> authority's obligation to evaluate and give due consideration to all relevant characteristics of the entity.[60]

That is, the Panel considered that the commercial behavior of an entity must be given a certain weight by an investigating authority in its evaluation of the relationship between the government and the entity. The Panel's understanding is in error.

47. Article 1.1(a)(1) requires that the entity found to make a financial contribution for purposes of the SCM Agreement must be "a government or any public body." Nothing in Article 1.1(a)(1) suggests that the existence of such commercial behavior would preclude an entity from being deemed a "government or any public body" within the meaning of that provision. And indeed, it is not the case that a government, or an entity controlled by a government, cannot act in a commercial manner. 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."[61]

48. This reasoning is supported by the structure of the SCM Agreement, which disciplines subsidies that constitute a financial contribution pursuant to Article 1.1(a)(1); confer a benefit pursuant to Article 1.1(a)(2); and are specific pursuant to Article 1.2. The bases for determining the existence of a financial contribution are laid out clearly in Article 1.1(a)(1), and, notably, do not include consideration of whether the financial contribution in question is provided consistent with market principles. Instead, such considerations are incorporated into the determination of benefit, which is covered by other provisions of the SCM Agreement.[62] To graft consideration of whether a financial contribution is provided consistent with market principles onto the determination of the existence of a financial contribution would make redundant the provisions of the SCM Agreement governing benefit.[63]

49. This reasoning is also consistent with the approach taken in prior proceedings. For example, in *Korea – Commercial Vessels (Panel)*, the panel stated that:

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[60] Panel Report, para. 7.61. *See also id.*, para. 7.58 ("The Appellate Body has observed that an investigating authority undertaking a public body analysis should take into account all evidence on the record regarding the relationship between the government and the entity at issue, *which may include evidence that the entity operates "in a commercial, de-regulated environment and conducts its operations and businesses on commercial principles.*").

[61] *Korea – Commercial Vessels (Panel)*, para. 7.48.

[62] For example, Article 14(d) of the SCM Agreement specifies that: "the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to *prevailing market conditions* for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)" (emphasis added).

[63] *See US – Gasoline (AB)*, p. 23 (cautioning against adopting "a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility").

> [T]he concept of "financial contribution" is written broadly to cover government and public body actions that might involve subsidization. Whether the government or public body action in fact gives rise to subsidization will depend on whether it gives rise to a "benefit." Since the concept of "benefit" acts as a screen to filter out commercial conduct, it is not necessary to introduce such a screen into the concept of "financial contribution."[64]

50. The Panel's finding that USDOC acted inconsistently with Article 1.1(a)(1) because it failed to "engage in a meaningful way" with evidence concerning commercial behavior appears to be based on a misunderstanding of a statement by the Appellate Body in *US – Carbon Steel (India),* which it considered to provide "guidance that evidence that an entity conducts its operations and business on commercial principles may be relevant to the public body assessment".[65]

51. Contrary to the Panel's observations, however, the Appellate Body in *US – Carbon Steel (India)* did not state that Article 1.1(a)(1) required the examination of evidence concerning an entity's commercial behavior. Rather, the Appellate Body was addressing whether the underlying panel had considered whether USDOC had taken into account specific pieces of evidence on its record. The Appellate Body found that the panel did not properly consider India's argument that USDOC failed to consider evidence regarding the NMDC's possible status as a *Miniratna* or *Navratna* company, which India had argued was a status that meant that the government had conferred greater autonomy on designated public sector enterprises to make them more efficient and competitive.[66] It was in the context of this discussion that the Appellate Body cited a statement by the Government of India that the entity in question "is operating in a commercial, market driven de-regulated environment and conducts its operations and businesses on commercial principles."[67] But the relevance of the NMDC's *Miniratna* status in *US – Carbon Steel (India)* was not that it showed commercial behavior, but that India claimed that this status meant that the government had granted "greater autonomy" to the entity in question,[68] and thereby related to the relationship between the government and the entity.

52. This is in contrast to the record of the proceedings at issue here, where the evidence in question related to the level of Erdemir and Isdemir's prices and its profit-maximizing behavior.[69] Consistent with the proper interpretation of Article 1.1(a)(1), USDOC considered

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[64] *See Korea – Commercial Vessels (Panel)*, para. 7.28. The Appellate Body in *Brazil – Aircraft* similarly recognized that financial contribution and benefit are independent concepts, both of which must be present for a measure to be a subsidy in the sense of the SCM Agreement. *Brazil – Aircraft* (*AB*), para. 157.
[65] Panel Report, para. 7.61.
[66] *US – Carbon Steel (India*) (*AB*), paras. 4.40-4.41.
[67] *US – Carbon Steel (India) (AB)*, para. 4.40.
[68] *US – Carbon Steel (India) (AB)*, para. 4.41.
[69] OCTG Final I&D Memo, p. 35 ("Toscelik claims that 'Erdemir does not sell at preferential prices; its prices are higher than Toscelik's cost of production, and they are higher than Toscelik's selling prices.") (Exhibit TUR-85); HWRP Final I&D Memo, p. 22 ("[W]e disagree with the GOT that, because Erdemir operates on a commercial basis to maximize profitability, *i.e.*, is a publicly traded company, is required to follow corporate governance principles,

this information and provided a reasoned and adequate explanation for why the information did not carry much weight. As USDOC explained, "a firm's commercial behavior is not dispositive in determining whether that firm is a government 'authority.'"[70] Specifically, USDOC explained, "this line of argument conflates the issues of the 'financial contribution' being provided by an authority and 'benefit.'"[71] USDOC also explained that, regardless of whether "loans or goods or services are provided at commercial prices, *i.e.*, act in a commercial manner," they are "still being provided by an authority and, thus, constitute[] a financial contribution . . . ."[72]

53. Thus, while evidence of a government's conferral of autonomy on an entity may be relevant to determining "the degree of control by the [government] and the degree of autonomy enjoyed by the [entity],"[73] evidence of profit-maximizing, commercial behavior is not. The implication of a finding to the contrary would mean that an entity that is otherwise meaningfully controlled by the government, and even vested with government authority (such as the authority to transfer the government's own economic resources), but operates in a profit-maximizing manner, could not be a public body. The result would be that all of its behavior – whether it provides a benefit or not – would be shielded from review under the SCM Agreement. Such a conclusion would remove a broad range of transfers of governmental economic resources from the disciplines of the SCM Agreement contrary to the terms of the Agreement.[74]

54. Therefore, the Panel's finding that a public body analysis must include "meaningful consideration" of the commercial behavior of an entity is inconsistent with Article 1.1(a)(1) of the SCM Agreement and must be reversed. To the extent the Appellate Body considers that the Panel's error grew out of its understanding of the Appellate Body's approach to public body in *US – Carbon Steel (India)*, the Appellate Body should take this opportunity to clarify its articulation of its approach to Article 1.1(a)(1), and if necessary, modify that approach in conformity with the considerations discussed above.

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and has shares owned by institutional investors from around the world, Erdemir, and by extension Isdemir, cannot be considered 'authorities.'") (Exhibit TUR-46); WLP Final I&D Memo, p. 35 (discussing evidence that Erdemir and Isdemir each operate on a commercial basis to maximize profitability) (Exhibit TUR-122); CWP Final I&D Memo, p. 29 (discussing evidence on record concerning Erdemir and Isdemir operating on a commercial basis to maximize profitability) (Exhibit TUR-22).

[70] OCTG Final I&D Memo, p. 35 (Exhibit TUR-85); HWRP Final I&D Memo, p. 22 (Exhibit TUR-46); WLP Final I&D Memo, p. 36 (Exhibit TUR-122); CWP Final I&D Memo, p. 29 (Exhibit TUR-22).

[71] OCTG Final I&D Memo, p. 35 (Exhibit TUR-85); HWRP Final I&D Memo, p. 22 (Exhibit TUR-46); WLP Final I&D Memo, p. 36 (Exhibit TUR-122); CWP Final I&D Memo, p. 29 (Exhibit TUR-22).

[72] OCTG Final I&D Memo, p. 35 (Exhibit TUR-85); HWRP Final I&D Memo, p. 22 (Exhibit TUR-46); WLP Final I&D Memo, p. 36 (Exhibit TUR-122); CWP Final I&D Memo, p. 29 (Exhibit TUR-22).

[73] *US – Carbon Steel (India) (AB)*, para. 4.44.

[74] *See* Cartland, Depayre, & Woznowski. *Is Something Going Wrong in the WTO Dispute Settlement?* Journal of World Trade 46, no. 5 (2012), at 1004-05 ("Article 1 of the SCMA is not about restraining behaviour of anyone; to the contrary, in some sense it is about describing *what kinds of entities might provide 'gifts' to certain other entities*, with disciplines where those gifts distort trade. It is simply not necessary for a particular entity to have regulatory power (to constrain others' behaviour) for that entity to be able to provide gifts that might distort trade, *that is, to channel trade distorting government resources to particular recipients in an economy*." (italics added)).

B. An Objective and Unbiased Investigating Authority Could Have Found That Erdemir and Isdemir Are Public Bodies Based on the Totality of the Record Evidence

55. The Panel also erred in its application of Article 1.1(a)(1) because it reached a finding of inconsistency by reviewing *de novo* individual pieces of record evidence in isolation, and rejecting each in turn. In assessing USDOC's public body findings, however, the Panel's task was to consider whether USDOC's analysis – which considered the totality of the evidence in the record – was reasoned and adequate, and whether the determination is one an objective and unbiased investigating authority could have reached.

56. The Panel itself recognized this when it quoted the Appellate Body in *Japan – DRAMs (Korea)*, stating:

> when 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. In addition, if an investigating authority explains that the totality of the evidence supports the conclusion reached, a panel must undertake a critical examination of whether, in the light of the evidence on record, the investigating authority's conclusion was reasoned and adequate.[75]

57. Despite its recognition that a panel should consider the totality of the evidence, however, the Panel failed to do so. Instead, the Panel chose to examine each piece of evidence for itself, and in isolation, never explaining why USDOC's analysis of the evidence concerning Erdemir and Isdemir, in its totality, could not support a determination that an objective and unbiased investigating authority could have reached. The Panel's failure to assess the totality of the evidence, as USDOC did, is inconsistent with the manner in which the Appellate Body and other panels have considered evidence, and constitutes legal error.

58. In the challenged determinations, USDOC examined evidence regarding the functions and conduct of Erdemir and Isdemir, as well as evidence demonstrating the Government of Turkey's exercise of meaningful control over the two entities. After consideration of the record as a whole, USDOC determined Erdemir and Isdemir to be public bodies.[76]

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[75] Panel Report, para. 7.32 (citing *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis in original)).

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

59. Specifically, USDOC first discussed evidence showing that "OYAK effectively decides the composition of the majority of Erdemir's board through its majority shareholder voting rights in Erdemir,"[77] and 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."[78] USDOC also pointed to Erdemir's Articles of Association, which states that "Board of Directors consists of minimum 5 and maximum 9 members to be selected by the General Assembly of Shareholders under the provisions of Turkish Commercial Code and Capital Markets Board Law."[79] As a result, USDOC determined that OYAK controls the selection of Erdemir's board.[80] In the CWP, HWRP, and WLP determinations,[81] USDOC similarly considered such evidence.[82]

60. USDOC next considered the presence of government officials on Erdemir's Board of Directors[83], including, for instance, in the OCTG investigation, that of the nine members of Erdemir's Board of Directors, Erdemir's 2012 Annual Report only listed three as "independent" board members.[84] Of the remaining six members, one was a representative of the Prime Ministry Privatization Administration (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.[85] Furthermore, one of the two board's auditors was a representative from the Ministry of Finance.[86]

61. In each of the challenged determinations, USDOC also cited the veto power of the Prime Ministry Privatization Administration (TPA) over any decision related to the closure, sale, merger, or liquidation of Erdemir and Isdemir, as well as related to capacity curtailing any of the

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

[77] OCTG Final I&D Memo, p. 22 (Exhibit TUR-85).

[78] OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).

[79] OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).

[80] OCTG Final I&D Memo, p. 34 (Exhibit TUR-85).

[81] CWP Final I&D Memo, p. 9, n. 45 (Exhibit TUR-22); WLP Final I&D Memo, p. 14, n. 69 (Exhibit TUR-122); HWRP Final I&D Memo, p. 12, n. 60 (Exhibit TUR-46).

[82] CWP Final I&D Memo, p. 9, n. 45 (Exhibit TUR-22); WLP Final I&D Memo, p. 14, n. 69 (Exhibit TUR-122); HWRP Final I&D Memo, p. 12, n. 60 (Exhibit TUR-46). *See also* Erdemir's Articles of Association (as submitted in WLP, CWP, HWRP, and OCTG) (Erdemir's Articles of Association), Articles 10, 21 (Exhibit USA-8).

[83] OCTG Final I&D Memo, pp. 21-22 (Exhibit TUR-85) (noting that "one of the board's two auditors is a "Representative of the Ministry of Finance"); OCTG Erdemir 2012 Annual Report (complete), pp. 54-55 (Exhibit USA-5); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); Erdemir 2013 Annual Report (complete), pp. 65-66 (Exhibit USA-7); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).

[84] Erdemir 2012 Annual Report (complete), pp. 54-55 (Exhibit USA-5).

[85] For a list of companies that are part of OYAK, see TESEV Publications, "Military-Economic Structure in Turkey: Present Situation, Problems, and Solutions," p. 10 (Exhibit USA-4)).

[86] OCTG Final I&D Memo, p. 22 (Exhibit TUR-85). *See also* Erdemir 2012 Annual Report (complete), p. 55 (Exhibit USA-5).

integrated steel product plants or mining plants owned by the Company and/or its affiliates.[87] USDOC thus determined that Erdemir and Isdemir are structured in a manner that affords the Government of Turkey, through the TPA, an ability to determine critical aspects of Erdemir's and Isdemir's operations. Indeed, by the very provisions in their Articles of Association, Erdemir and Isdemir could not transfer their own resources without the Government of Turkey's approval.[88]

62. Moreover, 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 Government of Turkey's macroeconomic policies, representing action that transcends mere commercial behavior.[89] As discussed by USDOC, the 2012-2014 Medium Term Programme was promulgated by the Ministry of Development to achieve certain objectives, including "increasing employment, maintaining fiscal discipline, increasing domestic saving, reducing the current account deficit, so by this way strengthening macroeconomic stability in stable growth process."[90] 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."[91] Thus, based on the totality of the record evidence, USDOC determined that the Government of Turkey exercised meaningful control over Erdemir and Isdemir such that the entities are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement.

63. In its review of USDOC's assessment, however, the Panel performed its own *de novo* assessment of each piece of evidence, and rejected each in turn. First, the Panel addressed evidence regarding the presence of government officials on Erdemir's board of directors. As discussed further below in Section III, having determined that OYAK was neither government in the broad or narrow sense, the Panel failed to discuss any of OYAK's involvement in Erdemir.[92] This included consideration of OYAK's majority shareholding voting rights in Erdemir's board of directors, which resulted in government presence on the board.

64. However, the Panel went on to also summarily reject additional evidence concerning the presence of the Ministry of Finance and the Prime Ministry Privatization Administration (TPA) on Erdemir's board of directors, stating that such information "amount[s] to formal 'indicia' of

[87] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* Erdemir 2012 Annual Report (complete), pp. 62-63 (Exhibit USA-5); Erdemir's Articles of Association, Articles 21, 22, 37 (Exhibit USA-8).
[88] OCTG Final I&D Memo, p.21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[89] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).
[90] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); Medium Term Programme, p. 12 (Exhibit USA-6). *See also* WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[91] OCTG Final I&D Memo, p. 21 n. 160 (TUR-85); Medium Term Programme, p.23 (Exhibit USA-6).
[92] Panel Report, para. 7.41.

control that is insufficient to establish that the Government of Turkey meaningfully controls Erdemir and Isdemir."[93] The Panel did not consider this information further in the context of the totality of the evidence, but rather, considered that, not being a *sufficient* basis for a public body determination, government presence on an entity's board is not *relevant* to a public body determination.

65. In the same paragraph, the Panel also summarily rejected information concerning the veto power of the Prime Ministry Privatization Administration (TPA) over decisions related to the closure, sale, merger, or liquidation over Erdemir, as well as the capacity curtailing of any of the integrated steel product plants or mining plants owned by the Company and/or its affiliates.[94] Specifically, the Panel found that "the USDOC has not pointed to evidence on the record that TPA has at any point since Erdemir's privatization exercised its veto power or sought to influence Erdemir's pricing, production or financial decisions."[95] The Panel then stated, without more, "[w]e do not share the United States' view that events taking place at the time of Erdemir's privatization in 2006 are indicative of whether Erdemir and Isdemir were acting in pursuit of Turkish governmental policies in the years after Erdemir's privatization."[96] Again, the Panel did not go on to consider this information in the context of the totality of the record evidence, this time appearing to consider that governmental *veto* power over key decision-making was not relevant to a public body determination.

66. Next, the Panel isolated statements made in Erdemir's 2012 and 2013 Annual Reports, finding that:

> [a]bsent clear indication that Erdemir acts pursuant to government authority, the mere fact that Erdemir's own business strategies include encouraging customers in export-oriented industries to increase production or encouraging the use of domestic sources of raw materials – even if such efforts might align with [Government of Turkey] macroeconomic policy objectives – does not show that Erdemir and Isdemir exercise governmental authority.[97]

For a third time, then, the Panel reviewed and rejected, *in isolation*, evidence that formed part of USDOC's assessment of the totality of the evidence.

67. The Panel's error was further compounded when it then stated that it did "not consider that general references to developing the Turkish steel industry and Turkish industry [in Erdemir's 2012 and 2013 Annual Reports] more generally change our assessment reached above."[98] Thus, having concluded that Erdemir's 2012 and 2013 Annual Reports themselves did not demonstrate that Erdemir and Isdemir exercise governmental authority, the Panel then

[93] Panel Report, para. 7.42.
[94] Panel Report, para. 7.42.
[95] Panel Report, para. 7.42.
[96] Panel Report, para. 7.42.
[97] Panel Report, para. 7.44.
[98] Panel Report, para. 7.47.

determined that additional statements in the Annual Reports did not change its conclusion (that is, a conclusion that was based on less than the totality of the evidence).

68. The Panel's erroneous approach to its review of USDOC's determination is clear from its concluding remark that, "most of the evidence that the USDOC relied upon amounts to 'indicia' of government control" and that it was "not convinced that" statements in Erdemir's Annual Reports demonstrated that Erdemir and Isdemir are aligned with Government of Turkey's macroeconomic policies.[99] Having rejected the evidence piece by piece, the Panel failed to assess the evidence concerning Erdemir and Isdemir *together*, in its totality, and thus erroneously found that USDOC's determination could not be supported.

69. However, the Panel's analytical framework erroneously precludes drawing legitimate inferences from the evidence on the record as a whole in making a determination that Erdemir and Isdemir are public bodies. The Panel failed to recognize that the value of a piece of evidence may not be its sufficiency on its own, but rather when taken together with other pieces of evidence, that it can form part of an overall picture giving rise to the ultimate conclusion -- that is, that the Government of Turkey exercised meaningful control over Erdemir and Isdemir such that the two entities are public bodies.[100] Indeed, the Appellate Body in *US – Carbon Steel (India)* found that "formal indicia of control" "are certainly relevant to the question at issue."[101] It is only "*without further evidence and analysis*, [that formal indicia of control] do not provide a sufficient basis for a finding that the [entity] is a public body."[102] As discussed above, additional evidence was certainly considered by USDOC, and USDOC did not rely upon government presence on Erdemir's board alone to reach its determination. That the Panel might have reached a different conclusion itself is not a basis for a finding of inconsistency.[103] Thus, the Panel did not consider the totality of the evidence taken together, but substituted its judgment on each piece of evidence. The Panel failed to explain why it was not reasoned and adequate for an investigating authority to draw a logical inference from the totality of such evidence that Erdemir and Isdemir are public bodies.

70. The Panel's approach in this dispute is similar to that of the panel in *US – Countervailing Duty Investigation on DRAMS*, where the Appellate Body ultimately reversed the panel's finding because it failed to consider the evidence in its totality, stating:

> that the Panel's discussion of the *totality* of the evidence appears to be primarily a summation of errors that the Panel found in the course of its review of the individual pieces of evidence. Such errors undoubtedly would affect an examination of the *totality* of the evidence, as these pieces would constitute the evidence the

[99] Panel Report, para. 7.49.
[100] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 154 ("As we have already observed, individual pieces of circumstantial evidence are unlikely to establish [a conclusion]; the significance of individual pieces of evidence may become clear only when viewed together with other evidence.").
[101] *US – Carbon Steel (India) (AB)*, para. 4.43.
[102] *US – Carbon Steel (India) (AB)*, para. 4.43 (emphasis added).
[103] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 187.

> Panel would consider as a whole in assessing the evidentiary support of the USDOC's finding of entrustment or direction. Nevertheless, what is absent from the Panel's "global" assessment, in our view, is a consideration of the *inferences* that might reasonably have been drawn by the USDOC on the basis of the *totality* of the evidence. As we have already observed, individual pieces of circumstantial evidence are unlikely to establish entrustment or direction; the significance of individual pieces of evidence may become clear only when viewed together with other evidence. In other words, a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, *could*, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference of entrustment or direction. Although the USDOC relied on such an approach — and the Panel, not finding it unreasonable, stated its intention to emulate it — the Panel stopped short of assessing the evidence on such a global basis.[104]

71. Similarly, here, USDOC based its determination on the totality of the record evidence. Although the Panel recognized that USDOC took such an approach, and recognized that it therefore had "the obligation to consider . . . 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,"[105] the Panel's findings show that it nevertheless failed to consider whether that the evidence, *taken together*, supported the conclusion that the Government of Turkey exercised meaningful control over Erdemir and Isdemir.

72. Therefore, the United States respectfully requests that Appellate Body reverse the Panel's findings that USDOC acted inconsistently with Article 1.1(a)(1) in finding that Erdemir and Isdemir were public bodies.

C. Conclusion

73. For the foregoing reasons, the United States respectfully requests the Appellate Body to find that the Panel erred in its interpretation and application of Article 1.1(a)(1) to the public body determinations in this dispute. The United States has explained that the Panel erred on numerous bases. The Panel erred in its interpretation and application of Article 1.1(a)(1) when it found that the ability of a government to interfere in an entity's critical operations and key decisions is not evidence of the government *exercising* meaningful control over an entity and required such evidence to support a public body finding. The Panel also erred in its interpretation and application of Article 1.1(a)(1) when it found that an entity's commercial, profit-maximizing behavior is necessarily relevant to the public body assessment. The Panel's errors suggest that the Appellate Body should take this opportunity to clarify its articulation of its

[104] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 154 (emphasis added).
[105] Panel Report, para. 7.32 (citing to *Japan –DRAMs (Korea) (AB)*, para. 131 (emphasis in original)).

approach to Article 1.1(a)(1), and if necessary, modify that approach in conformity with the considerations discussed by the United States. Finally, the Panel also erred by reviewing the record evidence in isolation, and failing to consider whether the evidence, taken together, could support a determination that the Government of Turkey exercised meaningful control over Erdemir and Isdemir such that the entities are public bodies within the meaning of Article 1.1(a)(1). Accordingly, we request the Appellate Body to reverse the Panel's findings relating to public body for Erdemir and Isdemir under Article 1.1(a)(1) of the SCM Agreement and to reverse the Panel's conclusions that the United States acted inconsistently with Article 1.1(a)(1).

IV. THE PANEL ERRED IN ITS APPLICATION OF ARTICLE 1.1(A)(1) BY ASSESSING EVIDENCE CONCERNING OYAK IN ITS FINDINGS WITH RESPECT TO ERDEMIR AND ISDEMIR

74. The United States appeals the Panel's findings on the public body determinations concerning Erdemir and Isdemir and conclusion that the United States acted inconsistently with Article 1.1(a)(1) because the Panel erred in its assessment of this claim through its findings concerning OYAK. USDOC examined OYAK as an entity through which the Government of Turkey exercised meaningful control over Erdemir and Isdemir.[106] Before the Panel, Turkey claimed that USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement because it determined *OYAK* to be a public body.[107] However, as the United States explained to the Panel, USDOC did *not* find OYAK to be a public body, and did not need to because USDOC never attributed a financial contribution to OYAK.[108] Therefore, the United States requested for the Panel to not make a finding concerning OYAK under Article 1.1(a)(1).[109] The Panel ultimately determined it was not necessary for it to address Turkey's claim under Article 1.1(a)(1) with respect to OYAK.[110] However, in addressing Turkey's claim against Erdemir and Isdemir, the Panel nonetheless addressed at length all of the evidence and argumentation raised by Turkey for purposes of its OYAK claim. This approach by the Panel and these findings were in error.

75. First, the Panel erred by "making the case" for Turkey and evaluating Turkey's claim against USDOC's public body determinations concerning Erdemir and Isdemir while incorporating Turkey's arguments concerning OYAK from its separate claim against OYAK. But that is a case that Turkey never sought to make. This error provides an independent basis to reverse the Panel's conclusion that the United States acted inconsistently with Article 1.1(a)(1) in its public body determinations concerning Erdemir and Isdemir.

76. Second, in conducting this improper evaluation, the Panel also applied an erroneous approach. Specifically, the Panel failed to assess the evidence concerning OYAK as USDOC did, in its totality. Instead, the Panel isolated each piece of evidence and tested whether each piece, *in and of itself*, could demonstrate that OYAK was an entity through which the

[106] Panel Report, paras. 7.37-7.40.
[107] Panel Report, para. 7.7.
[108] Panel Report, para. 7.17.
[109] Panel Report, para. 7.17.
[110] Panel Report, para. 7.64.

Government of Turkey exercised meaningful control over Erdemir and Isdemir. This error vitiates the Panel's findings concerning OYAK, and provides a further basis to reverse the Panel's conclusion that the United States acted inconsistently with Article 1.1(a)(1) in its public body determinations concerning Erdemir and Isdemir.

A. The Panel Erred in Making the Case for Turkey by Incorporating Into Turkey's Claim Against the Public Body Determinations on Erdemir and Isdemir the Evidence and Arguments Raised by Turkey in Its Claim Against an Alleged Public Body Finding on OYAK

77. The Panel erred by evaluating Turkey's claim against USDOC's public body determinations concerning Erdemir and Isdemir by taking into account the evidence and argumentation raised by Turkey in its claim concerning OYAK. In taking this approach, the Panel made a case for Turkey different from the one it actually advanced, and made Turkey's case for it. The Panel's findings under Article 1.1(a)(1) were based on these erroneous findings, and the United States requests the Appellate Body to reverse the Panel's conclusion that the United States acted inconsistently with Article 1.1(a)(1) in its public body determinations concerning Erdemir and Isdemir.

78. Before the Panel, Turkey raised two claims under Article 1.1(a)(1) of the SCM Agreement. Turkey first claimed that USDOC's determination of OYAK as a public body is inconsistent with Article 1.1(a)(1).[111] Turkey also claimed that USDOC's determination of Erdemir and Isdemir as public bodies is inconsistent with Article 1.1(a)(1).[112] Under its Article 1.1(a)(1) claim with respect to OYAK, Turkey raised arguments challenging the evidence relied upon by USDOC concerning OYAK.[113] Then, under its claim with respect to Erdemir and Isdemir, Turkey separately raised arguments concerning other evidence that USDOC identified in support of its determination that the two entities are public bodies.[114]

79. Importantly, Turkey's arguments concerning OYAK were *not* raised under its claim against USDOC's determination concerning Erdemir and Isdemir.[115] Furthermore, Turkey's claim and arguments concerning OYAK were raised in relation to USDOC's alleged error of finding OYAK to be a public body – a finding that USDOC did *not* make.[116]

80. In its report, the Panel declined to reach a finding concerning USDOC's assessment of OYAK as a public body and its consistency with Article 1.1(a)(1).[117] The Panel stated, "[w]e are

[111] Panel Report, paras. 7.19, 7.63.
[112] Panel Report, para. 7.23.
[113] Panel Report, para. 7.24 (citing Turkey's First Written Submission, paras. 111-135, 261-285, 374-397, 485-508, all of which relate to its claim that USDOC's determination that OYAK is a public body is inconsistent with Article 1.1(a)(1)).
[114] Panel Report, para. 7.25 (citing portions of Turkey's First Written Submission, which are raised under its claim that USDOC's determination that Erdemir and Isdemir are public bodies is inconsistent with Article 1.1(a)(1)).
[115] Panel Report, para. 7.17.
[116] Panel Report, para. 7.17.
[117] Panel Report, para. 7.64.

of the view that we have adequately addressed flaws in the USDOC's analysis regarding OYAK in our assessment above [regarding Erdemir and Isdemir]. Accordingly, we make no separate finding regarding any public body determination that the USDOC may have made in respect of OYAK."[118]

81. However, the Panel had no basis to review Turkey's OYAK arguments that were raised as part of its claim concerning an alleged public body finding on OYAK. Turkey did not present its evidence or arguments concerning OYAK to support its challenge to the Erdemir and Isdemir public body determinations. Having determined not to reach a finding concerning USDOC's assessment of OYAK as part of a claim Turkey *did* present, the Panel should not have considered Turkey's evidence and arguments concerning OYAK to assess a different claim by Turkey.

82. As the Appellate Body explained in *EC – Fasteners*, "the burden rests on the complainant to substantiate its claims with legal arguments and evidence in its written and oral submissions to the panel."[119] Where a complainant has failed to set forth arguments in its submissions sufficient to substantiate its claims, the panel "cannot intervene to raise arguments on a party's behalf and make the case for the complainant."[120] Because Turkey did not bring forward evidence and arguments concerning OYAK as part of its claim against the Erdemir and Isdemir public body determinations, one simply cannot know if the arguments and evidence evaluated by the Panel are the case that Turkey would have sought to make, had it chosen to do so.

83. Because Turkey failed to provide any evidence or argumentation regarding OYAK in the context of its Erdemir and Isdemir claim, the Panel erred in making the case for Turkey by importing into its discussion under Article 1.1(a)(1) evidence and arguments raised in a different context. Accordingly, the United States requests the Appellate Body to reverse the Panel's findings concerning OYAK,[121] and the Panel's conclusion that the United States acted inconsistently with Article 1.1(a)(1) in its public body determinations concerning Erdemir and Isdemir.

84. As discussed below, and for completeness, the United States also explains why the Panel also erred in its evaluation of this evidence, and in finding that the record evidence did not support USDOC's factual finding that OYAK was an entity through which the Government of Turkey exercised meaningful control over Erdemir and Isdemir.

B. The Panel's Legal Conclusion Under Article 1.1(a)(1) Also Must Be Reversed Because the Panel Erred in Reviewing the Evidence Concerning OYAK in Isolation and Not in Light of the Totality of the Evidence

[118] Panel Report, para. 7.64.
[119] *EC – Fasteners (China) (AB)*, para. 566.
[120] *EC – Fasteners (China) (AB)*, para. 566.
[121] Panel Report, paras. 7.38-7.40 (finding that the record before USDOC did not support its factual finding that OYAK was an entity through which the GOT exercised meaningful control over Erdemir and Isdemir).

85. The Panel also erred in reviewing each piece of evidence concerning OYAK in isolation, and failing to assess the evidence in totality, as USDOC did. In reaching a factual finding that OYAK was an entity through which the Government of Turkey exercised meaningful control over Erdemir and Isdemir, USDOC considered the totality of evidence before it. However, the Panel did not assess the evidence concerning OYAK in its totality, but rather, reviewed each piece in isolation. Because of the Panel's erroneous approach to reviewing the USDOC's determination under Article 1.1(a)(1), the Panel's conclusion that the United States acted inconsistently with Article 1.1(a)(1) in its public body determinations concerning Erdemir and Isdemir must be reversed.

86. Specifically, in the determinations at issue, USDOC assessed the totality of the evidence concerning OYAK to reach its factual finding that OYAK was an entity through which the GOT exercised meaningful control over Erdemir and Isdemir. 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. USDOC considered the fact that OYAK was created, by virtue of its authorizing statute,[122] Law No. 205 (1961), and that the text of that statute explicitly stated that OYAK is "an institution related to the Ministry of National Defense."[123] USDOC also considered that Law No. 205 articulates that OYAK is "established to provide members of [the] Turkish Armed Forces with mutual assistance" and is to be headquartered in Ankara, the seat of the GOT.[124] OYAK was thus expressly established to provide retirement and social security benefits to members of the country's armed forces. Indeed, Article 20 of Law No. 205 stipulates the benefits provided to members, including retirement, disability, death and housing acquisition benefits.[125] Article 39 further states that in the case of a war in which the Turkish Armed Forces may physically take part, retirement, disability and death benefits shall be suspended as of the beginning of such war.[126]

87. In carrying out its function, USDOC noted that Law No. 205 specifies that OYAK's property "shall enjoy the same rights and privileges as State property"[127] and that OYAK is

[122] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, pp. 8-9 (Exhibit TUR-22); HWRP Final I&D Memo, pp. 11-12 (Exhibit TUR-46).
[123] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 8 (Exhibit TUR-22); HWRP Final I&D Memo, p. 11 (Exhibit TUR-46).
[124] HWRP Law No. 205, Article 1 (Exhibit TUR-30); OCTG Law No. 205, Article 1 (Exhibit TUR-58); CWP Law No. 205, Article 1 (Exhibit TUR-11); WLP Law No. 205, Article 1 (Exhibit TUR-107).
[125] HWRP Law No. 205, Article 20 (Exhibit TUR-30); OCTG Law No. 205, Article 20 (Exhibit TUR-58); CWP Law No. 205, Article 20 (Exhibit TUR-11); WLP Law No. 205, Article 20 (Exhibit TUR-107).
[126] HWRP Law No. 205, Article 39 (Exhibit TUR-30); OCTG Law No. 205, Article 39 (Exhibit TUR-58); CWP Law No. 205, Article 39 (Exhibit TUR-11); WLP Law No. 205, Article 39 (Exhibit TUR-107).
[127] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); HWRP Law No. 205, Article 37 (Exhibit TUR-30); OCTG Law No. 205, Article 37 (Exhibit TUR-58); CWP Law No. 205, Article 37 (Exhibit TUR-11); WLP Law No. 205, Article 37 (Exhibit TUR-107).

exempt from corporate and other taxes in parallel with the privileges granted to all actors operating within the social security system in Turkey.[128]

88. Moreover, USDOC likewise observed that "members of the armed forces must by law contribute part of their salaries to OYAK."[129] Specifically, Article 17 of Law No. 205 calls for mandatory membership in OYAK for members of the Turkish Armed Forces, and Article 18 provides for a mandatory levy on their salaries.[130] Likewise, Article 31 provides that unpaid dues are collected pursuant to a law concerning "public debt," with a 10% penalty levied and collected by another government agency, the Ministry of Finance.[131] Therefore, although OYAK does not receive direct funding from the GOT budget, it is ensured funding through mandatory contribution requirements, which it can enforce as a matter of law.

89. USDOC also considered the language of Law No. 205, which established OYAK's leadership structure to overlap in significant part with the Turkish Armed Forces and other government agencies. Indeed, USDOC examined Law No. 205 in the four proceedings and observed:[132]

> OYAK's Representative Assembly comprises 50 to 100 members of the Turkish Armed Forces "designated by their respective commanders or superiors." The Representative Assembly, in turn, elects 20 of the 40 members of OYAK's General Assembly. Of the General Assembly's other 20 members, 17 are by statute government officials (*e.g.*, Ministers of Finance and Defense). Members of the General Assembly elect the eight-person Board of Directors.

90. Furthermore, the General Assembly then elects three members – nominated by the Minister of National Defense and Chief of the General Staff – of OYAK's Board of Directors.[133]

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

[129] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46).

[130] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); HWRP Law No. 205, Articles 17, 18 (Exhibit TUR-30); OCTG Law No. 205, Articles 17, 18 (Exhibit TUR-58); CWP Law No. 205, Articles 17, 18 (Exhibit TUR-11); WLP Law No. 205, Articles 17, 18 (Exhibit TUR-107).

[131] HWRP Law No. 205, Article 31 (Exhibit TUR-30); OCTG Law No. 205, Article 31 (Exhibit TUR-58); CWP Law No. 205, Article 31 (Exhibit TUR-11); WLP Law No. 205, Article 31 (Exhibit TUR-107).

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

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

The other four members on the Board of Directors are selected by an Election Committee composed of, among other individuals, the Minister of National Defense, the Minister of Finance, the President of the Court of Accounts of the Republic of Turkey, and the President of the Board of General Audit of the Prime Ministry of the Republic of Turkey.[134]

91. In the OCTG Final Determination, USDOC also examined a study by the Turkish Economic and Social Studies Foundation and concluded that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control."[135] The record evidence thus demonstrates that – across OYAK's governing bodies – individuals serve either *because* of their status as GOT officials or *because* they were selected by GOT officials.

92. In the WLP investigation, USDOC also examined evidence that the GOT directed OYAK to implement Turkish industrial policy directives or objectives in the process of Erdemir's privatization in finding that the GOT meaningfully controlled Erdemir and Isdemir through OYAK.[136] In particular, as a condition of purchase, OYAK was "required to add 3.5 million tonnes of flat steel capacity…by the end of 2008."[137] As a guarantee of the fulfilment of this condition, OYAK fronted a $500 million bond and was expected to construct an additional plant, estimated to cost some $2 billion.[138] OYAK also agreed not to reduce Erdemir's workforce to less than 95% within two years.[139] This information was among the evidence that USDOC relied upon in finding that the GOT exercised meaningful control over Erdemir and Isdemir, and that those two entities were therefore public bodies.

93. Thus, USDOC reviewed the totality of the evidence to support its factual finding that OYAK is an entity through which the GOT exercised meaningful control over Erdemir and Isdemir.

94. In its assessment of USDOC's factual finding concerning OYAK, however, the Panel failed to review the evidence as USDOC did, that is, in its totality – specifically: (1) OYAK's Annual Report; (2) OYAK's authority under Law No. 205; (3) the composition of OYAK's board of directors; and (4) the Turkish Economic and Social Studies Foundation (TESEV) study.

95. The Panel first reviewed evidence regarding OYAK's annual report. In doing so, however, the Panel highlighted only one page of that report, which described OYAK as a private

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

[135] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85) (citing TESEV Publications, "Military-Economic Structure in Turkey: Present Situation, Problems, and Solutions" (Exhibit USA-4)).

[136] WLP Final I&D Memo, pp. 33-34 (Exhibit TUR-122).

[137] Letter from Maverick Tube Corporation to USDOC, "Welded Line Pipe from the Republic of Turkey: Comments on the Government of Turkey's Third Supplemental Questionnaire Response" (March 10, 2015), Ex. 4 ("Maverick's March 10, 2015 Comments") (Exhibit USA-35).

[138] Maverick's March 10, 2015 Comments, Ex. 4 (Exhibit USA-35).

[139] Maverick's March 10, 2015 Comments, Ex. 4 (Exhibit USA-35).

supplemental pension fund that is not funded by the Government of Turkey.[140] Then, in reviewing USDOC's examination of Law No. 205, it isolated one portion of the statute, stating that, "the fact that OYAK is granted financial and administrative autonomy under Turkish law is relevant to the analysis of whether OYAK acts according to the mandate of the Government of Turkey or in pursuit of Turkish government policies or objectives."[141] With respect to both pieces of evidence, the Panel thus isolated one page or one sentence from the record, and determined that "in weighing the relevance of OYAK's status under Turkish law, OYAK's financial and administrative autonomy is also relevant."[142] However, the Panel failed to further assess this evidence alongside the totality of all the evidence concerning OYAK, and consider the conclusion that could be drawn from the evidence, *taken together*.[143]

96. The Panel also erred at paragraph of 7.39 of the report, where it stated that:

> [w]e do not consider the fact that OYAK's governing bodies are comprised of military and certain governmental personnel, which elect the eight-person board of directors, that OYAK is ensured mandatory contributions for pension purposes, and that OYAK may benefit from its certain property and tax status, is sufficient to establish that OYAK acts pursuant to governmental authority or is under the meaningful control of the GOT."[144]

97. Although this sentence appears to include consideration of several pieces of evidence together, the subsequent discussion by the Panel focuses only on the first piece of evidence concerning the composition of OYAK's governing bodies, and concludes that information concerning OYAK's board reflected only "formal indicia of control."[145] It then stated that it saw "nothing in the evidence that the USDOC considered in its analysis of OYAK to suggest that military and government personnel within OYAK have made decisions *under the direction of* the GOT in pursuit of governmental economic policies."[146] Thus, the Panel did not consider OYAK's board composition further in the context of the totality of the evidence, but rather, considered that government presence on an entity's board, alone, was not sufficient evidence.

98. Having rejected information concerning the composition of OYAK's board because it amounted to "formal indicia of control," the Panel then broadly asserted that information concerning OYAK's board, OYAK's property status, and the fact that OYAK is ensured mandatory contributions did not demonstrate that OYAK was governmental in either a broad or

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[140] Panel Report, para. 7.37.
[141] Panel Report, para. 7.38.
[142] Panel Report, para. 7.38.
[143] *Japan – DRAMs (Korea) (AB)*, para. 131 ("[I]n 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.") (emphasis omitted)).
[144] Panel Report, para. 7.39.
[145] Panel Report, para. 7.39.
[146] Panel Report, para. 7.39 (emphasis added).

narrow sense.[147] However, the Panel never explained why evidence concerning mandatory contributions to OYAK or OYAK's property status could not be relevant to an investigating authority's factual examination of an entity through which the government exercised meaningful control, especially when viewed together with evidence of a significant government presence on its board.

99. The Panel then discussed the USDOC's reference to "a single statement in the TESEV study that 'a review of the membership and administrative structure of OYAK reveals that the military is clearly in control," and faulted USDOC for "equat[ing] Turkish military presence in OYAK with governmental control based on this statement."[148] However, USDOC never relied *solely* on that statement in examining OYAK was an entity through which the Government of Turkey exercised meaningful control. Nor does the Panel explain in its report why the presence of the military on OYAK's board is *not* relevant to an assessment of whether the government controls that entity. Thus, here again, the Panel did what the Appellate Body has previously cautioned against, "examining whether certain pieces of evidence were sufficient to establish certain conclusions that USDOC did not seek to draw, at least solely on the basis of those pieces of evidence." [149]

100. In fact, the Panel *never* assessed the totality of the evidence together at all. Rather, after finding that the individual pieces of evidence did not meet its test, the Panel then summarily concluded that "we are not persuaded that the evidence that the USDOC relied upon demonstrates that OYAK is under the meaningful control of the GOT, or that OYAK is part of the GOT in either the broad sense or the narrow sense."[150] The Panel's error is the same as the panel's in *US – Countervailing Duty Investigation on DRAMs*: the "discussion of the *totality* of the evidence appears to be primarily a summation of errors that the Panel found in the course of its review of the individual pieces of evidence."[151] "What is absent … is a consideration of the *inferences* that might reasonably have been drawn by the USDOC on the basis of the *totality* of the evidence."[152]

101. Therefore, the United States respectfully requests the Appellate Body to reverse the Panel's finding of inconsistency under Article 1.1(a)(1), because the Panel's assessment failed to reflect the approach taken by USDOC of reviewing the evidence in its totality.

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[147] Panel Report, para. 7.39.
[148] Panel Report, para. 7.39.
[149] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 188.
[150] Panel Report, para. 7.40.
[151] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 154.
[152] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 154; *see also US – Continued Zeroing (AB)*, para. 336 ("A panel has a duty . . . to evaluate evidence in its totality, by which we mean the duty to weigh collectively all of the evidence an in relation to each other, even if no piece of evidence is by itself determinative of the asserted fact or claim.").

C. Conclusion

102. Therefore, the Panel erred in assessing evidence concerning OYAK in its findings under Article 1.1(a)(1) with respect to Erdemir and Isdemir. As discussed above, because Turkey failed to provide any evidence or argumentation regarding OYAK in the context of its Erdemir and Isdemir claim, the Panel erred in making the case for Turkey by importing into its discussion under Article 1.1(a)(1) evidence and arguments raised in a separate claim. This error provides an independent basis to reverse the Panel's findings concerning OYAK,[153] and the Panel's conclusion that the United States acted inconsistently with Article 1.1(a)(1) in its public body determinations concerning Erdemir and Isdemir. In any event, the Panel also erred in reviewing the evidence concerning OYAK in isolation and not in light of the totality of the record evidence, as USDOC did. Therefore, the United States respectfully requests the Appellate Body to reverse the Panel's finding of inconsistency under Article 1.1(a)(1).

V. THE UNITED STATES APPEALS THE PANEL'S FINDINGS REGARDING THE EXISTENCE OF A "SUBSIDY PROGRAMME" UNDER ARTICLE 2.1(C) AND 2.4 OF THE SCM AGREEMENT

103. The United States appeals the Panel's finding that USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement "by failing to properly identify and substantiate the existence of a subsidy programme in the form of the Provision of HRS for LTAR."[154] This finding was based on an erroneous interpretation and application of Article 2.1(c) and must be reversed.

104. First, we explain in Section V.A., that the Panel erred in its assessment of the existence of a "subsidy programme" by interpreting the term "programme" in a manner that is inconsistent with the ordinary meaning of the term in its context in light of the object and purpose of the SCM Agreement.[155] In particular, the Panel misconstrued guidance in a prior Appellate Body report so as to read into the text a requirement that investigating authorities demonstrate "systematic" *subsidization* to substantiate the existence of a "subsidy programme," rather than a systematic *series of actions* (a program) pursuant to which subsides are provided. This requirement to find "systematic" subsidization is contrary to the text of Article 2.1(c) and requires reversal. Because the Panel applied this erroneous interpretation to the specificity determinations at issue, the Panel's findings that those determinations were inconsistent with Article 2.1(c) also must be reversed.

105. Second, in Section V.B., we explain that the Panel also erred in its application of Article 2.1(c) because it viewed the record evidence in isolation and not in its *totality*, as USDOC did. Specifically, the Panel analyzed whether each individual piece of evidence, when viewed in isolation, was sufficient to demonstrate the existence of a "subsidy programme," notwithstanding

[153] Panel Report, paras 7.38-7.40 (finding that the record before USDOC did not support its factual finding that OYAK was an entity through which the GOT exercised meaningful control over Erdemir and Isdemir).
[154] Panel Report, para. 7.161.
[155] Panel Report, paras. 7.137-7.162.

that USDOC never conducted such an analysis;[156] and failed to consider whether, when *taken together*, the totality of the evidence formed an overall picture that could give rise to USDOC's ultimate conclusion.[157] The Panel thus substituted its judgment for that of the investigating authority.

106. Each of these grounds provides a sufficient basis on which to reverse the Panel's findings. And because the Panel's finding under Article 2.4 is dependent on its analysis under Article 2.1(c),[158] its finding under Article 2.4 must also be reversed.

107. In the discussion below, we begin with the proper interpretation of Article 2.1 and then address each of the Panel's errors in turn.

A. The Panel Erred in Its Interpretation of the Term "Subsidy Programme" in Article 2.1(c) of the SCM Agreement

108. The Panel erred in its interpretation and application of the term "subsidy programme" when it applied Article 2.1(c) to the USDOC's determinations. The Panel's interpretation is not supported by the text of Article 2.1(c), in its context in light of the object and purpose of the SCM Agreement, and must be reversed.

1. The Legal Standard Under Article 2.1 of the SCM Agreement

109. Article 2.1 describes principles that apply in order to determine whether a subsidy is specific to certain enterprises, namely by virtue of being provided to an enterprise, industry, or group of enterprises or industries (collectively, "certain enterprises").

110. The chapeau of Article 2.1 provides, in its entirety:

> In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply.[159]

111. The text thus indicates that the subparagraphs that follow are "principles," rather than rules, and these principles "apply" when an investigating authority (or WTO adjudicator) is determining "whether a subsidy . . . is specific."[160] In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body explained, "[w]e consider that the use of the term

[156] Panel Report, paras. 7.155-7.159.
[157] Panel Report, paras. 7.160-7.161.
[158] Panel Report, para. 7.162.
[159] SCM Agreement, Article 2.1.
[160] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366 (the chapeau "frames the central inquiry as a determination as to whether a subsidy is specific to 'certain enterprises' . . . and provides that, in an examination of whether this is so, the 'principles' set out in subparagraphs (a) through (c) 'shall apply'").

'principles'—instead of, for instance, 'rules'—suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle."[161]

112. Among the applicable principles, subparagraph (c) of Article 2.1 contains the provision at issue in this appeal.[162] It consists of the following three sentences:

> - If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered.
>
> - Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. [FN 3: "In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered."]
>
> - In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

113. This text thus indicates that in determining whether "the subsidy" is specific "notwithstanding any appearance of non-specificity," other factors may be considered. The term "subsidy programme" appears twice: in the first factor enumerated in the second sentence ("use of a subsidy programme by a limited number of certain enterprises") and in the third sentence ("as well as the length of time during which the subsidy programme has been in operation"). The other factors in the second sentence do *not* refer to the "subsidy programme"; they are silent ("predominant use by certain enterprises") or refer to the "subsidy" ("granting of disproportionately large amounts of subsidy to certain enterprises"; "the manner in which discretion has been exercised by the granting authority in the decision to grant the subsidy"; "information on the frequency with which applications for a subsidy are refused or approved"). The sporadic references to "subsidy programme" reinforce that the aim of the evaluation of

[161] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366; *US – Countervailing Measures (China) (AB)*, para. 4.117.
[162] *See, e.g., US – Countervailing Measures (China) (AB)*, para. 4.129 ("a *de facto* specificity analysis under subparagraph (c) would appear to be most pertinent and useful in the context of subsidies in respect of which eligibility or access limitations are *not* explicitly provided for in a law or regulation.").

factors is to consider whether "the subsidy is in fact specific" – as noted in the chapeau, "a subsidy, as defined in paragraph 1 of Article 1."

114. The Appellate Body in *US – Countervailing Measures (China)* also explained,

> - That the *de facto* specificity of a subsidy is to be *assessed in an even broader analytical framework* is borne out in the first factor listed in Article 2.1(c) – "use of a subsidy programme by a limited number of certain enterprises."
> - The ordinary meaning of the word "programme" refers to "a *plan or scheme of any intended proceedings (whether in writing or not)*; an outline or abstract of something to be done."
> - The reference to "use of a subsidy programme" suggests that it is relevant to consider whether subsidies have been provided to recipients *pursuant to* a plan or scheme of some kind.
> - Evidence regarding the nature and scope of a subsidy programme *may be found in a wide variety of forms*, for instance, in the form of a law, regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy.
> - A subsidy scheme or plan may also be evidenced by a *systematic series of actions pursuant to which* financial contributions that confer a benefit have been provided to certain enterprises.
> - This is so particularly in the context of Article 2.1(c), where the inquiry focuses on whether there are reasons to believe that a subsidy is, in fact, specific, *even though there is no explicit limitation of access to the subsidy* set out in, for example, a law, regulation, or other official document.[163]

115. Given that the existence of the subsidy itself is established through application of Article 1.1,[164] these observations help to elucidate that the *de facto* specificity inquiry is concerned with the *recipients* of the subsidy and the *manner* in which it is provided. Without some consideration of the recipients (or extent of enjoyment of the subsidy), the analysis would lack a point of reference against which to distinguish a broadly available subsidy from one that benefits only certain groups. For example, if a subsidy were provided to all enterprises in the economy, a showing that all the respondents under investigation used that subsidy would not suffice to

[163] *US – Countervailing Measures (China) (AB)*, para. 4.141 (emphasis added) (citations omitted).
[164] *US – Countervailing Measures (China) (AB)*, para. 4.144 (emphasis added) ("In any event, we recall 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*.").

establish "use of a subsidy programme by a limited number of certain enterprises." Thus, where it is known that all the respondents under investigation used a subsidy, there must logically be some consideration of the extent to which that subsidy was provided in order to establish that the recipients are limited in number.

116. In terms of discerning the recipients of such a subsidy or the manner in which that subsidy is provided, the very mechanism by which the subsidy is identified (and the nature of that type of subsidy) may provide all of the information that is necessary to answer this question.[165] In other cases, it might not. Where the particular factor being considered is whether "use of a subsidy programme [is] by a limited number of certain enterprises," consideration of whether there is "a plan or scheme" is relevant to evaluating use of the program.[166] However, depending on the analysis required to establish which government entity or public body provided the subsidy, the type of financial contribution being provided, and whether the subsidy was observed as an isolated transaction or, rather, provided repeatedly and always by the same mechanism, the relevant "subsidy programme" may have already been identified and determined to exist in the process of ascertaining the existence of the subsidy in the first place under Article 1.1. Indeed, the Appellate Body in *US – Countervailing Measures (China)* found that this may *often* be how the Article 2.1(c) and Article 1.1 analyses are satisfied by the same set of observations.[167]

117. The Appellate Body in *US – Countervailing Measures (China)* also explained that:

> [T]he fact that the first factor in Article 2.1(c) refers to a "subsidy programme" does *not* mean that a *de facto* specificity inquiry requires identification of an explicit subsidy programme implemented through law or regulation, or through other explicit means. Rather, the relevant inquiry with respect to the first of the "other factors" under Article 2.1(c) seeks to determine whether the subsidy at issue is, in fact, specific by considering whether the relevant subsidy programme is used by a limited number of certain enterprises. By its very nature, such an analysis normally focuses on evidence other than of the kind found in written documents or express acts or pronouncements by a granting authority.[168]

118. In sum, the nature of an unwritten subsidy program, *i.e.*, plan or scheme which may be *evidenced by* a systematic series of actions pursuant to which the subsidy was conveyed, means

[165] *See 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.").
[166] *US – Countervailing Measures (China) (AB)*, para. 4.143.
[167] *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.").
[168] *US – Countervailing Measures (China) (AB)*, para. 4.146.

that evidence regarding the nature and scope of a subsidy program may be found in a wide variety of forms and 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.

2. The Panel Failed to Properly Interpret Article 2.1(c)

119. In interpreting Article 2.1(c), the Panel found that "the number or frequency of the subsidies provided under an alleged subsidy programme must be analysed before the systematic nature of the subsidy provision can be determined."[169] Although the Panel stated that it was "not suggesting that a 'subsidy programme' in the form of provision of inputs for LTAR must consist exclusively of transactions with prices lower than the benchmark prices," it nevertheless required that an investigating authority must provide "a reasoned explanation as to how *each* of the pieces of evidence individually or jointly indicates the existence of the alleged subsidy programme."[170] Where the program consists of a "systematic series of transactions," the Panel found that "there must be a reasoned explanation as to whether and how the transactions providing a subsidy are 'systematic' in the particular circumstances of a given case."[171] According to the Panel, "if the transactions providing a subsidy are disparate and infrequent in light of the total number of transactions, it may not be discernible that subsidies were provided pursuant to 'a plan or scheme of some kind'."[172] In applying this interpretation to the determinations at issue, the Panel concluded that USDOC did not "actually analyse[] the list of HRS transactions to determine whether the transactions providing subsidies in the form of the provision of HRS for LTAR are *systematic* by considering, e.g. the volume and frequency of transactions providing subsidies as compared with transactions for which the prices are above the benchmark."[173]

120. The Panel's interpretation is not supported by the text of Article 2.1(c) of the SCM Agreement. The Panel's appraoch would require an investigating authority to show, not the existence of a "subsidy programme," but the existence of "systematic subsidization." However, this is not what Article 2.1(c) requires. As explained above, under a proper interpretation of Article 2.1(c), a systematic series of actions need not consist entirely of acts of subsidization. Rather, the subsidy in question must be provided "pursuant to" a series of actions that qualifies as a "program."

121. As the Appellate Body explained in *US – Countervailing Measures (China)*, a "programme" is "a plan or scheme," and in the context of establishing *de facto* specificity under the first factor of Article 2.1(c) ("use of a subsidy programme by a limited number of certain enterprises"):

> [i]n order to establish that the provision of financial contributions constitutes a plan or scheme under Article 2.1(c), an investigating

[169] Panel Report, para. 7.159.
[170] Panel Report, para. 7.159.
[171] Panel Report, para. 7.159.
[172] Panel Report, para. 7.159.
[173] Panel Report, para. 7.159 (emphasis in original) (citations omitted).

> authority must have adequate evidence of the existence of *a systematic series of actions pursuant to which* financial contributions that confer a benefit are provided *to certain enterprises*.[174]

122. Instead of evaluating whether USDOC identified "a systematic series of actions" *pursuant to which* subsides were provided, however, the Panel improperly interpreted the language of Article 2.1(c) to read as if "a systematic subsidy programme" were required, thereby effectively adding an additional element to the requirement in Article 2.1 that is not reflected in the text of that provision.[175]

123. As discussed above, the inquiry under "Article 2.1 *assumes* the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is specific."[176] Because financial contribution and benefit are analyzed separately from this inquiry, the only remaining question is whether these were provided *pursuant to* "a systematic series of actions."[177] The inquiry under Article 2.1 concerns *specificity*, that is, whether a subsidy is limited to certain enterprises or industries.[178] The Panel here, however, did exactly the opposite.

124. Here, the relevant inquiry is focused on *de facto* limitation, taking into consideration the type of subsidy in question. In this case, the subsidy in question is the provision of hot-rolled steel for less than adequate remuneration, and the essential specificity question is whether it is generally available or *de facto* limited to certain enterprises. In the context of a public body providing hot-rolled steel for less than adequate remuneration, an investigating authority must take account of the features of such a subsidy program.[179] The manufacture and provision of hot-rolled steel to a limited number of certain enterprises in a repetitive manner, as was found in these proceedings, *is* "a systematic activity or series of actions" pursuant to which financial contributions that confer a benefit have been provided.

125. Therefore, in examining USDOC's determinations, the Panel should have taken into account the *manner* and *context* in which the subsidies were provided, rather than requiring that

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[174] *See US – Countervailing Measures (China) (AB)*, para. 4.143 (emphasis added).
[175] Panel Report, paras. 7.158-159.
[176] *US – Countervailing Measures (China) (AB)*, para. 4.144 (emphasis added).
[177] The United States makes these observations in the sense of their application to the provision of hot-rolled steel for less than adequate remuneration found in the USDOC's determinations here. In other circumstances, such as in the case of a single grant, it would not necessarily be appropriate to limit consideration of the word "programme" to the interpretation we focus on in this appeal.
[178] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 377 ("Rather, what must be made explicit under Article 2.1(a) is the *limitation on access* to the subsidy . . . . In this respect, we consider that, generally, a legal instrument explicitly limited access to a financial contribution to certain enterprises, but remaining silent on access to the benefit, would nevertheless constitute an explicit limitation on access to that subsidy.").
[179] *See 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.").

some portion of the transactions examined conferred a benefit. To introduce the element of benefit into the interpretation of the term "subsidy programme," as the Panel did, is to improperly conflate the benefit and specificity provisions of the SCM Agreement and, thereby, erroneously interpret Article 2.1.

126. We note that the Panel's error echoes an error addressed in *US – Anti-Dumping and Countervailing Duties (China)*,[180] where the Appellate Body rejected a complainant's claim that "a subsidy is specific in the sense of Article 2.1(a) only if the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limited access *both* to the financial contribution *and* to its corresponding benefit . . . ."[181] The Appellate Body found that in conducting a specificity analysis, the lack of a demonstration of benefit does not impact a finding of specificity.[182] The same reasoning would apply to the examination of whether a "program" exists under Article 2.1(c).

127. Based on the foregoing, the United States respectfully requests that the Appellate Body reverse the Panel's interpretation of Article 2.1(c). The United States also requests the Appellate Body to reverse the Panel's finding that USDOC acted inconsistently with its obligations under Article 2.1(c) in the determination at issue because that finding was based on the Panel's erroneous interpretation of that provision.

B. The Panel Erred by Failing to Review the Evidence Supporting the Existence of a "Subsidy Programme," as USDOC Did, in Its Totality

128. The Panel erred by failing to review the evidence at issue in its *totality*. As described above in Section III.B., the Appellate Body in *US – Countervailing Duty Investigation on DRAMs* explained that where an investigating authority bases its finding on the totality of the evidence, a Panel should "follow the agency's approach to the examination of the evidence."[183] A Panel may err if it "appear[s] to examine whether each piece of evidence, viewed *in isolation*, demonstrated [the finding at issue],[184] thus "essentially fault[ing] the [investigating authority] for drawing a certain inference from a single piece of evidence, where, in fact, the agency did no such thing."[185] That is, where an investigating authority bases its finding on the totality of the evidence, a Panel errs where its "discussion of the *totality* of the evidence appears to be primarily a summation of errors that the Panel found in the course of its review of the individual pieces of

[180] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 360-378.
[181] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 376.
[182] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 377 ("a legal instrument explicitly limiting access to a financial contribution to certain enterprises, but remaining silent on access to the benefit, would nevertheless constitute an explicit limitation on access to that subsidy").
[183] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 143; *see also id.*, para. 150 ("In our view, having accepted an investigating authority's approach, a panel normally should examine the probative value of a piece of evidence in a similar manner to that followed by the investigating authority.").
[184] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 146.
[185] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 146; *see also id.*, para. 149 ("In each of the above instances, the Panel appears to have implicitly required that entrustment or direction be *established*, or *determined*, or *inferred*, solely on the particular piece of evidence examined.").

evidence,"[186] as absent from any such analysis "is a consideration of the *inferences* that might reasonably have been drawn by [the investigating authority] on the basis of the *totality* of the evidence."[187]

129. In each of the relevant determinations, USDOC evaluated whether a "subsidy programme" existed, and determined that, through the repeated provision of HRS for LTAR in accordance with officially promulgated government policy, Erdemir and Isdemir engaged in "a systematic series of actions" that is probative of the existence of a "subsidy programme."

130. Specifically, in each proceeding, the HRS for LTAR subsidy program was first identified to USDOC by the U.S. domestic industries in their petitions.[188] USDOC reviewed the accuracy and adequacy of the evidence provided by petitioners to substantiate these claims and determined that the evidence warranted the initiation of an investigation.[189] Thereafter, in each proceeding USDOC identified the program in the preliminary determination,[190] gave all interested parties the opportunity to comment, and ultimately issued a final determination with respect to the program in each proceeding.[191]

131. USDOC explained, in each proceeding, that statements in Erdemir's Annual Report aligned with the Government of Turkey's macroeconomic policies. In the OCTG final determination, USDOC examined and discussed Erdemir's 2012 Annual Report, which states that Erdemir "implemented policies which promoted…customers to engage in export-oriented production" and "supports the use of domestically mined resources for raw materials in view of…the added value created by the domestic suppliers in favor of the local industries."[192] USDOC determined that "[t]hese policies are in line with the GOT's . . . 2012-2014 Medium Term Programme," which was promulgated by the Ministry of Development to achieve certain objectives, including "increasing employment, maintaining fiscal discipline, increasing domestic saving, [and] reducing the current account deficit, [in] this way strengthening macroeconomic

[186] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 154; *see also US – Continued Zeroing (AB)*, para. 336 ("A panel has a duty . . . to evaluate evidence in its totality, by which we mean the duty to weigh collectively all of the evidence an in relation to each other, even if no piece of evidence is by itself determinative of the asserted fact or claim.").
[187] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 154 (emphasis in original).
[188] OCTG Petition, Vol. X, p. 11 (Exhibit TUR-74); WLP Petition, Volume III, p. 4-5 (Exhibit USA-9); HWRP Petition, Volume V, p. 5 (Exhibit USA-17); Letter from Petitioner, "Administrative Review of Countervailing Duty Order on Certain Welded Carbon Steel Pipe and Tube from Turkey: New Subsides Allegation" (August 27, 2014) ("CWP New Subsidy Allegation"), pp. 3-4 (Exhibit USA-33)).
[189] OCTG Initiation Checklist, p. 8 (Exhibit TUR-71); WLP Initiation Checklist, p. 8 (Exhibit TUR-115); HWRP Initiation Checklist, p. 8 (Exhibit TUR-37); CWP New Subsidy Allegation Memorandum, p. 2 (Exhibit USA-21)).
[190] OCTG Post-Preliminary Analysis Memorandum for Borusan, p. 7 (Exhibit TUR-75); OCTG Post-Preliminary Analysis Memorandum for Toscelik, p. 6. (Exhibit TUR-76).
[191] OCTG Final I&D Memo, pp. 21-22, 49 (Exhibit TUR-85); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46); CWP Final I&D Memo, pp. 9-10 (Exhibit TUR-22); WLP Final I&D Memo, pp.14-15 (Exhibit TUR-122).
[192] OCTG Final I&D Memo, p. 21 (Exhibit TUR-85); *see also* OCTG Erdemir 2012 Annual Report (complete), pp. 29, 35 (Exhibit USA-5).

stability in stable growth process."[193] In particular, the policies adhered to the Medium Term Programme's stated objective to "decrease high dependency of production and exports on imports" through "policies and supports enhancing domestic production capacity."[194]

132. Similarly, in the WLP, CWP and HWRP determinations, USDOC examined Erdemir's 2013 Annual Report, which states that through "flat steel sales to exporting industries," Erdemir "made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013"[195] and "continues to create value added for Turkish industry through initiatives to increase the use of domestic sources of raw materials."[196] The 2013 Annual Report, which designates Erdemir as "Turkey's iron and steel power,"[197] also notes that Erdemir made 35% of its flat steel sales to the steel pipe manufacturing sector, one of the largest exporting sectors in Turkey."[198] In the WLP and CWP determinations, USDOC determined that "[t]hese policies are in line with the GOT's stated policy in its 2012-2014 Medium Term Programme to improve Turkey's balance of payments."[199] With this evidence in mind, a systematic series of actions establishing a "plan" or "scheme" was then established by information submitted by the Turkish respondents in each proceeding. Specifically, the respondents provided USDOC with a complete transaction-specific accounting of the provision of HRS for LTAR.[200] USDOC in each proceeding relied on this evidence in identifying the subsidy program alleged by petitioners.

133. Notwithstanding that USDOC's determinations were based on *both* the transaction-specific accountings of the provision of HRS for LTAR provided by Erdemir and Isdemir *and* statements in Erdemir's 2012 and 2013 Annual Reports indicating that its actions furthered the promotion of export-oriented production consistent with the Government of Turkey's policy as set out in Turkey's 2012-2014 Medium Term Programme — that it was these findings *in conjunction* that formed the basis of USDOC's determinations — the Panel failed to review USDOC's findings on their own terms. In so doing, the Panel committed legal error.

134. As demonstrated below, the Panel's review of USDOC's "subsidy programme" findings under Article 2.1(c) manifested the same errors as the panel report that was overturned by the Appellate Body in *US – Countervailing Duty Investigation on DRAMs*. Specifically, the Panel's

[193] OCTG Final I&D Memo, p. 21 n.160 (Exhibit TUR-85); *see also* Medium Term Programme, p. 12 (Exhibit USA-6).
[194] OCTG Final I&D Memo, p. 21 n.160 (Exhibit TUR-85); *see also* Medium Term Programme, p. 12 (Exhibit USA-6).
[195] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22). *See also* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[196] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22); HWRP Final I&D Memo, p. 12 (Exhibit TUR-46). *See also* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[197] *See* Erdemir 2013 Annual Report (complete), p. 2 (Exhibit USA-7).
[198] *See* Erdemir 2013 Annual Report (complete), p. 34 (Exhibit USA-7).
[199] WLP Final I&D Memo, p. 14 (Exhibit TUR-122); CWP Final I&D Memo, p. 9 (Exhibit TUR-22). *See also* Medium Term Programme, p. 23 (Exhibit USA-6).
[200] WLP Tosçelik Questionnaire Response, pp. 9-10 and Exhibit 12 (Exhibit USA-18); WLP Borusan Initial Questionnaire Response, p. 11-12 and Exhibit 18 (Exhibit USA-15); CWP Borusan Supplemental New Subsidy Allegations Questionnaire Response, p. 2 and Exhibits NSA-8, NSA-9 (Exhibit USA-19); HWRP MMZ Initial Questionnaire Response, p. 7 and Exhibit 5 (Exhibit USA-24).

report demonstrates that the Panel examined whether each piece of evidence, when viewed in isolation, was sufficient to demonstrate the existence of a "subsidy programme,"[201] and failed to consider whether the totality of the evidence formed part of an overall picture that could demonstrate the the existence of a "subsidy programme."[202] As a result, the Panel's findings must be reversed.

135. First, the Panel began its review of USDOC's determinations by examining whether each piece of evidence, viewed in isolation, was sufficient to demonstrate the existence of a "subsidy programme." Specifically, when reviewing USDOC's analysis of the transaction-specific accountings of the provision of HRS by Erdemir and Isdemir, the Panel concluded that this evidence "alone is not sufficient . . . ."[203]

136. Next, when reviewing USDOC's analysis of the Medium Term Programme, the Panel found,

> [i]n the absence of any additional evidence suggesting that the Medium Term Programme somehow envisages the provision of subsidized HRS . . . any connection between these broad governmental policies in the Medium Term Programme and the alleged provision of HRS for LTAR Programme is too remote to support the existence of the latter subsidy programme.[204]

137. With respect to its review of Erdemir's 2012 and 2013 Annual Reports, the Panel likewise stated, "an objective and unbiased investigating authority is expected to provide a reasoned and adequate explanation in its determinations of how Erdemir's alleged policies indicate the existence of the Provision of HRS for LTAR."[205] The Panel also found that "any connection between Erdermir's alleged policies and the alleged Provision of HRS for LTAR Program is too remote to support the existence of the latter subsidy programme."[206]

138. Finally, the Panel completed its review of USDOC's determinations with a conclusory statement that demonstrated *no consideration whatsoever* of how the interaction of the *totality* of the evidence could reasonably support USDOC's findings. The Panel explained as follows:

> We note that the United States argues that the USDOC considered the above-mentioned policy statements and the list of HRS transactions "in conjunction". Having considered that each of the three pieces of evidence was not sufficient to support the USDOC's alleged conclusion concerning the existence of a

[201] Panel Report, paras. 7.155-7.159.
[202] Panel Report, paras. 7.160-7.161.
[203] Panel Report, para. 7.158.
[204] Panel Report, para. 7.155.
[205] Panel Report, para. 7.157.
[206] Panel Report, para. 7.157.

> subsidy programme in the form of the Provision of HRS for LTAR, we are not persuaded that the abovementioned evidence, when considered together, supports the USDOC's alleged conclusion that a subsidy program existed in the form of a systematic provision of HRS for LTAR by Erdemir and Isdemir.[207]

139. However, a "discussion of the *totality* of the evidence [that] appears to be primarily a summation of errors that the Panel found in the course of its review of the individual pieces of evidence"[208] is insufficient and must be reversed. The Panel failed to consider whether, based on the totality of the evidence, an objective and unbiased investigating authority could find the existence of a "subsidy programme."

140. As we have previously explained, USDOC never reasoned that any of this evidence alone was sufficient to establish the existence of the "subsidy programme." Rather, USDOC determined that, through the repeated provision of HRS for LTAR, and in conjunction with officially promulgated government policy, Erdemir and Isdemir engaged in "a systematic series of actions" that is probative of the existence of a subsidy program. The Panel's review fails to take any meaningful consideration of this overall picture and, as a result, must be reversed.

C. Conclusion

141. In sum, the Panel erred in finding that USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement "by failing to properly identify and substantiate the existence of a subsidy programme in the form of the Provision of HRS for LTAR."[209] As explained, this finding was based on an erroneous interpretation and application Article 2.1(c). The Panel misconstrued the Appellate Body's guidance in a manner that read into the text of Article 2.1(c) a requirement that investigating authorities demonstrate "systematic" *subsidization* to substantiate the existence of a "subsidy programme," rather than a systematic *series of actions* pursuant to which subsidies are provided. Furthermore, the Panel erred by applying this erroneous interpretation to the specificity determinations at issue. Lastly, the Panel also erred in its application by reviewing the record evidence in isolation, and failing to consider whether, when *taken together*, the totality of the evidence formed an overall picture that could give rise to USDOC's ultimate conclusion. To that end, we request that the Appellate Body reverse the Panel's findings at paragraphs 7.155, 7.157-7.161, and 7.182.

142. Furthermore, as a result of the Panel finding that USDOC acted inconsistently with Article 2.1(c) with respect to the existence of a "subsidy programme," the Panel in turn found that USDOC acted inconsistently with Article 2.4 of the SCM Agreement.[210] Because the Panel's finding under Article 2.4 is a consequential finding and dependent on its analysis under

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[207] Panel Report, para. 7.160 (citations omitted).
[208] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 154 (emphasis in original).
[209] Panel Report, para. 7.161.
[210] Panel Report, para. 7.162.

Article 2.1(c), we also request that the Appellate Body reverse the Panel's finding at paragraph 7.162.

VI. THE PANEL ERRED IN ITS APPLICATION OF ARTICLE 12.7 OF THE SCM AGREEMENT

143. The United States appeals the Panel's findings that USDOC's application of facts available during the OCTG, WLP, and HWRP investigations was inconsistent with Article 12.7 of the SCM Agreement.[211] Specifically, the Panel erred in applying Article 12.7 when it found that USDOC had not engaged in a "process of reasoning and evaluation" in selecting facts available during these proceedings.[212] As will be explained below, USDOC *did* engage in reasoning and evaluation, consistent with Article 12.7, in selecting among the facts available to find reasonable replacements for missing information that was necessary to reach a subsidization determination in each investigation. The United States therefore respectfully requests that the Appellate Body reverse the Panel's findings to the contrary.

A. Legal Standard under Article 12.7 of the SCM Agreement

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

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

145. In this appeal, the United States does not challenge the Panel's interpretation of Article 12.7, which comports with the understanding of certain previous reports. That is, Article 12.7 permits an investigating authority "to fill in gaps in the information necessary to arrive at a conclusion as to subsidization . . . and injury."[213] The ability to rely on the facts available in these circumstances "is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation."[214]

146. In applying facts available, "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."[215] Where there are several "facts available" from which

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[211] Panel Report, paras. 8.2.d.ii-8.2.d.iv; *see also* Panel Report paras. 7.215, 7.221, 7.223, 7.252, 7.262, 7.264-7.266.
[212] Panel Report, paras. 8.2.d.ii-8.2.d.iv.
[213] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.
[214] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296 (Article 12.7 ensures that "the work of an investigating authority should not be frustrated or hampered by non-cooperation on the part of interested parties.").
[215] *US – Carbon Steel (India) (AB)*, para. 4.416 (quoting *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 293-294) (emphasis added by Appellate Body); *see also US – Countervailing Measures (China) (AB)*, para. 4.178.

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."[216]

147. As the Appellate Body has acknowledged, 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.[217] While Article 12.7 should not be used to "punish non-cooperating parties by choosing adverse facts for that purpose,"[218] the use of an inference that is adverse to the interests of a non-cooperating party "is not necessarily inconsistent with Article 12.7"[219].

B. The Panel Erred in Its Application of Article 12.7 in the OCTG Investigation When It Found That USDOC Did Not Engage in a Process of Reasoning and Evaluation

148. In the OCTG investigation, respondent Borusan provided requested information regarding HRS purchases from Erdemir and Isdemir for one of its facilities (Gemlik), but failed to provide the same information for two other facilities (Halkali and Izmit).[220] In order to replace this missing necessary information, USDOC applied facts available with respect to the price and quantity of HRS purchases for the Halkali and Izmit mills.[221] With respect to price, USDOC determined that the non-responding facilities paid the lowest actual price paid by the Gemlik mill for HRS from Erdemir and Isdemir.[222] With respect to quantity, USDOC initially determined that Borusan purchased the same quantity of HRS from Erdemir and Isdemir for the Halkali and Izmit mills as it did for the Gemlik mill.[223] However, based on comments received from interested parties and information on the record, USDOC adjusted that quantity for its final determination to find that the two mills purchased a quantity of HRS corresponding to each facility's annual production capacity, adjusted to reflect the ratio of the Gemlik mill's purchases of HRS from Erdemir and Isdemir compared to its total HRS purchases from all sources.[224]

149. The Panel erred in finding that USDOC did not engage in a process of "reasoning and evaluation" in making these findings, and thereby acted inconsistently with Article 12.7. The Panel did not explain why an unbiased and objective investigating authority could not have determined the selected facts to be reasonable replacements, or why USDOC's rationale for selecting those facts did not reflect a process of reasoning and evaluation. In fact, as the OCTG

[216] *US – Carbon Steel (India) (AB)*, para. 4.426.
[217] *US – Carbon Steel (India) (AB)*, para. 4.426.
[218] *US – Carbon Steel (India) (AB)*, para. 4.419.
[219] *US – Carbon Steel (India) (AB)*, para. 4.469.
[220] OCTG Final I&D Memo, pp. 9-12 (Exhibit TUR-85).
[221] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[222] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[223] OCTG Post-Preliminary Analysis Memorandum for Borusan, p. 14 (Exhibit TUR-75).
[224] OCTG Final I&D Memo, pp. 12, 52 (Exhibit TUR-85).

determination shows, USDOC did engage in a process of reasoning and evaluation in its selection among facts available.

1. The Panel's Findings

150. In its report, the Panel found that USDOC failed to engage in a process of reasoning and evaluation in its selection of price and, in part, with respect to quantity, and thus acted inconsistently with Article 12.7 in its application of facts available.

151. With respect to price, the Panel found that USDOC did not "engage[] in any comparative process of reasoning and evaluation in selecting the lowest price on the record," because "USDOC clearly stated that it was 'inferring adversely' in selecting the lowest price on the record because of Borusan's non cooperation." For the Panel, therefore, "the sole basis for selecting the relevant price data was the adverse inference."[225]

152. As for quantity, the Panel found that USDOC failed to engage in a process of reasoning and evaluation, and thus acted inconsistently with Article 12.7, in using the full utilization capacity of the Halkali and Izmit mills to calculate the quantity of HRS purchased from Erdemir and Isdemir for those mills.[226] Specifically, the Panel found that "an objective and unbiased investigating authority would not have simply used the full production capacity as a basis to calculate the quantities of HRS purchases from Erdemir and Isdemir at the two non-responding facilities, without first considering any substantiated information on the record that may shed light on the capacity utilization of the two non-responding facilities."[227] The Panel then went on to identify information that, in its view, also might have served as "a reasonable approximation" of the utilization capacity for the two mills, including the capacity utilization rate at the Gemlik facility and "information from secondary sources, such as the industry average capacity utilization rate."[228]

2. The Panel Erred in Finding that USDOC Did Not Engage in a Process of Reasoning and Evaluation

153. The Panel's finding that USDOC did not engage in a process of "reasoning and evaluation" in applying facts available is flawed, and its conclusion that the United States acted inconsistently with Article 12.7 must be reversed. No evidence was presented – either by Turkey during these proceedings or by Borusan during the original investigation – that the Gemlik price or quantity selected by USDOC was inaccurate or not a "reasonable replacement" for the missing information. Nor did the Panel find that the facts selected by USDOC were facts that an objective and unbiased investigating authority could *not* have found to be a "reasonable replacement." Rather, the Panel's findings of WTO-inconsistency are premised on a purported

[225] Panel Report, para. 7.215.
[226] Panel Report, paras. 7.220-7.221.
[227] Panel Report, para. 7.220.
[228] Panel Report, para. 7.220.

procedural defect: namely, that USDOC allegedly failed to "engage[] in any comparative process of reasoning and evaluation" in selecting the price.[229] The Panel is in error.

154. The nature and extent of explanation and analysis an investigating authority would engage in to apply facts available "will necessarily vary from determination to determination."[230] In the OCTG investigation, USDOC was faced with determining a reasonable replacement for price and quantity information that was missing *in its entirety* for two of Borusan's three mills. As is clear from the OCTG determination, USDOC evaluated all the information on the record and provided the reasons for its selection from among those facts. [231]

155. With respect to price, the Panel was of the view that, "given that there is a range of actual prices available on the record, one cannot ascertain which of the actual prices reasonably replaces the missing 'necessary information' under Article 12.7 without also looking into the particular circumstances of the transactions."[232] In particular, the Panel faulted USDOC for not considering "the whole range of transactional prices on the record, including in particular the date, seller, purchase quantity associated with these transactions, as well as any reasons for fluctuations in prices."[233] However, as the OCTG final determination reflects, USDOC *did* engage in a process of reasoning and evaluation, one that necessarily considered "the whole range of transactional prices on the record."

156. In particular, USDOC stated that it was "inferring adversely that Borusan purchased all HRS for the Halkali and Izmit mills at the lowest price on the record for the Gemlik mill's HRS purchases from Erdemir and Isdemir."[234] The only way for USDOC to determine the lowest price on the record was by comparing all of the Gemlik prices to one another. USDOC also necessarily considered all of the sellers in the Gemlik transactions, as USDOC identified and evaluated the prices paid for HRS from two specific sellers: Erdemir and Isdemir. That the USDOC used an adverse inference in making its selection does not negate this process of reasoning and evaluation. To the contrary, in selecting from among the available facts, an investigating authority may take into account the procedural circumstances of the missing information, including a non-cooperating party's knowledge of the consequences of failing to provide information.[235] Here, the questionnaire requesting data regarding Borusan's HRS purchases clearly explained that USDOC may use facts available – which may include adverse inferences – if a party failed to submit information in a timely matter.[236] Under these

[229] Panel Report, para. 7.215.
[230] *US – Countervailing Measures (China) (AB)*, para. 4.179.
[231] OCTG Final I&D Memo, pp. 9-13, 49-53 (Exhibit TUR-85).
[232] Panel Report, para. 7.217.
[233] Panel Report, para. 7.213.
[234] OCTG Final I&D Memo, p. 12 (Exhibit TUR-85).
[235] *US – Carbon Steel (India) (AB)*, para. 4.426.
[236] OCTG Initial Questionnaire at Section I, para. H (Exhibit USA-10) ("If you are unable to respond completely to every question in the attached questionnaire by the established deadline, or are unable to provide all requested supporting documentation by the same date, you must notify the officials in charge and submit a written request for an extension of the deadline for all or part of the questionnaire response. . . . [F]ailure to properly request extensions for all or part of a questionnaire response *may result in the application of partial or total facts available*, pursuant to

circumstances, it was appropriate for USDOC to infer that Borusan's actual purchase prices would not have led to a more favorable outcome than the other prices on the record.

157. As for the other "particular circumstances of the transactions" suggested by the Panel (date, quantity, and price fluctuations), the Panel has provided no explanation, much less pointed to record evidence, to explain why a comparison of these characteristics is necessary to select a "reasonable replacement" of the missing price information. Comparing the "circumstances" of the *Gemlik* mill transactions against each other would not be informative because the missing information was regarding the Halkali and Izmit facilities, not the Gemlik mill. Similarly, that some of the *Gemlik* transactions occurred on one date versus another, or involved certain quantities or price fluctuations, would not provide USDOC with accurate information about the missing prices for the Halkali and Izmit mills.

158. In fact, even the Panel conceded that, "[w]hile the United States may be right in pointing out that the unknown actual price at the non-responding facilities could be lower than the lowest price at the Gemlik facility, it is equally possible that the unknown price at the non-responding facilities could be higher than the highest price at the Gemlik facility."[237] The United States agrees. As is always the case when pricing information is missing from the record, it was impossible for USDOC to determine whether the *actual* prices paid for the Halkali and Izmit mills were lower than the lowest Gemlik price or higher than the highest Gemlik price (or somewhere in between). This was the consequence of Borusan's failure to provide necessary information. In the absence of such information, there is no basis to conclude that USDOC did not select a "reasonable replacement" when it chose an actual, verified price paid by Borusan, the non-cooperating entity, for the Gemlik mill, even if it was the lowest record price available.

159. With respect to the quantity of HRS purchased, USDOC appropriately turned to relevant facts on the record, including the quantity of HRS purchased from Erdemir and Isdemir for the Gemlik mill. In its initial post-preliminary analysis, USDOC determined that Borusan purchased the same quantity of HRS for the Halkali and Izmit mills as it did for the Gemlik mill.[238] However, based on comments received from interested parties and information on the record, and in order to derive a more accurate subsidy calculation, USDOC reduced that quantity for its final determination.[239] For the final determination, USDOC found that the non-responding mills purchased quantities of HRS equal to each facility's annual production capacity,[240] and that the percentage of HRS purchased for these mills from Erdemir and Isdemir corresponded to the same percentage as the Gemlik mill's purchases of HRS from Erdemir and Isdemir.[241] USDOC's application of facts available was thus based on actual HRS purchase data that

section 776(a) of the Act, <u>*which may include adverse inferences*</u>, pursuant to section 776(b) of the Act.") (emphasis added); *see also* OCTG Borusan Supplemental Questionnaire at Cover Letter, p. 1 (Exhibit TUR-54).

[237] Panel Report, para. 7.217.

[238] OCTG Post-Preliminary Analysis Memorandum for Borusan, p. 14 (Exhibit TUR-75).

[239] OCTG Final I&D Memo, pp. 50-52 (Exhibit TUR-85).

[240] OCTG Final I&D Memo, pp. 51-52 (Exhibit TUR-85).

[241] OCTG Final I&D Memo, pp. 51-52 (Exhibit TUR-85).

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.

160. While the Panel speculates that the capacity utilization rate of Gemlik "might have served as a reasonable approximation" for the other mills,[242] there is no record evidence that would support such an assertion. Therefore, while it is *possible* that the non-responding mills operated at less than full capacity, no facts supporting that such a possibility was *reality* were presented to USDOC. Notably, Borusan itself never argued before USDOC that the Gemlik mill's capacity utilization rate should be used for the Halkali and Izmit mills.[243]

161. The flaws in the Panel's findings with respect to these two aspects of USDOC's determination are even more evident in light of its finding that USDOC *did* engage in a process of reasoning and evaluation in determining to adjust the non-responding mills' production capacities by the ratio of Gemlik's HRS purchases. There, the Panel found that the USDOC's findings were "reasonable," because the USDOC: (1) "rejected the alternative facts proposed by the petitioner"; and (2) chose information with "a sufficiently close connection" to the missing information.[244]

162. As an initial matter, the Panel apparently overlooks that USDOC made a single determination with respect to the quantity of HRS purchases made by Borusan for the non-responding mills. Therefore, it is not clear on what basis the Panel could determine that USDOC only engaged in a process of reasoning and evaluation with respect to one aspect of its application of facts available for quantity. Rather, it would appear that the Panel instead disagreed with *one aspect* of USDOC's process of reasoning and evaluation. That the Panel, when faced with the same facts, would have come to a different determination than USDOC, however, is not a basis for a finding of inconsistency.

163. In addition, neither of the reasons the Panel provides for why the USDOC acted consistently with Article 12.7 in the one aspect of quantity distinguishes the other findings of inconsistency the Panel made. The Panel fails to explain why it considered the chosen information to have "a sufficiently close connection" to the missing information,[245] or even how such a comparison could be made with respect to *missing* information. Moreover, that USDOC rejected an alternative fact is true for every application of facts available at issue. As explained above, in selecting one price from among the actual prices available on the record, the USDOC considered and rejected all the other prices. And in determining the utilization capacity for the two mills, USDOC rejected a petitioner's proposal that USDOC determine that the non-responding mills purchased the *same quantity* of HRS as Gemlik.[246] Therefore, applying the Panel's own reasoning, USDOC's rejection of petitioner's proposal shows it engaged in a

[242] Panel Report, para. 7.220.
[243] OCTG from Turkey: Borusan Case Brief, pp. 59-60 (Exhibit TUR-52).
[244] Panel Report, para. 7.222.
[245] Panel Report, para. 7.222.
[246] OCTG Final I&D Memo, p. 52-53 (Exhibit TUR-85).

process of reasoning and evaluation in determining to use the Halkali and Izmit mills' full production capacity instead of using the quantity of HRS purchased for the Gemlik mill.

164. In sum, the Panel erred in finding that USDOC acted inconsistently with Article 12.7 by failing to engage in any process of "reasoning and evaluation" in selecting a reasonable replacement for the missing price and quantity information in the OCTG investigation. Accordingly, the United States respectfully requests that the Appellate Body reverse these findings.

C. The Panel Erred in Its Application of Article 12.7 in the WLP Investigation When It Made Findings for Which Turkey Provided No Substantive Argumentation and When It Found That USDOC Did Not Engage in a Process of Reasoning and Evaluation

165. When considering USDOC's application of facts available in the WLP investigation, the Panel committed two errors in applying Article 12.7 of the SCM Agreement. First, the Panel erred by making findings regarding USDOC's application of facts available with respect to the Provision of HRS for LTAR program, as Turkey provided *no* substantive argumentation regarding that program during the course of panel proceedings. Second, the Panel erred when it found that USDOC did not engage in a process of reasoning and evaluation in its selection of facts available with respect to the Provision of HRS for LTAR program. In fact, USDOC did engage in such a process when it determined to apply the rate it had calculated for a cooperating company's use of the *same* program in the *same* investigation.

1. The Panel Erred in Its Application of Article 12.7 in the WLP Investigation When It Made Findings for Which Turkey Provided No Substantive Argumentation

166. In the WLP investigation, respondent Borusan refused to participate in verification, which meant that there was no verified information on the record regarding the 30 subsidy programs at issue.[247] In order to replace this missing necessary information, USDOC relied on facts available to determine countervailable subsidy rates for each of these programs. In its request for establishment of a panel, however, Turkey only challenged USDOC's application of facts available in the WLP investigation with respect to a single program: the Provision of HRS for LTAR.[248] Yet Turkey opted not to raise *any* substantive arguments in *any* of its submissions regarding USDOC's selection of facts available with respect to the Provision of HRS for LTAR program.[249] Therefore, Turkey did not properly advance before the Panel *any* claims under Article 12.7 with respect to the WLP proceeding.

[247] WLP Final I&D Memo, p. 31 (Exhibit TUR-122).
[248] Panel Request, para. 8.(B).2.a. The Panel correctly found that the other 29 programs at issue in the WLP investigation fell outside the Panel's terms of reference. *See* Panel Report, paras. 7.235-7.236.
[249] Turkey's First Written Submission, paras. 322-330; Turkey's Responses to First Panel Questions, paras. 96-102; *see also* Turkey's First Oral Statement, paras. 64-68.

167. The Panel thus erred in finding that USDOC's application of facts available with respect to the Provision of HRS for LTAR program in the WLP investigation was inconsistent with Article 12.7. Since Turkey provided no argumentation to support this claim, there is no basis for the Panel's finding.

a. The Panel Erred in Finding That Turkey Provided Substantive Argumentation

168. In its report, the Panel rejected the United States' argument that Turkey provided no substantive argumentation concerning the Provision of HRS for LTAR program.[250] According to the Panel, Turkey's principal arguments were: "first, the subsidy rate calculations for all of the subsidy programmes in the WLP investigation, including the Provision of HRS for LTAR, are not reasonable replacements of the missing information; and second, the USDOC purposefully selected the worst possible facts available in order to punish Borusan for its alleged failure to cooperate."[251] The Panel also noted that in its first written submission, Turkey disputed the total subsidy rate that the USDOC calculated for Borusan.[252] Thus, in the Panel's view, Turkey's arguments "were made with reference to all subsidy programmes it sought to challenge, including the Provision of HRS for LTAR."[253]

169. The Panel's conclusion that Turkey made out its claim under Article 12.7 must be reversed because Turkey provided no evidence or argumentation regarding the Provision of HRS for LTAR program. In its first written submission, Turkey provided "examples of inaccurate determinations made by the USDOC" with respect to 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.[254] These two categories encompass 13 of the 30 subsidy programs at issue in the WLP proceedings – however, they do *not* include the Provision of HRS for LTAR program, which is the sole program the Panel found to be within its terms of reference.[255]

170. Later, in response to the first set of Panel questions, Turkey sought to belatedly present arguments for 14 of the 17 subsidy programs that it had failed to address in its first written

[250] Panel Report, para. 7.246.
[251] Panel Report, para. 7.246.
[252] Panel Report, para. 7.246.
[253] Panel Report, para. 7.246.
[254] Turkey's First Written Submission, para. 327.
[255] These programs comprise the IEP – Customs Duty Exemption, IEP – VAT Exemption, Large-Scale Investment Incentives – VAT Exemption, Large-Scale Investment Incentives – Customs Duty Exemption, Strategic Investment Incentives – VAT Exemption, Strategic Investment Incentives – Customs Duty Exemption, Deductions from Taxable Income for Export Revenue, Incentives for Research and Development (R&D) Activities – Tax Breaks, Large Scale Investment Incentives – Tax Reductions, Large Scale Investment Incentives – Income Tax Withholdings, Strategic Investment Incentives – Tax Reductions, Strategic Investment Incentives – Income Tax Withholdings, and Law 5084: Withholding of Income Tax on Wage and Salaries. *See* WLP Final I&D Memo, pp. 5, 7 (Exhibit TUR-122).

submission.[256] For the remaining three subsidy programs – including the Provision of HRS for LTAR program – Turkey continued to provide *no* substantive argumentation or analysis.[257] Likewise, Turkey's oral statements, second written submission, and responses to the Panel's second set of questions include *no* substantive arguments or discussion of the Provision of HRS for LTAR program.[258]

171. As the Appellate Body explained in *EC – Fasteners*, "the burden rests on the complainant to substantiate its claims with legal arguments and evidence in its written and oral submissions to the panel."[259] Where a complainant has failed to set forth arguments in its submissions sufficient to substantiate its claims, the panel "cannot intervene to raise arguments on a party's behalf and make the case for the complainant."[260]

172. Turkey, as the complaining party, bore the burden of demonstrating that USDOC's application of facts available with respect to the Provision of HRS for LTAR program is inconsistent with Article 12.7 of the SCM Agreement. By failing to provide any substantive argumentation regarding the Provision of HRS for LTAR program, Turkey failed to meet that burden.

173. While the Panel suggests that the Provision of HRS for LTAR program falls within the scope of Turkey's two "principal arguments," Turkey did not actually raise either of these arguments with respect to the Provision of HRS for LTAR program. Regarding Turkey's contention that the rates calculated by USDOC were not a "reasonable replacement" for missing information, for example, Turkey argued that the Government of Turkey's responses to USDOC's questionnaire showed that Borusan did not actually use some of the subsidy programs at issue.[261] With respect to the Provision of HRS for LTAR program, however, Borusan admitted to purchasing HRS from Erdemir and Isdemir during the POI.[262] Turkey also argued that, for certain programs, information in USDOC's final determination was worse than what it had found in the preliminary determination.[263] However, for the Provision of HRS for LTAR

[256] Turkey's Response to First Panel Questions, para. 100. These 14 programs comprise the Provision of Land for LTAR, Law 5084: Energy Support, Post-Shipment Rediscount Credit Program, Law 6486: Social Security Premium Incentive, Provision of Lignite for LTAR, Export-Oriented Working Capital Program, Incentives for R&D Activities – Product Development R&D Support-UFT, Pre-Export Credits Program, Large Scale Investment Incentives – Social Security and Interest Support, Large Scale Investment Incentives – Land Allocation, Strategic Investment Incentives – Social Security and Interest Support, Strategic Investment Incentives Land Allocation, Export Insurance Provided by the Turk Eximbank, and Law 5084: Incentive for Employer's Share in Insurance Premiums. *See* WLP Final I&D Memo, pp. 5-6 (Exhibit TUR-122).
[257] Turkey's Response to First Panel Questions, paras. 97-102. These three programs comprise the Provision of HRS for LTAR program, Rediscount Program, and Exemption from Property Tax. *See* WLP Final I&D Memo, pp. 5-6.
[258] *See* Turkey's First Oral Statement, paras. 63-76; Turkey's Second Oral Statement, paras. 79-94; Turkey's Second Written Submission, paras. 121-138; Turkey's Response to Second Panel Questions, section II.D.
[259] *EC – Fasteners (China) (AB)*, para. 566.
[260] *EC – Fasteners (China) (AB)*, para. 566.
[261] Turkey's Response to First Panel Questions, para. 100.
[262] OCTG from Turkey: Borusan Questionnaire Response, pp. 7-8 (Exhibit TUR-53).
[263] Turkey's Response to First Panel Questions, para. 100.

program, USDOC's final determination actually has a *lower* rate than the preliminary determination.[264]

174. As for Turkey's argument that USDOC selected the "worst" information available in order to punish Borusan, Turkey specifically complained that, "if there were no above-zero rates calculated for the other mandatory respondent, Toscelik, for identical programs, the USDOC selected the *highest* possible rates, *i.e.*, the *worst* information available, for any *similar* programs from prior investigations involving Turkey or for any programs from which Borusan could *conceivably* have benefited, for the specific purpose of punishing Borusan for its alleged non-cooperation."[265] This complaint does not apply to the Provision of HRS for LTAR program, however, since there *was* an above-zero rate for this program calculated for Toscelik.[266] It was this rate that USDOC applied to Borusan.[267] At no point in these proceedings did Turkey assert that USDOC's use of a rate calculated for the *same* program in the *same* proceeding was inconsistent with Article 12.7.[268]

175. Thus, unlike almost every other program at issue, for which Turkey did eventually provide arguments and evidence regarding alleged inaccuracies and the alleged selection by USDOC of the "worst" information possible, Turkey never raised any such arguments with respect to the Provision of HRS for LTAR program. And although Turkey did contest the *overall* subsidy rate, that does not mean that it was contesting every *individual* program rate that went into determining that overall rate. Instead, as it made clear in response to Panel question 49, Turkey was disputing the rates selected for 27 of the 30 programs at issue, with the Provision of HRS for LTAR being one of the three programs for which it raised no challenge.[269] In addition, even if Turkey's challenge to the overall subsidy rate did include a challenge to the specific 0.06 percent rate selected for the Provision of HRS for LTAR program, that alone would not be sufficient. Claims must be substantiated with evidence and argumentation, and Turkey failed to provide either.

176. The Panel therefore erred in finding that USDOC's application of facts available with respect to the Provision of HRS for LTAR program was inconsistent with Article 12.7 because Turkey failed to provide argumentation that would support such a finding. The Panel's finding must therefore be reversed.

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[264] *Compare* Decision Memorandum for the Affirmative Preliminary Determination in the Countervailing Duty Investigation of Welded Line Pipe from the Republic of Turkey, p. 17 (Exhibit TUR-125) (determining a 8.40% preliminary rate for Borusan's use of Provision of HRS for LTAR program) *with* WLP Final I&D Memo, pp. 5, 8 (Exhibit TUR-122) (determining a 0.06% final rate for Borusan's use of Provision of HRS for LTAR program).
[265] Turkey's Response to First Panel Questions, para. 99 (emphasis in original).
[266] WLP Final I&D Memo, p. 5 (Exhibit TUR-122).
[267] WLP Final I&D Memo, p. 5 (Exhibit TUR-122).
[268] *See* Turkey's First Written Submission, paras. 322-328; Turkey's First Oral Statement, paras. 63-76; Turkey's Responses to First Panel Questions, paras. 96-102; Turkey's Second Written Submission, paras. 121-138; Turkey's Second Oral Statement, paras. 79-94; Turkey's Response to Second Panel Questions, section II.D.
[269] *See* Turkey's Response to First Panel Questions, para. 100.

2. The Panel Erred in Its Application of Article 12.7 in the WLP Investigation When It Found That USDOC Did Not Engage in a Process of Reasoning and Evaluation

177. As explained above, Turkey provided no argumentation that would support the Panel's finding that USDOC's application of facts available with respect to the Provision of HRS for LTAR program is inconsistent with Article 12.7. The Panel's finding must be reversed for that basis alone. For the sake of completeness, however, the United States also addresses the Panel's finding on its merits below.

178. In the WLP investigation, respondent Borusan refused to participate in verification, which meant that there was no verified information on the record regarding the Provision of HRS for LTAR program.[270] As a result, USDOC used facts available to determine a countervailable subsidy rate for this program. In particular, USDOC applied the rate for the Provision of HRS for LTAR program that was calculated for Borusan's co-respondent in the WLP proceeding, Toscelik.[271] This rate, which was 0.06 percent, was thus based on verified information provided by a cooperating company in the *same* countervailing duty investigation regarding the *same* subsidy program.

179. The Panel erred in finding that USDOC did not engage in a process of "reasoning and evaluation" in making this determination, and thereby acted inconsistently with Article 12.7. The Panel did not explain why an unbiased and objective investigating authority could not have determined the selected fact to be a reasonable replacement, or why the USDOC's rationale for selecting that fact did not reflect a process of reasoning and evaluation. In fact, as the WLP determination shows, USDOC did engage in a process of reasoning and evaluation in its selection among facts available.

a. The Panel Erred in Finding that USDOC Did Not Engage in a Process of Reasoning and Evaluation

180. In its report, the Panel found that "the investigation record does not indicate that the USDOC engaged in a process of reasoning and evaluation of which facts available reasonably replaces the missing necessary information."[272] Instead, according to the Panel, "the WLP Final Determination shows that the USDOC simply selected the highest possible rate for the same programme in the same proceeding.[273]

181. The Panel is in error. As with the OCTG proceeding, neither Turkey during these proceedings, nor Borusan during the original investigation, ever argued that the selection of Toscelik's 0.06 percent rate was inaccurate or not a "reasonable replacement" for the missing

[270] WLP Final I&D Memo, p. 31 (Exhibit TUR-122).
[271] WLP Final I&D Memo, pp. 5, 8 (Exhibit TUR-122).
[272] Panel Report, para. 7.251.
[273] Panel Report, para. 7.251.

information.[274] Nor did the Panel find that the rate selected by USDOC was not one that an objective and unbiased investigating authority could have found to be a "reasonable replacement." Rather, the Panel's findings of WTO-inconsistency are again premised on the purported procedural defect that the investigation record allegedly does not indicate that USDOC "engaged in a process of reasoning and evaluation" of which facts available reasonably replace the necessary information.[275] The Panel's finding must be reversed.

182. In the WLP investigation, USDOC was faced with determining a subsidy rate that would serve as a reasonable replacement for a program for which Borusan had refused to provide *any* verified information. In the absence of verified information regarding Borusan's use of this program – or any of the other programs at issue in the WLP proceeding – USDOC explained its approach for applying facts available, including that "the Department applies the highest calculated rate for the identical program in the investigation if a responding company used the identical program, and the rate is not zero."[276] USDOC stated that it was "applying the above-zero rates calculated for Toscelik in this investigation for the following identical programs: Provision of HRS for LTAR."[277] In other words, USDOC applied as facts available the 0.06 percent subsidy rate calculated: (1) for a *cooperating* mandatory respondent, Toscelik; (2) within the *same* investigation; and (3) for the *identical* subsidy program.[278]

183. The Panel has provided no explanation for *why* the USDOC's process for selecting this rate is not one of "reasoning and evaluation," other than its objection that USDOC selected the "highest possible rate" for the same program in the same proceeding. The Panel fails to recognize, however, that the rate calculated for Toscelik was the *only* rate calculated for the Provision of HRS for LTAR program in the WLP proceeding.[279] There were only two respondents in that proceeding: Borusan and Toscelik.[280] Thus, it is unclear what other record information the Panel believes USDOC should have considered. Even if USDOC characterized its application of facts available as selecting the "highest" rate, that does not render the rate selected, or the process by which it was selected, inconsistent with Article 12.7. In fact, *Borusan itself* argued that if USDOC relied on facts available in determining Borusan's subsidy rate for the HRS for LTAR program, then the USDOC *should use* the subsidy rate calculated for Toscelik as the rate for Borusan.[281]

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[274] *See* WLP Final I&D Memo, p. 29 (Exhibit TUR-122); Turkey's First Written Submission, paras. 322-328; Turkey's First Oral Statement, paras. 63-76; Turkey's Responses to First Panel Questions, paras. 96-102; Turkey's Second Written Submission, paras. 121-138; Turkey's Second Oral Statement, paras. 79-94; Turkey's Response to Second Panel Questions, section II.D.
[275] Panel Report, para. 7.251.
[276] WLP Final I&D Memo, pp. 4-5 (Exhibit TUR-122).
[277] WLP Final I&D Memo, p. 5 (Exhibit TUR-122).
[278] WLP Final I&D Memo, pp. 5, 8 (Exhibit TUR-122).
[279] WLP Final I&D Memo, pp. 5, 8 (Exhibit TUR-122).
[280] WLP Final I&D Memo, pp. 5, 8 (Exhibit TUR-122).
[281] WLP Final I&D Memo, p. 29 (Exhibit TUR-122) ("Borusan notes that, in this investigation, Toscelik used virtually the same programs as Borusan. Therefore, Borusan asserts that, if the Department applies AFA, the Department should use the rates calculated for Toscelik for the identical programs that the Department found that

184. The Panel appear to imply that USDOC should have looked to the CWP verification report as facts available.[282] However, USDOC could not rely on information in the CWP report because it was not on the record, and could not be added to the record, of the WLP proceeding.[283] In addition, Borusan's subsidy rate for the Provision of HRS for LTAR program in the CWP administrative review was actually *higher* than the 0.06 percent USDOC selected as facts available in the WLP investigation.[284] It is illogical and a misapplication of Article 12.7 for the Panel to criticize USDOC for: (1) selecting a "facts available" rate that Borusan itself argued was reasonable, and (2) not using information that was not on the USDOC's written record (and that was, in any event, less-favorable).

185. In sum, the Panel erred in finding that USDOC acted inconsistently with Article 12.7 by failing to engage in any process of "reasoning and evaluation" in selecting "facts available" as a reasonable replacement for the missing information regarding the Provision of HRS for LTAR program in the WLP investigation. Accordingly, the United States respectfully requests that the Appellate Body reverse this finding.

D. The Panel Erred in Its Application of Article 12.7 in the HWRP Investigation When It Found That USDOC Did Not Engage in a Process of Reasoning and Evaluation

186. The United States also appeals the Panel's finding that USDOC did not engage in a process of "reasoning and evaluation" in making findings on the basis of facts available in the HWRP investigation, and thereby acted inconsistently with Article 12.7. The Panel failed to explain why an unbiased and objective investigating authority could not have determined the selected facts to be reasonable replacements, or why USDOC's rationale for selecting those facts did not reflect a process of reasoning and evaluation. In fact, as the HWRP determination shows, USDOC did engage in a process of reasoning and evaluation in its selection among facts available.

187. In the HWRP investigation, MMZ and Ozdemir claimed in their questionnaire responses that they did "not use" or were "not eligible" for the Deduction from Taxable Income for Export Revenue and Provision of Electricity for LTAR programs (MMZ) or Exemption from Property Tax program (Ozdemir).[285] It was only at verification that USDOC discovered that the

Borusan used in the Preliminary Determination. According to Borusan, these programs include the HRS for LTAR program . . . .").

[282] Panel Report, para. 7.250.

[283] WLP Final I&D Memo, pp. 30-31 (Exhibit TUR-122).

[284] Specifically, the rate in *CWP* was 0.46 percent. *See* CWP Final I&D Memo, p. 11 (Exhibit TUR-22).

[285] *See* Letter from MMZ to USDOC, "Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: MMZ ONUR BORU PROFIL URETIM SANAYi VE TiC A.S. (MMZ) Response to the Department's Section III (CVD) Questionnaire (October 30, 2015) ("HWRP MMZ Initial Questionnaire Response") (Exhibit USA-24); Letter from Ozdemir to USDOC, "Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey; Response to questionnaire" (October 30, 2015) ("HWRP Ozdemir Initial Questionnaire Response") (Exhibit USA-25).

respondents had in fact benefitted from these programs.[286] As a result of the respondents' non-cooperation, there was no verified information on the record regarding these programs, and USDOC relied on facts available by applying subsidy rates calculated for cooperating respondents for the same or similar programs.

188. Specifically, for the Deduction from Taxable Income for Export Revenue program, USDOC applied the rate calculated for Ozdemir for the *same* program in the *same* proceeding.[287] With respect to the remaining programs – Provision of Electricity for LTAR and Exemption from Property Tax – USDOC was unable to find a rate for the same programs in either the HWRP proceeding or prior proceedings, and therefore turned to "facts available" for similar subsidy programs.[288] Specifically, USDOC matched the Provision of Electricity for LTAR and Exemption from Property Tax programs to similar programs "based on program type and treatment of the benefit" from other Turkish countervailing duty proceedings,[289] and then determined and applied the highest rate calculated for these similar programs in either the HWRP investigation or prior investigations.

189. In its report, the Panel found that USDOC failed to engage in a process of reasoning and evaluation in its selection of a subsidy rate for these programs. Specifically, the Panel objected to USDOC's selection of "the *highest* calculated programme specific rates determined for a cooperating respondent in the same investigation for the Deduction from Taxable Income for Export Revenue, and the *highest* subsidy rates calculated in prior CVD cases involving Turkey for the Provision of Electricity for LTAR and Exemption from Property Tax."[290] According to the Panel, "by selecting the highest subsidy rates to ensure that the result is sufficiently adverse . . . , USDOC failed to engage in an adequate and meaningful qualitative assessment as to which facts available might reasonably replace the missing necessary information."[291] The Panel appeared to particularly object to USDOC's selection of a subsidy rate calculated for the Provision of HRS for LTAR program in the OCTG investigation – rather than a rate calculated for the Provision of HRS for LTAR program in the HWRP investigation – as a reasonable replacement for missing rate information for the Provision of Electricity for LTAR program.[292] According to the Panel, "this is not a situation when there were no other facts on the record for the USDOC to consider,"[293] referring specifically to "subsidy rates for various programmes on the record, including the rate for the Provision of HRS for LTAR for MMZ in the HWRP

[286] Memorandum from USDOC, "Verification of the Questionnaire Responses of MMZ Onur Boru Profil uretim San Ve Tic. A.S." (March 10, 2016) ("HWRP Verification of MMZ Questionnaire Responses"), p. 2 (Exhibit USA-28); Memorandum from USDOC, "Verification of the Questionnaire Responses of Ozdemir Boru Profil San ve Tic. Ltd Sti." (March 10, 2016) ("HWRP Verification of Ozdemir Questionnaire Responses"), pp. 2, 9 (Exhibit USA-31).
[287] HWRP Final I&D Memo, p. 7 (Exhibit TUR-46).
[288] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46).
[289] HWRP Final I&D Memo, p. 7 (Exhibit TUR-46).
[290] Panel Report, para. 7.259.
[291] Panel Report, para. 7.260.
[292] Panel Report, para. 7.259.
[293] Panel Report, para. 7.260.

investigation."[294] The Panel's analysis misapplies the standard under Article 12.7 of the SCM Agreement and must be reversed.

190. In the HWRP investigation, USDOC was faced with determining subsidy rates that would serve as reasonable replacements for programs for which MMZ and Ozdemir had failed to provide *any* verified information. Before making its findings, USDOC explained that:

> [T]he Department applies the highest calculated rate for the identical program in the investigation if a responding company used the identical program, and the rate is not zero. If there is no identical program match within the investigation, or if the rate is zero, the Department uses the highest non de minimis rate calculated for the identical program in another CVD proceeding involving the same country. If no such rate is available, the Department will use the highest non de minimis rate for a similar program (based on treatment of the benefit) in another CVD proceeding involving the same country. Absent an above de minimis subsidy rate calculated for a similar program, the Department applies the highest calculated subsidy rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non cooperating companies.[295]

191. Following this approach, USDOC stated that it was "applying the above-zero rates calculated for Ozdemir in this investigation to MMZ for the following identical program: Deduction from Taxable Income for Export Revenue".[296] USDOC thus applied as facts available for the Deduction from Taxable Income for Export Revenue the 0.06 percent subsidy rate calculated: (1) for a *cooperating* mandatory respondent, Ozdemir; (2) within the *same* investigation; and (3) for the *identical* subsidy program.[297] With respect to the remaining programs – Provision of Electricity for LTAR and Exemption from Property Tax – USDOC was unable to find a rate for the same programs in either the HWRP proceeding or prior proceedings,[298] and therefore turned to "facts available" for similar subsidy programs.[299] Specifically, USDOC stated that it was "able to match, based on program type and treatment of the benefit, the following programs to the highest non-de minimis rates for similar programs from other Turkish CVD proceedings: The Provision of Electricity for LTAR [and] Exemption from Property Tax."[300]

[294] Panel Report, para. 7.260, n. 418.
[295] HWRP Final I&D Memo, p. 6 (Exhibit TUR-46).
[296] HWRP Final I&D Memo, p. 7 (Exhibit TUR-46).
[297] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46).
[298] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46).
[299] HWRP Final I&D Memo, pp. 6-7 (Exhibit TUR-46).
[300] HWRP Final I&D Memo, p. 7 (Exhibit TUR-46).

192. Thus, as the HWRP final determination reflects, USDOC *did* engage in a process of reasoning and evaluation. Specifically, as reflected in its published decision memorandum,[301] USDOC's selection of facts available was based on facts (rates calculated for cooperating respondents), and those facts were evaluated in a progressive fashion – starting with rates for the same program in the same investigation, then other investigations, then similar programs, and so forth. In doing so, USDOC looked first to replacing unknown facts with the most relevant known facts, and only moved on to other known facts in diminishing degrees of relevance, when more closely related facts are not available. USDOC proceeded in this way for the three HWRP programs, determining that an above-zero rate calculated for a co-respondent in the same investigation for the same program should be applied where it was available, and that the highest rate calculated for a similar program in a prior or the same proceeding should be applied where no rate was available for the same program. USDOC's approach – explained over at least four pages in its published determination[302] – was clearly a process of reasoning and evaluation consistent with Article 12.7.

193. The Panel specifically objected to USDOC's selection of the "highest subsidy rates," noting that "USDOC selected the *highest* calculated programme-specific rates determined for a cooperating respondent in the same investigation for the Deduction from Taxable Income for Export Revenue, and the *highest* subsidy rates calculated in prior CVD cases involving Turkey for the Provision of Electricity for LTAR and Exemption from Property Tax."[303] However, the 0.06 percent rate USDOC selected for the Deduction from Taxable Income for Export Revenue program was not only the "highest" calculated rate for a cooperating respondent in the same investigation, it was the *only* calculated rate for a cooperating respondent in the same investigation, as there were only two respondents.[304] Nothing in the Panel's analysis explains why, in its view, an objective and unbiased investigating authority could not have found that the *only* calculated rate for the same program in the same investigation was a reasonable replacement for missing rate information. Nor does the Panel identify other record facts that USDOC failed to consider. Indeed, the Panel itself suggests elsewhere in its report that USDOC should consider rates calculated in the same investigation.[305]

194. As for USDOC's selection of the "highest" rate for a similar program in any Turkish CVD investigation for the Provision of Electricity for LTAR and Exemption from Property Tax programs, it is also unclear on what basis the Panel believes this does not reflect a process of "reasoning and evaluation." In order to determine which programs were similar to the two programs at issue, USDOC necessarily engaged in reasoning and evaluation. In particular, USDOC compared the program type and treatment of the benefit for the challenged programs against those of other Turkish subsidy programs. In addition, once it had identified a similar

[301] HWRP Final I&D Memo, pp. 5-8 (Exhibit TUR-46).
[302] HWRP Final I&D Memo, pp. 5-8 (Exhibit TUR-46).
[303] Panel Report, para. 7.259.
[304] HWRP Final I&D Memo, pp. 2, 7 (Exhibit TUR-46).
[305] Panel Report, para. 7.260 and n. 418 (noting that there were "other facts on the record for USDOC to consider", such as "subsidy rates for various programmes on the record, including the rate for the Provision of HRS for LTAR for MMZ in the HWRP investigation").

program, USDOC compared the rates it had calculated for that program in the HWRP proceeding and prior proceedings in order to determine the highest rate. The Panel is thus incorrect in its suggestion that USDOC did not "consider" the rate calculated for MMZ for the Provision of HRS for LTAR program in the HWRP investigation.[306] After determining that the Provision of HRS for LTAR program was similar to the Provision of Electricity for LTAR program, USDOC compared the rates it had calculated for the Provision of HRS for LTAR program in the HWRP investigation and in prior investigations in order to determine the highest calculated rate. Thus, USDOC considered, but did not use, the rate calculated for Ozdemir in the HWRP investigation.

195. In fact, with respect to the Provision of Electricity for LTAR program, USDOC's process of reasoning and evaluation also involved amending the selected facts available rate, leading to a reduction in the ultimate rate applied. Specifically, after issuing its final determination, USDOC received comments from the Government of Turkey and MMZ asserting that USDOC had made an error in using the 15.58 percent rate because that rate had been changed to 2.08 percent following litigation in the proceeding from which the USDOC had obtained the rate.[307] After analyzing the comments it had received, USDOC reduced the rate applied to MMZ for the Provision of Electricity for LTAR program to 2.08 percent,[308] which is *lower* than the 7.61 percent rate that was calculated for Ozdemir in the HWRP proceeding.[309] USDOC's consideration of Government of Turkey's and MMZ's comments and its lowering of the final rate shows that USDOC engaged in an ongoing process of reasoning and evaluation with respect to its application of facts available.

196. In sum, the Panel erred in finding that the USDOC acted inconsistently with Article 12.7 by failing to engage in any process of "reasoning and evaluation" in selecting "facts available" as a reasonable replacement for the missing rate information in the HWRP investigation. Because the subsidy rate calculated for each of the three HWRP programs challenged by Turkey was on a par with actual rates calculated for identical or similar subsidy programs, an objective and unbiased investigative authority could have found, as USDOC did, that these rates provide a reasonable replacement for the actual level of subsidization provided by the government.[310] Accordingly, the United States respectfully requests that the Appellate Body reverse this finding.

[306] Panel Report, para. 7.260 and n. 418.
[307] HWRP Ministerial Error Memo, pp. 5-6 (Exhibit USA-32).
[308] HWRP Ministerial Error Memo, pp. 5-6 (Exhibit USA-32); *see also* Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 81 Fed. Reg. 62,874, 62,875 (September 13, 2016) (Exhibit TUR-44).
[309] HWRP Final I&D Memo, p. 14 (Exhibit TUR-46).
[310] *US –Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

VII. THE PANEL ERRED IN FINDING THAT THE UNITED STATES ACTED INCONSISTENTLY WITH ARTICLE 15.3 OF THE SCM AGREEMENT

197. The Panel erred in its legal conclusions and interpretation and application of Article 15.3 of the SCM Agreement in three respects.[311] First, the Panel erred in concluding that the United States acted inconsistently with Article 15.3 because it erroneously found that USITC had a "practice" of cumulating the effects of subsidized imports with the effects of dumped, non-subsidized imports.[312] Second, the Panel erred in its interpretation of Article 15.3 because it found that "cross-cumulation" is inconsistent with Article 15.3. Third, the Panel erred in its application of Article 15.3 because its findings were based on the erroneous interpretation of Article 15.3.

A. The Panel Erred in Finding That the United States Acted Inconsistently With Article 15.3 Because the Panel Erroneously Found the Existence of a "Practice" of Cross-Cumulation Where No Such Measure Existed

198. With respect to original investigations, Turkey claimed before the Panel that USITC has a "practice," in assessing material injury, of cumulating imports subject to countervailing duty investigations with imports subject only to antidumping duty investigations, and that this "practice" is inconsistent with Article 15.3 of the SCM Agreement.[313] Specifically, Turkey argued that this alleged practice should be considered a rule or norm of general application, and found inconsistent "as such."[314] The Panel agreed with Turkey's claims, finding that "USITC has a practice, in assessing injury in original investigations, of cumulating the effects of subsidized imports with those of dumped, non-subsidized imports from all countries as to which petitions were filed on the same day," and that "this practice constitutes a rule or norm that has general and prospective application."[315] These findings are in error because no such measure exists, and the Panel's findings must therefore be reversed.

199. With respect to rules of general and prospective application, 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."[316] Rather, there is a "high [evidentiary] threshold" that must be reached by a complaining party, who must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application.[317] Evidence of such a measure "may include proof of the systematic application of the challenged

[311] Panel Report, paras. 7.295, 7.300, 7.314, 7.316, 7.332, 8.2.e.i-.ii.
[312] In the event the Appellate Body considers the Panel's assessment of whether the "practice" exists to be an error in the Panel's factual assessment, in the alternative, the United States appeals this finding under DSU Article 11.
[313] Turkey's First Written Submission, para. 222 (emphasis added).
[314] Turkey's First Written Submission, para. 224.
[315] Panel Report, para. 7.314.
[316] *US – Zeroing (EC) (AB)*, para. 196.
[317] *US – Zeroing (EC) (AB)*, para. 198.

'rule or norm'."[318] In finding the existence of a rule or norm of general and prospective application in *US – Zeroing (EC)*, the evidence relied on by the Appellate Body "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."[319]

200. Turkey's showing with respect to USITC's alleged practice fell far short of the "high threshold" for establishing the existence of a rule or norm. In support of its claim, Turkey pointed to a statement in the final injury determinations for OCTG, WLP, and HWRP. Specifically, Turkey recited the following statement in each of the final determinations:

> For purposes of evaluating the volume and [price] effects for a determination of material injury by reason of subject imports, section 771(7)(G)(i) of the Tariff Act requires the Commission to cumulate subject imports from all countries as to which petitions were filed . . . on the same day, if such imports compete with each other and with the domestic like product in the U.S. market.[320]

201. Turkey also cited to statements in two of these determinations referring to a "long-standing practice of cross-cumulating dumped and subsidized import"[321] (HWRP) and a "long-standing practice of 'cross-cumulating' imports subject to Commerce's affirmative subsidy determinations with imports subject to Commerce's affirmative dumping determinations"[322] (OCTG).

202. Based on these statements, the Panel found that "USITC itself considers that it has a long standing practice of cumulating the effects of imports subject to affirmative subsidy determinations with imports subject to affirmative dumping determinations,"[323] and that "USITC considers that it is *required* to cross cumulate imports whenever the statutory conditions are met."[324]

203. The Panel failed to acknowledge, however, that Turkey is challenging an "autonomous" unwritten measure, and the evidence Turkey has cited is insufficient to support the existence of such a measure. First, Turkey itself states that the alleged "practice" it challenges is *considered by the USITC to be required by U.S. statute*.[325] And the statement cited by Turkey from each determination similarly states that "section 771(7)(G)(i) of the Tariff Act requires the Commission" to take certain action. However, Turkey did not challenge that U.S. law, or place

[318] *US – Zeroing (EC) (AB)*, paras. 197-198.
[319] *US – Zeroing (EC) (AB)*, para. 204.
[320] Turkey's First Written Submission, paras. 223, 343, 456 (citations omitted).
[321] *HWRP from Turkey:* ITC Final Determination, p. 12, n. 44 (Exhibit TUR-38).
[322] *OCTG from Turkey:* ITC Final Determination, p. 20 (Exhibit TUR-72).
[323] Panel Report, para. 7.310.
[324] Panel Report, para. 7.308 (emphasis in original).
[325] Turkey's First Written Submission, paras. 223, 343, 456.

its content on the record of these proceedings.[326] Therefore, irrespective of what the U.S. statute may or may not require, Turkey did not even allege, much less demonstrate, that a "practice" autonomous from the U.S. statute exists.

204. In addition, Turkey failed to prove the content of the alleged practice. After describing the specific "practice" of "'cross-cumulating' subsidized and non-subsidized imports" in its first written submission, Turkey cited only to the specific injury determination at issue.[327] 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."

205. Furthermore, the USITC statements cited by Turkey – and relied upon by the Panel – do not describe the cumulation of subsidized imports and dumped, non-subsidized imports. Rather, the statement contained in all three determinations says that the relevant statute requires USITC "to cumulate subject imports from all countries as to which petitions were filed . . . on the same day, if such imports compete with each other and with the domestic like product in the U.S. market." This statement mimics language in the U.S. statute regarding cumulation, and does not indicate that both subsidized and dumped but non-subsidized imports must always be cumulated.

206. Similarly, USITC referenced a "practice of cross-cumulating dumped and subsidized imports"[328] in the HWRP determination and a "practice of 'cross-cumulating' imports subject to Commerce's affirmative subsidy determinations with imports subject to Commerce's affirmative dumping determinations"[329] in the OCTG determination. These statements do *not* describe a practice 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," as Turkey has claimed.[330]

207. Finally, as the panel in *US – Export Restraints* found, the fact that an investigating authority may have employed a practice in the past "would not be sufficient to accord such a practice an independent operational existence."[331] The panel observed that a U.S. investigating authority could depart from a practice as long as it explained its reasons for doing so, and concluded that this fact "prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action."[332] Therefore, Turkey's

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[326] We also note that the U.S. statute governing cumulation was itself challenged "as such" in *US – Carbon Steel (India) (AB)*. The Appellate Body in that dispute reversed the panel's findings of inconsistency with respect to the only two statutory subsections (19 U.S.C. § 1677(7)(G)(i)(I) and (II)) that have to date been used by USITC in antidumping or countervailing duty investigations, including the investigations at issue in this dispute. *US – Carbon Steel (India) (AB)*, paras. 4.622-4.625.
[327] Turkey's First Written Submission, paras. 222-223, 342-343, 455-456.
[328] *HWRP from Turkey:* ITC Final Determination, p. 12, n. 44 (Exhibit TUR-38).
[329] *OCTG from Turkey:* ITC Final Determination, p. 20 (Exhibit TUR-72).
[330] Panel Request, paras. 8.(A).5, 8.(B).4, 8.(C).4 (emphasis added); *see also* Turkey's First Written Submission, paras. 222, 340, 453.
[331] *US – Export Restraints (Panel)*, para. 8.126.
[332] *US – Export Restraints (Panel)*, para. 8.126 (emphasis in original).

reference to statements in the OCTG and HWRP final determinations in which USITC refers to a "practice" of cross-cumulation, does not support the existence of a rule or norm of general and prospective application in existence at the time of the panel's establishment.[333]

208. Based on the foregoing, Turkey failed to provide sufficient evidence to demonstrate the content or existence of the alleged "practice" it challenges, or that the "practice" constitutes a rule or norm of general and prospective application. The Panel thus erred in concluding that the United States acted inconsistently with Article 15.3 because it erred in finding that USITC has a "practice" of cross-cumulation and that this practice constitutes a norm of general and prospective application. The United States therefore respectfully requests the Appellate Body to reverse the findings in paragraphs 7.314, 7.316, and 8.2(e)(ii) of the panel report.

B. The Panel Erred in Finding That "Cross-Cumulation" Is Inconsistent with Article 15.3 of the SCM Agreement

209. The Panel erred in finding that "Article 15.3 of the SCM Agreement does not permit the cumulative assessment of the effects of subsidized imports with the effects of dumped, non-subsidized imports in original countervailing duty investigations."[334] First, Turkey failed to provide any legal arguments or evidence to support such an interpretation, and it is not the role of the Panel to make a party's case for it. Second, the Panel's interpretation is based on an incorrect understanding of that provision. A proper interpretation reveals that nothing in the text of Article 15.3 prohibits the cumulation of subsidized imports with imports that are dumped. In addition, the context and the object and purpose of the AD and SCM Agreements support the proposition that the cumulation of dumped and subsidized imports is consistent with the WTO Agreements.

1. Turkey Failed to Set Out an Interpretation of Article 15.3 Based on the Text of the SCM Agreement

210. Turkey failed to make its legal case regarding the inconsistency of cross-cumulation with Article 15.3 of the SCM Agreement. Therefore, there was no basis for the Panel's findings that the SCM Agreement prohibits the cumulative assessment of the effects of subsidized imports with the effects of dumped, non-subsidized imports in original countervailing duty investigations.

211. In its first written submission, Turkey did not explain how the text of Article 15.3 supported its claim that the provision contains a prohibition on "cross-cumulation," and instead cited only to the findings of the Appellate Body in a prior dispute. Mere reference to findings in another dispute without explanation for how the substantive elements of the provision of the covered agreement are met is not sufficient for purposes of making out a party's case. By failing to engage in any analysis of Article 15.3 of the SCM Agreement consistent with the customary rules of treaty interpretation, Turkey ignored that WTO adjudicators must apply those customary rules of interpretation to the text of the covered agreements[335] and failed to meet its burden of

[333] Turkey's First Written Submission, para. 224, n. 526; *id.*, para. 457.
[334] Panel Report, para. 7.295; *see also* Panel Report, paras. 7.288-7.294.
[335] *See* DSU, Articles 3.2, 7.1, 11.

proving that the cumulation of subsidized imports and dumped, non-subsidized imports is inconsistent with Article 15.3.

212. As numerous panels and the Appellate Body have stated, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[336] A complaining party will satisfy its burden of proof "when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence."[337] A "*prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[338] The panel may not make the case for a party, whether complainant or respondent.[339]

213. In this dispute, Turkey claimed that USITC's cumulation of imports, both "as applied" in the OCTG, WLP, and HWRP investigations and "as such" as a practice in original investigations, is inconsistent with Article 15.3. The burden of proving those claims thus falls on Turkey. Yet Turkey failed to engage in any analysis of Article 15.3 that would satisfy its burden. In particular, Turkey provided no interpretation of Article 15.3's text, in its context in light of the object and purpose of the SCM Agreement.[340] Instead, Turkey simply quoted certain statements made by the Appellate Body in a previous dispute, without elaboration or connection to Article 15.3.[341] This is not a sufficient basis upon which to make a legal showing.

214. Although Turkey appears to have attempted to provide some additional argumentation in its first oral statement and second written submission,[342] this additional argumentation was submitted too late in the panel proceedings. The Working Procedures adopted by the Panel provide that "*[b]efore the first substantive meeting* of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and *its arguments*."[343] Thus, both the working procedures that govern this dispute and basic procedural fairness prohibit the introduction of argumentation at such a late stage.

215. Since Turkey failed to substantiate its claims in a timely manner, there was no basis for the Panel's findings that the cumulative assessment of the effects of subsidized imports with the effects of dumped, non-subsidized imports in original countervailing duty investigations is not permitted under Article 15.3. Therefore, the United States respectfully requests that the Appellate Body reverse the Panel's findings in paragraph 7.295 of its report.

[336] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also EC – Selected Customs Matters (AB)*, para. 266.
[337] *Chile – Price Band System (Article 21.5 – Argentina*) *(AB)*, para. 134 (internal footnotes omitted).
[338] *EC – Hormones (AB)*, para. 104.
[339] *See Japan – Agricultural Products II (AB)*, para. 129.
[340] Turkey's First Written Submission, paras. 221-232, 339-346, 452-459.
[341] Turkey's First Written Submission, paras. 227, 231.
[342] Turkey's First Oral Statement, paras. 97-99; Turkey's Second Written Submission, paras. 151-152.
[343] Working Procedures of the Panel, para. 5.

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

216. Contrary to the Panel's finding, the text of Article 15.3 does not prohibit cross-cumulation of subsidized imports with dumped imports. Instead, Article 15.3 addresses the conditions under which an authority "may cumulatively assess" imports from all countries that are found to be subsidized. By its terms, Article 15.3 provides that, "[w]here imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of *such imports* only if" certain conditions are met. By using the phrase "such imports," Article 15.3 makes clear that the only category of imports subject to the criteria contained in Article 15.3 are imports from countries that "are simultaneously subject to countervailing duty investigations."

217. Article 15.3 does not address – and certainly does not set any prohibition against – the circumstance in which simultaneous countervailing duty investigations *and* antidumping investigations may be taking place. Nor, by its terms, does it impose an obligation on an investigating authority not to cumulatively assess subsidized imports with imports that are dumped. In fact, it does not address dumped imports at all. Rather, Article 15.3 is *silent* on the issue of whether cumulation of dumped and subsidized imports is permissible.

218. In similar circumstances, the Appellate Body has found that the silence of an agreement on the permissibility of a particular methodological approach does not indicate that the methodology is prohibited.[344] For example, in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body rejected Argentina's claim that an investigating authority could not cumulate imports from multiple countries in sunset reviews.[345] In that dispute, Argentina argued that the cumulation of imports from multiple countries was not permitted in sunset reviews under the AD Agreement, because the practice was not specifically authorized or addressed in the sunset provisions of the Agreement.

219. The Appellate Body rejected Argentina's claim, concluding that, although cumulation was not expressly authorized in sunset reviews, it was permissible because it was consistent with the policies underlying the AD Agreement.[346] In reaching this conclusion, the Appellate Body explained that "[t]he silence of the text on this issue ... cannot be understood to imply that cumulation is prohibited in sunset reviews."[347]

220. The United States suggests a similar finding here. Article 15.3 does not expressly prohibit or even address cross-cumulation – which may not be surprising as cross-cumulation only could arise where there is investigation of dumping from at least one source, investigation of subsidized imports from at least one different source, and injury to a domestic industry. And the fact that Article 15.3 does not specifically authorize an authority to cumulate subsidized imports with imports that are dumped but not subsidized does not, in and of itself, indicate that

[344] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 294-300.
[345] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 294-300.
[346] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 294-300.
[347] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 294 (emphasis added).

such an approach is prohibited by the SCM Agreement. The Panel's view that Article 15.3's silence on this matter must be read as prohibiting this practice would read into that text an obligation that is not there. Accordingly, the United States respectfully requests the Appellate Body to reverse the Panel's legal interpretation and findings in paragraph 7.295 of its report.

3. The Context Provided by the AD Agreement and Article VI of the GATT 1994 Supports an Interpretation That Cross-Cumulation is Permitted by the SCM Agreement

221. The AD and SCM Agreements contain nearly identical provisions governing an authority's injury analysis, including cumulation, in original investigations.[348] This near identical language highlights the overlap of the injury analysis under the AD and SCM Agreements. 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.

222. As the Appellate Body has recognized, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously."[349] Therefore, the obligations contained in the SCM Agreement must take account of the context offered both by Article VI of the GATT 1994 and the provisions of the AD Agreement.

223. Article VI of the GATT 1994 provides important context for considering the relationship of the SCM Agreement with the AD Agreement.[350] Article 15.1 of the SCM Agreement expressly references Article VI of the GATT 1994, stating that the injury findings prescribed in Article 15 of the SCM Agreement relate to a "determination for purposes of Article VI of GATT 1994."[351] The AD Agreement contains the same language in reference to Article VI.[352] Article VI:6(a) of the GATT 1994, in turn, provides that a Member shall not impose antidumping or countervailing duties "unless it determines that the effect of *dumping or subsidization*, as the case may be, is such as to cause or threaten to cause material injury to an established domestic industry…."

224. The phrase "as the case may be" acknowledges that cumulation of dumped and subsidized imports may be appropriate in particular injury investigations. In particular, this language recognizes that there may be situations in which it "may be the case" that the unfair trade practices covered by an authority's injury determination may involve dumping, subsidization, or both unfair trade practices. According to common definitions, "as the case may

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[348] *Compare* SCM Agreement, Article 15.3, *with* AD Agreement, Article 3.3.
[349] *US – Upland Cotton (AB)*, para 549 (quoting *Argentina – Footwear (EC) (AB)*, para. 81 (original emphasis)); *see also Korea – Dairy (AB)*, para. 81; *US – Gasoline (AB)*, p. 23, para. 21; *Japan – Alcoholic Beverages II (AB)*, p. 12, para. 106; and *India – Patents (US) (AB)*, para. 45).
[350] The cumulation of dumped and subsidized imports is fully consistent with the object and purpose of the SCM and AD Agreements, which authorize Members to provide relief to industries that are being injured by unfairly traded imports from a variety of sources. *EC - Tube or Pipe Fittings (AB)*, para. 116.
[351] SCM Agreement, Article 15.1.
[352] AD Agreement, Article 3.1.

be" means "according to the circumstances," and therefore does not indicate a binary choice between two options.[353] Article VI:6(a) requires that the effects of "dumping or subsidization, as the case may be," must cause injury to the domestic industry. The "circumstances" invoked by this phrase are the circumstances involving the injury to the domestic industry caused by the unfair trade practices.

225. Very often, a domestic industry will be faced with both dumped and subsidized imports, and where these circumstances exist, it would be appropriate to interpret Article VI:6(a) as contemplating a cumulative analysis of injury based on these circumstances. Therefore, the phrase "as the case may be," as used in Article VI of the GATT1994, indicates that the Agreement contemplates that an injury investigation may involve an examination of the injurious effects of dumped imports, subsidized imports, or dumped and subsidized imports. Furthermore, the use in Article VI:6(a) of the word "or" to join the phrases "dumping" and "subsidization" and the use of the phrase "as the case may be" reflects the fact that injury determinations can involve either or both unfair trade practices.

226. As the Appellate Body has acknowledged previously in the context of the AD Agreement, the ability to cumulate the injurious effects of dumped imports is a "useful tool" for an investigating authority "to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination."[354] The Appellate Body explained the rationale behind cumulation in *EC – Tube or Pipe Fittings* in the context of dumped imports:

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

[353] *See, e.g.*, "Collins" online definition at: http://www.collinsdictionary.com/dictionary/english/as-the-case-may-be; and "Oxford Dictionaries" online definition at: http://www.oxforddictionaries.com/us/definition/american_english/as-the-case-may-be?q=as+the+case+may+be.
[354] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 297.

> taken into account in a country-specific analysis of the injurious effects of dumped imports.[355]

227. The Appellate Body's explanation in *EC – Tube or Pipe Fittings*, outlining why cumulation plays an important role in the context of dumped imports, applies with equal force to a situation in which some imports are dumped and others subsidized, as was the case in the investigations at issue here. In contrast, an analysis that focuses solely on the injurious effects of either dumped or subsidized imports alone when both types of unfairly traded imports are injuring the domestic industry at the same time would necessarily prevent the investigating authority from "adequately taking into account" the injurious effects of all unfairly traded imports, and would render the authority's injury analysis less than complete.

228. Moreover, as noted above, the Appellate Body has emphasized these policies in *US – Oil Country Tubular Goods Sunset Reviews (AB)*, a case involving the issue of whether cumulation was permitted in sunset reviews under the AD Agreement. Relying on its statements in *EC – Tube or Pipe Fittings*, the Appellate Body found that an authority could cumulate imports from multiple countries in sunset reviews, even though such an approach was not expressly permitted in the sunset provisions of the AD Agreement.[356] The Appellate Body explained that:

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

[355] *EC – Tube or Pipe Fittings (AB)*, para. 116. Although the *EC – Tube or Pipe Fittings* dispute involved the injury provisions of the AD Agreement, the cumulation provisions of the SCM and AD Agreements are nearly identical and thus the same rationale would apply to the practice of cumulation under both Agreements. *Compare* AD Agreement, Article 3.3 *with* SCM Agreement, Article 15.3.
[356] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 296-297.

> to whether to impose – or continue to impose – anti-dumping duties on products from those sources.[357]

229. In other words, in *US – Oil Country Tubular Goods Sunset Reviews (AB)* and *EC – Tube or Pipe Fittings*, the Appellate Body emphasized that a cumulative assessment of the effects of unfairly traded imports from multiple countries is a critical component of the injury analysis authorized in the AD Agreement.[358] The same importance, of course, extends to the injury analysis conducted in countervailing duty investigations under the SCM Agreement.

230. The Panel's interpretation – focusing solely on the injurious effects of either dumped imports or subsidized imports alone – would have the effect of forcing a Member to make a country-specific analysis in the above circumstance. As discussed above, both the text of the AD and SCM Agreements, and the Appellate Body in *EC – Tube or Pipe Fittings*, recognize the inherent limitations in such an analysis.[359] The United States believes that denying the ability to cross-cumulate, such that the same volume of subsidized imports from a country can be countervailed in some circumstances but not in others, will impair the right afforded to Members under the SCM Agreement to countervail injurious subsidized imports. For, while the obligations applicable in the context of antidumping and countervailing duty investigations are legally distinct, the injury that has occurred to an industry, from the perspective of the relevant domestic industry, is cumulative.

231. If the view of the Appellate Body is that Members should not consider the remedies under the AD and SCM Agreements in "willful isolation,"[360] it would be misguided to consider the injury caused by dumped and subsidized imports to the same domestic industry in isolation. Antidumping and countervailing duty remedies "are, from the perspective of producers and exporters, indistinguishable."[361] Therefore, injury caused by dumping and subsidization of imports is, from the perspective of domestic producers, indistinguishable. The Appellate Body recognized this when it observed that "it may well be the case that the injury the [antidumping and countervailing] duties seek to counteract is the same injury to the same industry."[362] Accordingly, it would make little analytic sense for an investigating authority to conduct separate injury analyses of dumped and subsidized imports when both types of imports are simultaneously injuring the same domestic industry and the requirements for cumulation are otherwise satisfied. The United States therefore urges the Appellate Body 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.

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[357] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 296-297 (emphasis added).
[358] *EC – Tube or Pipe Fittings (AB)*, para. 117.
[359] *EC – Tube or Pipe Fittings (AB)*, para. 116.
[360] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 571.
[361] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 570.
[362] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 570, n. 549. Even the Panel in this dispute recognized that "economic and statistical methodologies available to investigating authorities do not easily permit separating the injurious effects of dumped and subsidized imports." Panel Report, para. 7.316, n. 508.

232. In sum, both the relevant context and the object and purpose of the AD and SCM Agreements support the proposition that cumulation of dumped and subsidized imports is consistent with the WTO Agreements. Whenever dumping and subsidization are simultaneously occurring in the market, there often will be cumulative price or volume effects from the dumped and subsidized imports — effects that will be indistinguishable to domestic producers injured by those imports. Where dumped and subsidized imports from multiple countries are having such a compounding effect on the industry, it is reasonable for an investigating authority to consider the effects of these imports on a cumulated basis in its analysis. Doing otherwise would prevent an investigating authority from properly taking into account the combined injurious impact of all unfairly traded imports that are affecting an industry adversely at the very same time.[363]

233. For these reasons, the Appellate Body should reverse the Panel's findings in paragraphs 7.288 to 7.295 of the panel report, and find that cross-cumulation is not inconsistent with Article 15.3 of the SCM Agreement, when read in context and in light of the object and purpose of the Agreement.

C. The Panel Erred in Its Application of Article 15.3 of the SCM Agreement Because It Made Findings Based on an Incorrect Legal Interpretation

234. As explained above, the Panel erred in finding that Article 15.3 prohibits the cumulative assessment of the effects of subsidized imports with the effects of dumped, non-subsidized imports in original countervailing duty investigations. Therefore, the Panel also erred in finding, in paragraphs 7.300 and 8.3(e)(i) of the panel report, that the cumulative assessment of such imports in the OCTG, WLP, and HWRP original investigations was inconsistent with Article 15.3 of the SCM Agreement. Accordingly, the United States respectfully requests the Appellate Body to reverse this finding.

235. The United States has appealed above the Panel's finding that a "practice" with respect to the cumulation of subsidized and dumped, non-subsidized imports in original investigations exists. In the alternative, if the Appellate Body finds that the Panel did not err in finding that such a practice exists, the United States also requests that the Appellate Body reverse the Panel's findings in paragraphs 7.316 and 8.2(e)(ii) that such a "practice" is inconsistent "as such" with Article 15.3 of the SCM Agreement, because the finding was based on an erroneous interpretation of that provision.

VIII. CONCLUSION

236. For the foregoing reasons, the United States respectfully requests that the Appellate Body reverse each of the findings discussed in this submission and as identified in the U.S. Notice of Appeal.

[363] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 296-297; *EC – Tube or Pipe Fittings (AB)*, para. 116.