WORLD TRADE ORGANIZATION

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18 December 2018

(18-7938)

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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS523/R.

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WORKING PROCEDURES OF THE PANEL

Adopted on 8 November 2017

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before 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, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Turkey requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Turkey shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause, including where the issue concerning translation arises later in the dispute. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party become aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Turkey could be numbered TUR-1, TUR-2, etc. If the last exhibit in connection with the first submission was numbered TUR-5, the first exhibit of the next submission thus would be numbered TUR-6.

Questions

10. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

11. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 12h00 (noon) the previous working day.

12. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Turkey to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 17h00 on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Turkey presenting its statement first.

13. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement,

followed by Turkey. If the United States chooses not to avail itself of that right, the Panel shall invite Turkey to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 17h00 of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 12h00 (noon) the previous working day.

16. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 17h00 of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to

which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive section

17. The description of the arguments of the parties and third parties in the descriptive section of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

18. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

19. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

20. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file three paper copies of all documents it submits to the Panel. Exhibits may be filed in two copies on a CD-ROM, DVD or USB key and two paper copies. The DS Registrar shall stamp the documents with the date and time of the filing.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, DVD or USB key or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to xxxxx@wto.org, with a copy to xxxxx@wto.org and xxxxx@wto.org. If a CD-ROM, DVD or USB key is provided,

it shall be filed with the DS Registry. The paper version of documents shall constitute the official version for purposes of the record of the dispute.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 17h00 (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive section, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

Adopted on 8 November 2017

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.

2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the U.S. Department of Commerce or the United States International Trade Commission as confidential or proprietary information protected by Administrative Protective Order in the course of the countervailing duty proceedings at issue in this dispute. In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned proceedings agrees in writing to make the information publicly available.

3. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in the proceedings at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Turkey and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of the proceeding. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorizing letter referred to above. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in this paragraph to grant such authorization.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. However, an outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the proceedings at issue in this dispute, or an officer or employee of an association of such enterprises.

5. A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

6. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. Documents previously submitted to the United States Department of Commerce containing information designated as BCI for purposes of these proceedings pursuant to paragraph 2, and marked as "Contains Business Proprietary Information", shall be deemed to comply with this requirement. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit TUR-1 (BCI)).

7. Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

8. Where a party or third party submits a document containing BCI to the Panel, the other party or third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked and treated as described in paragraph 7. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are present or observing the session at that time. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

9. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.

10. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party and, where BCI was submitted by a third party, that third party an opportunity to review the report to ensure that it does not contain any information that the party or third party has designated as BCI.

11. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Report of the Panel.

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

1.1. On 14 September 2018, the Panel issued its Interim Report to the parties. On 28 September 2018, Turkey and the United States submitted their written requests for review. In addition to its written request, the United States also requested the Panel to hold an interim review meeting with the parties. On 5 October 2018, Turkey submitted comments on the United States' written request for review. The Panel held an interim review meeting with the parties on 13 November 2018.

1.2. In accordance with Article 15.3 of the DSU, this Annex sets out our discussion of the arguments made at the interim review stage. We have revised certain aspects of the Interim Report in light of the parties' comments. In addition, we have made certain editorial changes to improve the clarity and accuracy of the Final Report, or to correct typographical and non-substantive errors, including those suggested by the parties. The footnote numbers in the Final Report have changed due to these revisions. The footnote numbers indicated in this Annex pertain to those in the Final Report. The paragraph numbers in the Final Report remain unchanged.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Paragraph 3.1

2.1. The United States requests us to modify paragraph 3.1 to clarify which claims Turkey brought "as such" and those claims it brought "as applied".[1] Turkey did not comment on this request.

2.2. We have modified this paragraph to specify which claims Turkey brought "as such" and those it brought "as applied".

2.2 Paragraphs 7.6 and 7.15

2.3. The United States requests us to delete the term "manager" in describing OYAK as a pension fund, as this term is not used in the description of OYAK in the USDOC's determinations.[2] Turkey did not comment on this request.

2.4. We have made the requested change in these two paragraphs.

2.3 Paragraph 7.17

2.5. The United States requests us to modify this paragraph to accurately describe its argument concerning OYAK.[3] Turkey asks us to reject the United States' request because Turkey considers that the USDOC did treat OYAK as a governmental entity or as governmental in the broader sense.[4]

2.6. We have made some changes to more closely reflect the actual language used by the United States in its submissions without making any of the requested changes objected to by Turkey. We consider that these changes reflect the United States' position.

[1] United States' request for interim review, para. 4.
[2] United States' request for interim review, paras. 5-6.
[3] United States' request for interim review, para. 7.
[4] Turkey's comments on the United States' request for interim review, para. 1.

2.4 Paragraph 7.21 and footnote 51

2.7. The United States requests us to modify footnote 51 to reiterate its argument that we should not consider Turkey's arguments with respect to OYAK in the context of its challenge to Erdemir and Isdemir because the claim was independently raised.[5] Turkey requests us to modify the last sentence to avoid suggesting that the parties have agreed on OYAK's status.[6]

2.8. We have made the requested changes to clarify the United States' argument and to address Turkey's concern.

2.5 Paragraph 7.27 and footnote 61

2.9. The United States requests us to modify this paragraph and footnote 61 to reflect the fact that Erdemir's ownership interest in Isdemir differed slightly in each of the challenged determinations.[7] Turkey did not comment on this request.

2.10. We have made changes to paragraph 7.27 and footnote 61 to reflect that Erdemir's ownership interest in Isdemir differed slightly in the context of each of the challenged determinations.

2.6 Paragraph 7.61

2.11. The United States requests us to delete the language "not legally 'relevant'" from this paragraph because the USDOC's determinations used the phrase "not dispositive".[8] Turkey asks us to reject the United States' request because the USDOC used the language "not legally 'relevant'" in the OCTG CVD Final Determination Memorandum.[9]

2.12. We reject the United States' request because, as Turkey notes, the USDOC used the word "relevant" in the OCTG CVD Final Determination Memorandum. The USDOC alternately used the term "dispositive" in the WLP, HWRP, and CWP CVD Final Determination Memoranda. Therefore, it is accurate to include both terms.

2.7 Paragraph 7.96

2.13. The United States requests us to delete the word "sole" before the word "basis" when referring to the United States' argument concerning Turkey's "as such" claim corresponding to the benefit determination in the OCTG investigation.[10] Turkey did not comment on this request.

2.14. We have made the suggested deletion.

2.8 Paragraph 7.102

2.15. The United States requests us to modify this paragraph to clarify that the United States requested the Panel to find that the OCTG Final Determination is outside the Panel's terms of reference.[11] Turkey did not comment on this request.

2.16. We have made the suggested change.

2.9 Paragraphs 7.103 and 7.105

2.17. The United States requests us to delete paragraph 7.103 concerning panels' discretion to rule on expired measures, and to additionally modify paragraph 7.105 to indicate that the Panel has no basis to make findings on a measure that ceased to have legal effect or was withdrawn

[5] United States' request for interim review, para. 8.
[6] Turkey's request for interim review, para. 2.
[7] United States' request for interim review, paras. 9-10.
[8] United States' request for interim review, para. 11.
[9] Turkey's comments on the United States' request for interim review, para. 2.
[10] United States' request for interim review, para. 12.
[11] United States' request for interim review, para. 13.

prior to the establishment of a panel.[12] The United States considers that prior panel reports support its position that panels have no discretion to make findings regarding measures that expire *before* a panel's establishment. In such instances, the United States considers that panels are required to rule that such measures fall outside of a panel's terms of reference.[13] Turkey did not comment on this request.

2.18. We see no basis to make either of the United States' requested changes. Paragraph 7.103 is correct as formulated. The Panel otherwise disagrees with the United States that panels have no discretion to make findings on measures at issue that ceased to have legal effect or were withdrawn prior to the establishment of a panel. We hold the view that the decision whether to make findings on a given measure that has expired – including measures that have expired prior to a panel's establishment – will depend on the circumstances of the case. A panel is therefore required to exercise its discretion in deciding whether to make findings depending on the circumstances.

2.10 Paragraph 7.106

2.19. The United States requests us to conform the language in this paragraph with the changes it has requested to paragraphs 7.103 and 7.105. In particular, the United States requests that the Panel state that it has no basis to make "as applied" findings, rather than stating that the Panel does not need to make findings on the WTO consistency of the initial benchmark determination.[14] Turkey asks us to reject this request in the view that the phrases "see no basis" and "do not need to make" have different meanings, and because Turkey disagrees with the United States' view that the Panel had no discretion in deciding whether to make findings or not.[15]

2.20. We decline to make this change for the same reason as we declined to make changes to paragraphs 7.103 and 7.105.

2.11 Paragraph 7.123

2.21. The United States requests us to adjust language in this paragraph to indicate that the United States submitted examples in response to the Panel's questions seeking such examples.[16] Turkey did not comment on this request.

2.22. We have made the requested change.

2.12 Paragraphs 7.153, 7.157, 7.209, 7.213, 7.217, 7.220, and 7.249

2.23. The United States requests us to replace the phrase "reasonable and unbiased investigating authority" with "objective and unbiased investigating authority" in last sentence of paragraph 7.153, as well as in paragraphs 7.157, 7.209, 7.213, 7.217, 7.220, and 7.249, to reflect the standard of review as articulated in prior panel reports.[17] Turkey did not comment on this request.

2.24. We have made the requested changes to improve consistency and to conform the language to the applicable standard of review as set out in, *inter alia*, paragraphs 7.2, 7.3, 7.205, and 7.222.

2.13 Paragraph 7.190

2.25. The United States requests us to replace the word "determine" with "make determinations" in the first sentence of paragraph 7.190 to more accurately reflect the text of Article 12.7 of the SCM Agreement.[18] Turkey did not comment on this request.

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[12] United States' request for interim review, para. 18.
[13] United States' request for interim review, paras. 15-17.
[14] United States' request for interim review, para. 19.
[15] Turkey's comments on the United States' request for interim review, para. 3.
[16] United States' request for interim review, para. 20.
[17] United States' request for interim review, paras. 21-22.
[18] United States' request for interim review, para. 23.

2.26. We have made the requested change.

2.14 Subsection 7.5.2.2.2 heading and paragraph 7.203

2.27. The United States requests us to modify the heading of this subsection to read "Punitive application of facts available" rather than "Punitive facts available". The United States also requests us to make similar modifications to the third and fifth sentences of paragraph 7.203.[19] Turkey did not make any comment on this request.

2.28. We have made the requested changes.

2.15 Paragraph 7.200

2.29. The United States requests us to replace "this data" in the second sentence of paragraph 7.200 with "the data provided by Borusan regarding its purchases of HRS for the Gemlik mill" to specify which data that is being discussed.[20] Turkey did not comment on this request.

2.30. We have made the requested change.

2.16 Paragraph 7.202

2.31. The United States requests us to modify this paragraph to more accurately reflect the United States' argument that the use of weighted average transaction prices would in general "require a finding that is necessarily *better* than some of the outcomes for cooperating entities".[21] In particular the United States requests that we replace the language "have led to a finding which would have made Borusan necessarily better off" with the language "in general lead to findings that are necessarily better than some of the outcomes for cooperating entities". Turkey did not comment on this request.

2.32. We have made the requested change.

2.17 Paragraph 7.204

2.33. The United States requests us to modify the language in the second sentence to reflect that the alleged punitive nature of the USDOC's application of facts available is an argument advanced by Turkey and contested by the United States.[22] Turkey did not comment on this request.

2.34. We have made the requested change.

2.18 Paragraph 7.215

2.35. The United States requests us to strike the phrase "to discourage non-cooperation" in the second sentence in paragraph 7.215 to avoid giving the impression that the USDOC inferred adversely by selecting the lower price on the record to discourage non-cooperation. According to the United States, there is no statement in the USDOC's Final Determination to this effect.[23] Turkey disagrees that the sentence is inaccurate as currently drafted. In the event that the Panel were to modify this paragraph, Turkey requests us to indicate that the USDOC inferred adversely in selecting the lowest price on the record because of Borusan's non-cooperation.[24]

2.36. We do not consider that the United States' requested change is a fair reflection of the USDOC's determination in this regard. Although the USDOC does not explicitly state in its determination that it inferred adversely in order to discourage non-cooperation, the USDOC's OCTG Final Determination nevertheless clearly connects its decision to apply an adverse inference

[19] United States' request for interim review, paras. 24 and 27.
[20] United States' request for interim review, para. 25.
[21] United States' request for interim review, para. 26 (referring to United States' response to Panel question No. 47, para. 146).
[22] United States' request for interim review, para. 28.
[23] United States' request for interim review, para. 29.
[24] Turkey's comments on the United States' request for interim review, para. 4.

to its finding that Borusan failed to cooperate.[25] We have accordingly modified this paragraph to reflect the USDOC's statements in the OCTG Final Determination that the USDOC inferred adversely in selecting the lowest price on the record because of Borusan's non-cooperation.

2.19 Paragraph 7.250

2.37. The United States requests us to modify this paragraph to indicate that the CWP review and the WLP investigation did not cover the identical subsidy programmes, but only some of the same programmes.[26] Turkey did not comment on this request.

2.38. We have made the requested change.

2.20 Paragraph 7.260, footnote 418

2.39. The United States requests us to delete footnote 418 because it does not support the proposition in the text.[27] Turkey did not comment on this request.

2.40. We have modified the footnote to more clearly support our statement that this is not a situation in which the USDOC did not have other facts on the record to consider.

2.21 Paragraphs 7.267, 7.317, 7.330, and 7.333

2.41. Turkey requests us to identify the CWP sunset review at issue as the 2011 CWP sunset review.[28] The United States did not comment on this request.

2.42. We have made the requested change.

2.22 Paragraph 7.275, footnote 431

2.43. The United States requests us to modify footnote 431 to more accurately reflect the text of the Appellate Body's report in *Argentina – Import Measures*.[29] Turkey did not comment on this request.

2.44. We have made the requested changes.

2.23 Paragraphs 7.285-7.295 and footnote 444

2.45. The United States requests us to revise our approach as set out in paragraphs 7.285 to 7.295 and footnote 444 regarding the interpretation of Article 15.3 of the SCM Agreement. The United States submits that the Panel erred in enquiring whether the United States has identified "cogent reasons" for deviating from the conclusions reached by the panel and the Appellate Body in *US – Carbon Steel (India)* regarding the interpretation of Article 15.3. According to the United States, the Panel's understanding of the value of prior adopted panel or Appellate Body reports is inconsistent with the relevant provisions of the DSU and the WTO dispute settlement system. The United States thus asks us to eliminate any reference to the notion of "cogent reasons" or to otherwise engage with specific provisions in Article 3.9 of the DSU and Article IX:2 of the WTO Agreement, and with arguments that have been presented against a "cogent reasons" approach.[30]

2.46. At an interim review meeting held with the Panel, the United States elaborated on its position that the DSU does not assign precedential value to adopted panel and Appellate Body

[25] See, e.g. OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 12 ("[W]e find that Borusan failed to cooperate by not acting to the best of its ability because Borusan withheld requested information on its purchases of HRS, despite having two opportunities, and never requested an extension to provide this information in accordance with 19 CFR 351.302(c). Consequently, an adverse inference is warranted in the application of facts available.")

[26] United States' request for interim review, para. 30.

[27] United States' request for interim review, para. 32.

[28] Turkey's request for interim review, para. 2.

[29] United States' request for interim review, para. 33.

[30] United States' request for interim review, paras. 34-36 and 41.

reports and the interpretations contained in those reports. According to the United States, a panel (or the Appellate Body) is to apply customary rules of interpretation of public international law in assisting the DSB to determine whether a measure is inconsistent with a Member's commitments under the covered agreements. The United States also argues that those rules of interpretation do not assign to interpretations given as part of dispute settlement a precedential value for purposes of discerning the meaning of the text of the covered agreements. The United States further elaborated on why it considers that there are flaws in the Appellate Body's statement that a panel must follow an Appellate Body interpretation absent undefined "cogent reasons" for departing from that interpretation. In this respect, the United States considers that the Appellate Body's "cogent reasons" approach is flawed because (a) it fails to appreciate the functions of panels and the Appellate Body in the WTO dispute settlement system; (b) it is based on an erroneous interpretation of Article 3.2 of the DSU; (c) it relies on previous reports that do not support it; (d) it misunderstands why parties cite previous reports in WTO disputes; (e) it rests on inappropriate analogies to other international adjudicative fora; and (f) it incorrectly assumes the existence of a hierarchical structure that does not reflect the role assigned to the Appellate Body in the DSU.[31] Although the United States disagrees that adopted panel and Appellate Body reports have precedential value, the United States considers it appropriate for a panel to consider and refer to prior Appellate Body or panel reasoning in conducting its own objective assessment of the matter.[32]

2.47. Turkey disagrees with the United States' requests. Turkey considers that, although the concept of "cogent reasons" does not appear in the text of the DSU, it can be derived from a reading of Article 3.2, 17.6, and 17.13 of the DSU, and it is well-established that a panel will resolve the same legal question in the same way in a subsequent case, absent cogent reasons to rule differently. Turkey further submits that the Panel correctly concluded that the United States provided no cogent reasons for why the Panel should depart from prior guidance in interpreting Article 15.3, and that the Panel did not fail to engage with the United States' arguments.[33]

2.48. We have made certain modifications to paragraphs 7.283 and 7.285-7.295, and accompanying footnotes to clarify our approach and the reasoning supporting our conclusions. In making our own objective assessment of the matter before us, we have recalled that panels may take into account the reasoning followed in prior adopted panel and Appellate Body reports when resolving similar legal issues. In this respect, the Report explains that we are persuaded by and agree with the panel's and the Appellate Body's interpretations of Article 15.3 of the SCM Agreement in *US – Carbon Steel (India)*, and we therefore adopt the reasoning contained in these reports as our own in making our objective assessment of Turkey's claim in this dispute. We found it all the more appropriate to do so given that the United States has raised essentially the same arguments in this dispute regarding the interpretation of Article 15.3 of the SCM Agreement as were before the panel and the Appellate Body in *US – Carbon Steel (India)* and were rejected in their entirety.

2.24 Paragraphs 7.288 and 7.295

2.49. The United States requests us to modify these paragraphs to avoid suggesting that the United States did not raise any new arguments in this dispute concerning the interpretation of Article 15.3 of the SCM Agreement apart from those raised before the panel and the Appellate Body in *US – Carbon Steel (India)*. The United States also disagrees that the Appellate Body in *US – Carbon Steel (India)* dismissed those arguments raised by the United States in their entirety. Accordingly, the United States requests us to replace the phrase "identical arguments" with "these same arguments".[34] The United States also requests that we specify the US statute that is discussed in this paragraph.[35] Turkey did not comment on these requests.

2.50. We have made the requested clarifications in the context of addressing other comments made by the United States in connection with paragraphs 7.285-7.295.

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[31] United States' statement at the interim review meeting, paras. 55-82.
[32] United States' statement at the interim review meeting, para. 27.
[33] Turkey's comments on the United States' request for interim review, paras. 5-6; statement at the interim review meeting, paras. 6-7.
[34] United States' request for interim review, paras. 37 and 39-40.
[35] United States' request for interim review, para. 38.

2.25 Paragraph 7.327, footnote 528

2.51. The United States requests us to delete footnote 528 for the same reasons as it requests us to make changes to paragraph 7.285 and footnote 444 as discussed above.[36] Turkey asks us to reject the United States' request because it considers that it is well-established that adopted panel and Appellate Body reports create legitimate expectations among WTO Members and that absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.[37]

2.52. We have deleted footnote 528 consistently with our modifications to paragraphs 7.285-7.295 as discussed above.

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[36] United States' request for interim review, para. 42.

[37] Turkey's comments on the United States' request for interim review, para. 7 (referring to Appellate Body Reports, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 143; and *US – Stainless Steel (Mexico)*, para. 160).

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. EXECUTIVE SUMMARY OF TURKEY'S FIRST WRITTEN SUBMISSION

1. This dispute relates to the countervailing duty measures imposed by the United States pursuant to its investigations of Turkish imports of Certain Oil Country Tubular Goods ("OCTG") (C-489-817); Welded Line Pipe ("WLP") (C-489-823); and Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes ("HWRP") (C-489-825); and pursuant to its sunset and administrative reviews, for calendar years 2011 and 2013, respectively, of the countervailing duty order on Turkish imports of Circular Welded Carbon Steel Pipes and Tubes ("CWP") (C-489-502).

2. The United States' determinations in these proceedings suffer from a number of manifest defects. As discussed in greater detail below, these measures are inconsistent with core WTO obligations, namely: Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.4, 12.7, 14(d), and 15.3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). Moreover, the United States' approach is particularly surprising because in most of these instances, the problematic approach is very similar, and in some cases identical, to that in previous determinations which the Appellate Body and prior panels have found to be inconsistent with the SCM Agreement.

3. At its core, this dispute originates with the United States' post-preliminary determinations in the OCTG proceeding. Specifically, in the OCTG proceeding, the U.S. Department of Commerce ("USDOC") first made a preliminary determination that no countervailing duty measures were warranted because it calculated *de minimis* subsidy rates. If that preliminary result had been left undisturbed, there would be no countervailing duty measures on Turkish imports of OCTG, and likely none on WLP or HWRP either.

4. However, the USDOC reversed its negative preliminary determination when it issued post-preliminary determinations increasing the calculated subsidy rates above the *de minimis* level and thus finding countervailable subsidies where originally it had not. In these post-preliminary determinations, the USDOC treated the private occupational pension fund for employees of the Turkish military, Ordu Yardimlasma Kurumu ("OYAK"), as well as Eregli Demir ve Celik Fabrikalari T.A.S. ("Erdemir") and Iskenderun Iron & Steel Works Co. ("Isdemir"), two of Turkey's three integrated iron and steel producers, as public bodies. The USDOC then relied on these and other erroneous findings in the OCTG proceeding to reach positive findings of subsidization in the investigations of WLP and HWRP and in a subsequent administrative review of the order on CWP. The U.S. International Trade Commission's ("ITC") injury determinations in these proceedings also suffer fatal flaws.

5. The United States' determinations in these proceedings are now enshrined in its countervailing duty regime, resulting in further WTO-inconsistent rulings and subjecting Turkey's steel imports to countervailing duty measures that should not exist.

A. Overview of Occupational Pension Funds, Turkey's Pension Fund System, the Turkish Steel Industry, and the United States Countervailing Duty Measures against Certain Turkish Steel Pipe and Tube Products

6. Like many other countries, Turkey has a diversified pension fund system, consisting of: a mandatory public social security system; mandatory and voluntary private occupational pension funds; and voluntary personal savings funds. This "three pillar" system is precisely the organizational structure recommended by the World Bank. There are two supplementary mandatory private occupational pension funds in the Turkish pension fund scheme. One of these funds is the Armed Forces Pension Fund, OYAK.

7. OYAK is the mandatory private occupational pension fund established in 1961 for employees of the Turkish military. OYAK operates as a non-profit foundation, providing pension plans and

other benefits such as retirement, disability, death, and mortgage and consumer loans for its over 300,000 members. OYAK is not part of the Turkish Armed Forces or affiliated with the Turkish Ministry of National Defense, or any other government agency. Turkey notes that the investigating authorities of other WTO Members that have investigated OYAK concluded it is not a public body. In 2014, for example, the Canada Border Services Agency found that "Ordu Yarimlasma Kurumu (OYAK) is a private pension fund established by law in 1961 with the objective of providing retirement benefits to member {*sic*} of the Turkish Armed Forces."

8. The challenged measures in this dispute all relate to OYAK and its alleged subsidization of Turkey's steel industry. As such, it may be useful to provide some background on that industry as well, including its development over time, and privatization. As previously mentioned, Erdemir and Isdemir are two of Turkey's three integrated iron and steel producers. Erdemir and Isdemir were previously owned by the GOT. Turkey established Erdemir in 1965 to produce flat steel products. Isdemir is one of Erdemir's subsidiaries.

9. Turkey began the process of privatizing its steel industry in 1996, when it entered into a free trade agreement with the European Coal and Steel Community to regulate trade in steel and eliminate customs duties on steel products. Pursuant to this agreement, Turkey committed to privatizing its steel industry and banning all forms of state aid.

10. In October 2005, the GOT, through the Turkish Privatization Administration, held a public tender to sell the entirety of its ownership interest in the Erdemir Group. OYAK participated in the public tender and was selected as the winning bid, with the terms of the sale finalized in 2006. Since then, *i.e.*, more than a decade ago and more than seven years prior to the countervailing duty petition that lay at the basis of the various measures now challenged in this dispute, Erdemir and its subsidiary Isdemir have operated on a commercial basis, fully independent from the GOT.

11. On July 2, 2013, several U.S. steel companies filed a petition with the USDOC alleging that the GOT provides countervailable subsidies to Turkish producers of OCTG. Petitioners alleged that the GOT, through OYAK and Erdemir, provides hot rolled steel, the primary input used to produce OCTG, for less than adequate remuneration. The USDOC agreed with petitioners, erroneously finding that OYAK, Erdemir, and Isdemir are "public bodies" because the GOT allegedly exercises "meaningful control" over OYAK. The USDOC also made similarly inadequate findings that the GOT's supposed "meaningful control" of OYAK extends to Erdemir and Isdemir.

12. The USDOC repeated the same errors in subsequent investigations of WLP and HWRP, and in a subsequent administrative review of the order on CWP, applying the same incorrect legal standard in its public body findings, which again were unsupported by the evidence. The USDOC consequently imposed additional, WTO-inconsistent countervailing duties measures on these other Turkish steel pipe and tube products. In short, the USDOC made a WTO-inconsistent set of findings in one determination, and then kept repeating that same set of mistakes over and over again.

B. Legal Standards

13. Turkey's claims in this dispute are based on several provisions of the SCM Agreement, namely: Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.4, 12.7, 14(d), and 15.3. The common thread among all of these claims is the United States' repeated failure to apply the correct legal standard and ground its findings in the evidence on the record.

C. The United States' Countervailing Duty Measures on Certain Oil Country Tubular Goods from Turkey Are Inconsistent with Its WTO Obligations

14. *First*, in determining that OYAK is a "public body," the USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) of the SCM Agreement and follow the Appellate Body's guidance regarding the interpretation of that standard. The USDOC failed to make any findings that OYAK meets the public body standard articulated by the Appellate Body, *i.e.*, that it possesses, exercises, or is vested with governmental authority. Instead, the USDOC found OYAK is a public body, within the meaning of Article 1.1(a)(1) of the SCM Agreement, alleging that the GOT exercises meaningful control over OYAK. However, the USDOC failed completely to assess how the GOT's alleged control of OYAK has been exercised in a meaningful way. The USDOC,

moreover, failed to engage in any analysis whatsoever of the overall relationship between OYAK and the GOT within the Turkish legal order.

15. The USDOC also failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its finding that OYAK is a public body. The evidence cited by the USDOC does not support its finding that OYAK is a public body; moreover, the USDOC failed to give proper consideration to evidence that contradicted its finding and which demonstrates that OYAK acts independently from the GOT. The USDOC made the same errors in finding that Erdemir and Isdemir are public bodies, within the meaning of Article 1.1(a)(1) of the SCM Agreement. In particular, (1) the evidence cited by the USDOC does not support its public body findings; and (2) the USDOC improperly failed, or outright refused, to consider evidence which contradicted its findings.

16. *Second*, the USDOC's determination that sales of hot rolled steel conferred a benefit and were made for less than adequate remuneration is inconsistent with Articles 1.1(b) and 14 of the SCM Agreement. The USDOC has a practice, in assessing whether a good is provided for less than adequate remuneration thereby conferring a benefit, of rejecting in-country prices as a benchmark based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good, with no consideration of whether in-country prices are distorted. This USDOC practice is inconsistent with Article 14(d) of the SCM Agreement both "as such" and as applied in this investigation. Furthermore, because the USDOC failed to properly establish that Erdemir and Isdemir provided hot rolled steel to the respondents for less than adequate remuneration under Article 14(d), it also failed to establish that the alleged provision of hot rolled steel conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement.

17. *Third*, the USDOC's application of "facts available" and use of an "adverse inference" is inconsistent with Article 12.7 of the SCM Agreement in light of difficulties the respondent, Borusan, experienced in gathering and reporting requested information. The USDOC's application of "facts available" is also inconsistent with Article 12.7 of the SCM Agreement because the USDOC applied an "adverse inference" for the purpose of punishing Borusan for its alleged non-cooperation.

18. *Fourth*, the USDOC's determination that the alleged provision of hot rolled steel for less than adequate remuneration is "specific" is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement, because the USDOC failed to sufficiently identify or substantiate, based on positive evidence on the record as required under Article 2.4, the existence of a "subsidy programme" related to the provision of hot rolled steel. Moreover, the USDOC's determination is inconsistent with Article 2.1, because the USDOC failed to consider the two factors specified in the last sentence of subparagraph (c).

19. *Fifth*, the ITC's cumulation of imports in its determination of injury is inconsistent with Article 15.3 of the SCM Agreement. The ITC has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, *i.e.*, non-subsidized imports. This practice of "cross-cumulating" subsidized and non-subsidized imports, with respect to which antidumping or countervailing duty petitions are filed on the same day, is inconsistent with Article 15.3 of the SCM Agreement both "as such" and as applied in its investigation of OCTG.

D. The United States' Countervailing Duty Measures on Welded Line Pipe from Turkey Are Inconsistent with Its WTO Obligations

20. *First*, the USDOC repeated the same errors it made in the OCTG investigation in determining that OYAK is a "public body." The USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) of the SCM Agreement and follow the Appellate Body's guidance regarding the interpretation of that standard. The USDOC failed to make any findings that OYAK meets the public body standard articulated by the Appellate Body, *i.e.*, that it possesses, exercises, or is vested with governmental authority. Instead, the USDOC found that OYAK is a public body, within the meaning of Article 1.1(a)(1) of the SCM Agreement, because the GOT exercises meaningful control over OYAK. However, the USDOC failed completely to assess how the GOT's alleged control of OYAK has been exercised in a meaningful way. The USDOC, moreover, failed to engage in any analysis whatsoever of the overall relationship between OYAK and the GOT within the Turkish legal order.

21. The USDOC also failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its finding that OYAK is a public body. The evidence cited by the USDOC does not support its finding that OYAK is a public body; moreover, the USDOC failed to give proper consideration to evidence that contradicted its finding and which demonstrates OYAK acts independently from the GOT. The USDOC again repeated the same errors in finding that Erdemir and Isdemir are public bodies, within the meaning of Article 1.1(a)(1) of the SCM Agreement.

22. *Second*, the USDOC's application of "facts available" and use of an "adverse inference" is inconsistent with Article 12.7 of the SCM Agreement because the USDOC applied an "adverse inference" for the purpose of punishing the respondent, Borusan, for its alleged non-cooperation. Furthermore, the United States has acted contrary to its obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by applying countervailing duty measures in excess of the amount of subsidization attributable to WLP.

23. *Third*, the USDOC's determination that the alleged provision of hot rolled steel for less than adequate remuneration is "specific" is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement, because the USDOC failed to sufficiently identify or substantiate, based on positive evidence on the record as required under Article 2.4, the existence of a "subsidy programme" related to the provision of hot rolled steel. Moreover, the USDOC's determination is inconsistent with Article 2.1, because the USDOC failed to consider the two factors specified in the last sentence of subparagraph (c).

24. *Fourth*, the ITC's cumulation of imports in its determination of injury is inconsistent with Article 15.3 of the SCM Agreement. The ITC has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, *i.e.*, non-subsidized imports. This practice of "cross-cumulating" subsidized and non-subsidized imports, with respect to which antidumping or countervailing duty petitions are filed on the same day, is inconsistent with Article 15.3 of the SCM Agreement both "as such" and as applied in its investigation of WLP.

E. The United States' Countervailing Duty Measures on Heavy Walled Rectangular Welded Carbon Steel Pipes from Turkey Are Inconsistent with Its WTO Obligations

25. *First*, the USDOC again repeated the same errors it made in the OCTG investigation in determining that OYAK is a "public body." The USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) of the SCM Agreement and follow the Appellate Body's guidance regarding the interpretation of that standard. The USDOC failed to make any findings that OYAK meets the public body standard articulated by the Appellate Body, *i.e.*, that it possesses, exercises, or is vested with governmental authority. Instead, the USDOC found that OYAK is a public body, within the meaning of Article 1.1(a)(1) of the SCM Agreement, because the GOT exercises meaningful control over OYAK. However, the USDOC failed completely to assess how the GOT's alleged control of OYAK has been exercised in a meaningful way. The USDOC, moreover, failed to engage in any analysis whatsoever of the overall relationship between OYAK and the GOT within the Turkish legal order.

26. The USDOC also failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its finding that OYAK is a public body. The evidence cited by the USDOC does not support its finding that OYAK is a public body; moreover, the USDOC failed to give proper consideration to evidence that contradicted its finding and which demonstrates OYAK acts independently from the GOT. The USDOC again repeated the same errors in finding that Erdemir and Isdemir are public bodies, within the meaning of Article 1.1(a)(1) of the SCM Agreement.

27. *Second*, the USDOC's application of "facts available" and use of an "adverse inference" is inconsistent with Article 12.7 of the SCM Agreement because the USDOC applied "adverse inferences" for the purpose of punishing the respondents, MMZ and Ozdemir, for their alleged non-cooperation. Furthermore, the United States has acted contrary to its obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by applying countervailing duty measures in excess of the amount of subsidization attributable to HWRP.

28. *Third*, the USDOC's determination that the alleged provision of hot rolled steel for less than adequate remuneration is "specific" is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement, because the USDOC failed to sufficiently identify or substantiate, based on positive evidence on the record as required under Article 2.4, the existence of a "subsidy programme" related to the provision of hot rolled steel. Moreover, the USDOC's determination is inconsistent with Article 2.1, because the USDOC failed to consider the two factors specified in the last sentence of subparagraph (c).

29. *Fourth*, the ITC's cumulation of imports in its determination of injury is inconsistent with Article 15.3 of the SCM Agreement. The ITC has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, *i.e.*, non-subsidized imports. This practice of "cross-cumulating" subsidized and non-subsidized imports, with respect to which antidumping or countervailing duty petitions are filed on the same day, is inconsistent with Article 15.3 of the SCM Agreement both "as such" and as applied in its investigation of HWRP.

F. The United States' Countervailing Duty Measures on Circular Welded Carbon Steel Pipes and Tubes from Turkey Are Inconsistent with Its WTO Obligations

30. *First*, the USDOC again repeated the same errors it made in the OCTG investigation in determining that OYAK is a "public body." The USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) of the SCM Agreement and follow the Appellate Body's guidance regarding the interpretation of that standard. The USDOC failed to make any findings that OYAK meets the public body standard articulated by the Appellate Body, *i.e.*, that it possesses, exercises, or is vested with governmental authority. Instead, the USDOC found that OYAK is a public body, within the meaning of Article 1.1(a)(1) of the SCM Agreement, because the GOT exercises meaningful control over OYAK. However, the USDOC failed completely to assess how the GOT's alleged control of OYAK has been exercised in a meaningful way. The USDOC, moreover, failed to engage in any analysis whatsoever of the overall relationship between OYAK and the GOT within the Turkish legal order.

31. The USDOC also failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its finding that OYAK is a public body. The evidence cited by the USDOC does not support its finding that OYAK is a public body; moreover, the USDOC failed to give proper consideration to evidence that contradicted its finding and which demonstrates OYAK acts independently from the GOT. The USDOC again repeated the same errors in finding that Erdemir and Isdemir are public bodies, within the meaning of Article 1.1(a)(1) of the SCM Agreement.

32. *Second*, the USDOC's determination that the alleged provision of hot rolled steel for less than adequate remuneration is "specific" is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement, because the USDOC failed to sufficiently identify or substantiate, based on positive evidence on the record as required under Article 2.4, the existence of a "subsidy programme" related to the provision of hot rolled steel. Moreover, the USDOC's determination is inconsistent with Article 2.1, because the USDOC failed to consider the two factors specified in the last sentence of subparagraph (c).

33. *Third*, the ITC's cumulation of imports in its determination of injury is inconsistent with Article 15.3 of the SCM Agreement. Similar to its practice in investigations, the ITC has a practice, in assessing material injury in five-year reviews, of cumulating imports that are subject to countervailing duty orders with imports that are subject only to antidumping duty orders, *i.e.*, non-subsidized imports, with respect to which the five-year reviews are initiated on the same day. This practice of "cross-cumulating" subsidized and non-subsidized imports, with respect to which five-year reviews of antidumping or countervailing duty orders are initiated on the same day, is inconsistent with Article 15.3 of the SCM Agreement both "as such" and as applied in its review of the countervailing duty order on CWP.

34. Moreover, because the United States' imposition of countervailing duty measures was inconsistent with its obligations under Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.4, 12.7, 14(d), 15.3, and 19.4 of the SCM Agreement, as well as Article VI:3 of the GATT 1994, the United States is also in violation of its obligations under Articles 10 and 32.1 of the SCM Agreement.

II. EXECUTIVE SUMMARY OF TURKEY'S OPENING STATEMENT AT THE FIRST MEETING OF THE PANEL

35. This dispute relates to several countervailing measures imposed by the United States on imports of steel products from Turkey in violation of its obligations under the SCM Agreement, specifically the United States' countervailing duty measures imposed pursuant to its investigation of Certain Oil Country Tubular Goods; Welded Line Pipe; and Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes; and pursuant to its sunset and administrative reviews, for calendar years 2011 and 2013, respectively, of the countervailing duty order on Circular Welded Carbon Steel Pipes and Tubes. As the two governments were unable to resolve this matter through consultations, the Government of Turkey has found it necessary to request the establishment of this Panel.

36. The United States' determinations in these proceedings are flawed in numerous respects, which are detailed in Turkey's First Submission. In this statement, Turkey will focus on a few key issues that should inform the Panel's examination of the measures at issue in this dispute. First, Turkey will address the legal standards for "governmental" entities, both for "public body" and "government organ", under Article 1.1(a)(1) of the SCM Agreement and explain why the USDOC failed to apply the correct legal standards with regard to OYAK and Erdemir (and its subsidiary Isdemir). Second, Turkey will explain why the USDOC failed to provide a reasoned and adequate explanation for its findings that OYAK and Erdemir are public bodies, within the meaning of Article 1.1(a)(1) of the SCM Agreement.

37. Third, Turkey will explain why the USDOC's rejection of in-country or "tier one" benchmarks, for purposes of assessing the level of benefit under Articles 1.1(b) and 14(d) of the SCM Agreement, based solely on evidence of government ownership or control of domestic suppliers is a "practice," subject to challenge "as such," and why this practice is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, both "as such" and "as applied" in the OCTG investigation. Fourth, Turkey will address the USDOC's reliance on facts available and its drawing of adverse inferences in choosing among the facts available for punitive purposes, which is inconsistent with Article 12.7 of the SCM Agreement.

38. Fifth, Turkey will address the USDOC's failure to identify a subsidy programme, within the meaning of Article 2.1(c) of the SCM Agreement, or evaluate the two specificity factors in the final sentence of Article 2.1(c). Finally, Turkey will address the legal standard for cumulation of imports under Article 15.3 of the SCM Agreement and explain why the ITC's practice of cross-cumulating subsidized and non-subsidized imports is inconsistent with Article 15.3, both "as such" and "as applied" in the proceedings at issue.

A. The USDOC Applied Incorrect Legal Standards for "Governmental" Entities, for Either "Government Organ" or "Public Body", Under Article 1.1(a)(1)

39. *First*, the United States' subsidy determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement because the USDOC failed to apply the correct legal standards for "governmental" entities, either for "public body" or "government organ", in its assessments of OYAK and Erdemir. The Appellate Body has defined "public body," within the meaning of Article 1.1(a)(1) of the SCM Agreement, as "an entity that possesses, exercises or is vested with governmental authority."

40. The United States does not dispute that this is the legal standard for "public body" under Article 1.1(a)(1) articulated by the Appellate Body, and Turkey considers that it is the correct standard. Moreover, Turkey has shown that the USDOC failed to apply this standard in its analysis of whether OYAK and Erdemir are public bodies. In particular, not once in any of the four proceedings at issue did the USDOC refer to the correct legal standard for "public body," that is, an entity that possesses, exercises, or is vested with governmental authority," let alone find that OYAK or Erdemir meet this standard. The United States' arguments to the contrary are nothing more than a *post hoc* rationale created for the benefit of this Panel in a belated attempt to reconcile the USDOC's public body findings with the requirements of Article 1.1(a)(1).

41. *Second*, contrary to the United States' argument, the USDOC did not examine OYAK as a "government organ". The United States provides no citation or evidentiary support for this assertion, and, indeed, nowhere in any of the USDOC's determinations did it make such a

statement regarding OYAK, or even mention the term "government organ." Moreover, the USDOC's reasoning and analysis in its published determinations compels the conclusion that it implicitly found OYAK to be a "public body."

42. However, assuming, *arguendo*, that the United States' characterization of the USDOC's analysis regarding OYAK is correct and that the USDOC did in fact examine OYAK as a "government organ," the USDOC still applied the incorrect legal standard under Article 1.1(a)(1). In particular, the legal standard for a "government organ" is actually a *stricter* one than the legal standard for "public body" articulated by the Appellate Body, *i.e.*, "an entity {that} possesses, exercises or is vested with governmental authority." The USDOC made no findings regarding OYAK that would suggest it applied this standard; rather, its findings were strictly limited to the concept of "meaningful control." As Turkey demonstrated in its First Submission, this is not the correct standard for a "public body," let alone for a "government organ."

43. *Third*, the lack of a financial contribution determination with regard to OYAK is irrelevant to this Panel's assessment of the USDOC's "public body", or "government organ", determination under Article 1.1(a)(1) of the SCM Agreement. The Appellate Body's guidance in interpreting Article 1.1(a)(1) makes clear that it is first necessary to determine whether an entity is governmental or a private body in order to establish that a financial contribution exists, because an additional showing of entrustment or direction is necessary if the entity is *not* governmental. Accordingly, the fact that the USDOC did not find that OYAK itself made a financial contribution does not mean that the USDOC could not make an analysis regarding OYAK's status, within the meaning of Article 1.1(a)(1). Moreover, Turkey submits that the United States' interpretation of Article 1.1(a)(1) raises serious concerns regarding the reviewability of an investigating authority's determinations.

B. The Evidence on the Records of the Underlying Proceedings Does Not Support the USDOC's Public Body Findings

44. The second issue Turkey will address is the lack of evidentiary support for the USDOC's public body findings. In each of the underlying proceedings, the USDOC provided a bulleted list of the pieces of evidence which it relied on in finding that OYAK and Erdemir are public bodies. While the USDOC may have considered these pieces of evidence in their totality, as the United States asserts, the Panel must enquire whether those particular pieces of evidence, taken individually and as a whole, support the USDOC's public body findings.

45. As Turkey discussed in its First Submission, the USDOC failed to provide a reasoned and adequate explanation for its findings that OYAK and Erdemir are public bodies. In particular, the evidence relied on by the USDOC does not support its public body findings and consists almost entirely of evidence that demonstrates, at most, "formal indicia" of government control. Turkey considers that indicia of government control can demonstrate, at most, that a government has the *ability* to control an entity; they are not evidence of that entity's functions or conduct and, in particular, they are not evidence that the government in fact *exercises* its ability to control an entity, or that entity's *conduct*. Turkey explained in detail in its First Submission these and other errors which the USDOC made in evaluating the evidence it relied on to find that OYAK and Erdemir are public bodies, and Turkey reaffirms those arguments.

46. Turkey also observes that the United States discusses in its First Submission several facts on the record of the underlying proceedings which the USDOC did not rely upon in finding that OYAK, Erdemir, and Isdemir are public bodies. As the United States acknowledges elsewhere in its First Submission, the Panel must consider the investigating authority's, *i.e.*, the USDOC's, explanations and conclusions on their own terms, not the United States' *post hoc* justifications for the USDOC's findings.

47. Moreover, while it is well established that a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority, a panel must take into account all of the evidence on the record before the investigating authority and, in the context of reviewing individual pieces of evidence, a panel should examine whether the evidence may reasonably be relied on in support of the particular inference drawn by the investigating authority. In this regard, Turkey submits that it is appropriate for this Panel to examine the immediate context of certain statements in Erdemir's Annual Reports which the USDOC cited and that, in light

of this context, the two statements cannot reasonably be relied on to support an inference that Erdemir implements governmental policies.

48. Finally, Turkey submits that the USDOC's public body findings lack evidentiary support because the USDOC failed to give proper consideration to evidence which contradicts its conclusions regarding OYAK and Erdemir. The Appellate Body has made it clear that evidence of an entity's conduct *is* relevant to whether that entity is a public body. As Turkey explained in its First Submission, there was a considerable amount of evidence on the record regarding OYAK's and Erdemir's conduct which demonstrates that these entities operate on a commercial basis, autonomously from the Government of Turkey.

C. The USDOC's Practice of Rejecting In-Country Benchmarks for Benefit Based on Evidence of Government Ownership or Control is Inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement

49. The third issue Turkey will address is the USDOC's practice of rejecting in-country prices as potential benchmarks in benefit determinations. Turkey has shown in its First Submission that the USDOC has a practice of rejecting in-country benchmarks for benefit based solely on evidence of government ownership or control of domestic suppliers and that this practice is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, both "as such" and "as applied" in the OCTG investigation.

50. Turkey considers that the practice at issue is expressed in a written document, namely the Preamble to the Department's regulations. Turkey also provided examples of several cases, including the OCTG investigation, which confirm the USDOC's understanding and application of the Preamble in practice; thus, there can be no uncertainty as to the existence or content of this practice.

51. Turkey has also demonstrated that the USDOC's practice of rejecting in-country prices as potential benchmarks is a rule or norm which has both "general" and "prospective" application. In particular, the Preamble explains that the USDOC will normally reject in-country benchmarks where the government owns or controls a majority or substantial portion of domestic production. This practice therefore has general application, because it may apply to an unidentified number of economic operators, and prospective application, because it embodies the USDOC's administrative guidance for future benefit determinations and the USDOC applies it systematically, such that economic operators have an expectation the practice will be applied in future. Turkey also submits that the USDOC's departure from its normal practice, under protest and at the direction of a U.S. domestic court, is not dispositive evidence that the practice does not exist or cannot be challenged "as such."

52. Accordingly, Turkey asks this Panel to find that the USDOC's practice of rejecting in-country prices as potential benchmarks based solely on evidence of majority or substantial government ownership or control of domestic production is a measure subject to challenge "as such," and that this practice is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, both "as such" and "as applied" in the OCTG investigation, as Turkey explained in its First Submission.

D. The USDOC Impermissibly Drew Adverse Inferences in Selecting among the Facts Available for the Purpose of Punishing Respondents

53. Fourth, Turkey will address several issues related to Turkey's claim under Article 12.7 of the SCM Agreement that the USDOC improperly applied adverse inferences in selecting among facts available, including by doing so for the express purpose of punishing respondents in the OCTG, WLP, and HWRP investigations. At the outset, Turkey reiterates that its claims under Article 12.7 of the SCM Agreement are not limited to particular subsidy programs as the United States suggests, but rather relate to the USDOC's application of facts available in general in these proceedings.

54. Turkey notes that the United States does not dispute that the USDOC applies adverse inferences in a manner specifically designed to punish respondents or that the USDOC did so in these proceedings. Nor does the United States dispute that the Appellate Body has found such

practices to be inconsistent with Article 12.7, because it could result in inaccurate subsidization determinations.

55. Turkey submits that if there is no connection between the "necessary information" that is missing and the "facts available" on which a determination is based, a subsidy determination cannot be considered "accurate" within the meaning of Article 12.7. The USDOC failed to establish a connection between the rates it selected by drawing adverse inferences and the "necessary information" missing from the record in these proceedings, and it is clear from the record of the underlying proceedings that this resulted in inaccurate subsidy determinations. Moreover, the USDOC's application of facts available and drawing of adverse inferences was clearly intended to be punitive, which is not permissible under Article 12.7.

E. The USDOC Failed to Identify a Subsidy Programme, Within the Meaning of Article 2.1(c), or Evaluate the Specificity Factors in Article 2.1(c)

56. Next, Turkey will address the USDOC's failure to identify a "subsidy programme," within the meaning of Article 2.1(c) of the SCM Agreement, or evaluate the factors in the last sentence of Article 2.1(c).

57. *First*, Turkey demonstrated in its First Submission that the USDOC failed to sufficiently identify or substantiate the existence of a "subsidy programme," *i.e.*, a "plan" or "scheme", related to the provision of hot rolled steel. In response, the United States points to evidence which was on the record of the OCTG investigation but on which the USDOC did not rely, in any way, in its specificity findings. Turkey respectfully submits that this is yet another example of *post hoc* justification by the United States. Turkey also submits that evidence that there was more than one transaction for which respondents' purchase prices for hot rolled steel were below the benchmark price is not positive evidence of a *systematic* series of actions, let alone a *plan* or *scheme* to provide hot rolled steel for less than adequate remuneration.

58. *Second*, Turkey demonstrated in its First Submission that the USDOC failed to take into account the two factors identified in the last sentence of Article 2.1(c) of the SCM Agreement. While consideration of these two factors need not be done explicitly, prior panels have made it clear that there must be *some* evidence on the record that the investigating authority took the two factors in the final sentence of Article 2.1(c) into account, either explicitly or implicitly. The United States points to no such evidence, and indeed it cannot, because the USDOC *did not* consider the two factors in Article 2.1(c), even implicitly. Moreover, Turkey submits that the USDOC's obligation to consider the two factors in the last sentence of Article 2.1(c) exists independent of whether any interested party raised the relevance of these factors in the underlying proceedings.

F. The ITC's Practice of Cross-Cumulating Subsidized and Non-Subsidized Imports Is Inconsistent with Article 15.3 of the SCM Agreement

59. Finally, Turkey will address the ITC's practice of cross-cumulating subsidized and non-subsidized imports in injury determinations. As Turkey explained in its First Submission, the ITC has a long-standing practice of cross-cumulating imports subject to the USDOC's affirmative subsidy determinations with imports subject to the USDOC's affirmative dumping determinations, when certain other conditions are met. Turkey would like to focus on this practice in the context of injury investigations.

60. Turkey provided evidence that this practice satisfies the three-prong test for measures which are challengeable "as such" articulated by the Appellate Body in *US – Zeroing (EC)*. *First*, Turkey identified the precise content of the ITC's practice in investigations: namely, the cumulation of subject imports from all countries as to which petitions were filed and/or investigations self-initiated by the USDOC on the same day, if such imports compete with each other and with the domestic like product in the U.S. market, regardless of whether those imports are subject to subsidy determinations or not. The ITC developed this practice in its cases over time, both as a result of its own interpretation of the Tariff Act and the interpretation of U.S. domestic courts.

61. *Second*, this practice is clearly attributable to the United States and, in particular, the ITC. The ITC is the sole U.S. agency responsible for making injury determinations in countervailing duty

investigations and reviews. In this regard, Turkey notes that the ITC discusses its practice of cross-cumulating subsidized and non-subsidized imports in its injury determinations in which it applies this practice.

62. *Third*, the ITC's practice has general and prospective application. It is a practice which the ITC developed based on its own and U.S. domestic court interpretations of the statute. As a result, the ITC considers this practice to be *required* under section 771(7)(G)(i) of the Tariff Act. The ITC applies this practice in *all* investigations involving subsidized and non-subsidized imports for which petitions were filed on the same day and/or investigations self-initiated by the USDOC on the same day. The practice thus affects an unidentified number of economic operators and therefore has "general application."

63. With regard to its "prospective application," the ITC has consistently applied the challenged practice in injury investigations since 1987, demonstrating a systemic application of the measure. Finally, the fact that the ITC interprets the statute to *require* this practice demonstrates that the practice provides administrative guidance for future conduct and creates expectations among economic operators that it will be applied in the future. In this regard, Turkey notes that the United States does not assert that the ITC has the authority to depart from its cross-cumulating practice in injury investigations. To the contrary, the ITC's own statements demonstrate that it *may not* depart from this practice in investigations, because it considers the practice to be *required* under the statute.

64. Turkey also demonstrated in its First Submission that the ITC's practice is inconsistent with Article 15.3 of the SCM Agreement, both "as such" and as applied in the underlying injury investigations. In particular, in its First Submission, Turkey discussed the legal standard for cumulation under Article 15.3 and the Appellate Body's approach to interpretation of Article 15.3 in *US – Carbon Steel (India)*. Turkey considers this to be the correct approach to interpreting Article 15.3 and one that this Panel should follow.

65. The United States presents an alternative approach to interpreting Article 15.3, but fails to explain why the Panel should deviate from the approach taken by the Appellate Body. Turkey respectfully submits that ensuring security and predictability in the dispute settlement system implies that, absent cogent reasons, panels should resolve the same legal questions in the same way in subsequent cases. The United States has provided no cogent reasons for why this Panel should interpret Article 15.3 in a manner that differs from the Appellate Body's approach in *US – Carbon Steel (India)*. Turkey also notes that the United States presented many of the same arguments regarding its preferred interpretation of Article 15.3 in *US – Carbon Steel (India)*, and both the Appellate Body and the panel in that case specifically rejected these arguments.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. EXECUTIVE SUMMARY OF TURKEY'S SECOND WRITTEN SUBMISSION

1. This submission by the Government of Turkey ("Turkey") responds to the arguments presented by the United States in its First Submission, during the first meeting of the Panel and in its responses to questions from the Panel concerning the countervailing duty measures imposed by the United States pursuant to its investigations of Turkish imports of Certain Oil Country Tubular Goods ("OCTG") (C-489-817); Welded Line Pipe ("WLP") (C-489-823); and Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes ("HWRP") (C-489-825); and pursuant to its sunset and administrative reviews, for calendar years 2011 and 2013, respectively, of the countervailing duty order on Turkish imports of Circular Welded Carbon Steel Pipes and Tubes ("CWP") (C-489-502).

2. At the outset, Turkey makes a few overarching observations. The first issue is the United States' continued, and repeated, efforts to rely on *post hoc* justification and explanations for actions that the USDOC and the ITC took in the past. Turkey recalls that the Appellate Body has made it very clear that WTO Members may not justify an investigating authority's determinations by providing reasoning and explanation that the authority itself did not provide. Thus, the Panel should disregard the United States' arguments to the extent those arguments are not reflected in the reasoning and evaluation provided by the USDOC, or the ITC, in the challenged determinations.

3. The second issue Turkey addresses upfront is the importance of the legal reasoning in previously adopted panel and Appellate Body reports. Turkey finds the United States' arguments during the first substantive meeting and in its responses to the Panel's questions regarding the alleged limited or non-existing relevance of prior panel and/or Appellate Body findings to be concerning.

4. The third issue is that Turkey observes that the United States appears to not dispute several key issues: (1) that the USDOC's benefit determination as applied in the OCTG investigation was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement; (2) that the USDOC's application of facts available based on adverse inferences for purposes of punishing a respondent is impermissible under Article 12.7 of the SCM Agreement; and (3) that the ITC has a practice of cross-cumulating subsidized and non-subsidized imports in injury determinations. Turkey believes that it is important to note this as this means that the Panel can now also consider that these issues are no longer in dispute.

5. The final issue is the United States' continued portrayal of OYAK and Turkish pension funds in general as some sort of anomaly. In reality, as noted in Turkey's First Submission, occupational pension fund schemes, both public and private, are widespread and a major source of capital in OECD countries, and OYAK is very comparable to the occupational pension fund schemes found in many countries.

A. The United States Has Failed to Rebut Turkey's Claim that the USDOC's Public Body Findings with Regard to OYAK and Erdemir and Isdemir are Inconsistent with Article 1.1(a)(1) of the SCM Agreement

6. As explained in Turkey's First Submission, the USDOC's findings in the underlying proceedings that OYAK, Erdemir, and Isdemir are "public bodies," within the meaning of Article 1.1(a)(1) of the SCM Agreement, are fundamentally flawed in two respects. First, the USDOC applied an incorrect legal standard for "public body." Second, the USDOC failed to provide a "reasoned and adequate" explanation for its public body findings. In its prior submissions and during the Panel meeting, the United States presented a number of arguments in an attempt to rebut Turkey's arguments to this effect. Each of these attempted counter arguments fails.

7. *First*, the United States argues that the USDOC did apply the correct standard, at least with regard to Erdemir and Isdemir, because "USDOC {} considered numerous indicia of the GOT's meaningful control over Erdemir and Isdemir" and "this evidence demonstrated that Erdemir and Isdemir possess, exercise or are vested with governmental authority." The United States' argument is nothing more than a *post hoc* rationale created for the benefit of this Panel. Not once in any of the four proceedings at issue did the USDOC refer to the correct legal standard for "public body," that is, an entity that possesses, exercises, or is vested with governmental authority," let alone find that OYAK, Erdemir, or Isdemir meets this standard. Moreover, to the extent the United States is arguing that this Panel should interpret Article 1.1(a)(1) in a manner differently than the Appellate Body, the United States has failed to provide any cogent reasons for why this Panel should depart from the Appellate Body's guidance in interpreting Article 1.1(a)(1) of the SCM Agreement.

8. *Second*, the United States argues that the USDOC evaluated OYAK as a "government organ" not a "public body" and made no legal findings regarding OYAK. This argument is demonstrably false, based on the reasoning and findings of the USDOC in its published determinations. In particular, the USDOC articulated its preferred legal standard for "public body" and applied that legal standard to OYAK in each of the challenged proceedings.

9. *Third*, the United States argues that the USDOC did not make a "financial contribution" finding with regard to OYAK, and thus did not find OYAK to be a "public body." As Turkey previously explained, the USDOC *did* investigate OYAK under its preferred public body standard, and thus this argument is just another example of *post hoc* rationalization. Moreover, the United States is incorrect that a "financial contribution" finding is a necessary prerequisite for application of the disciplines of Article 1.1(a)(1) to an investigating authority's "public body" finding regarding a particular entity. Turkey also considers that the United States' interpretation of Article 1.1(a)(1), and its argument that the requirements of Article 1.1(a)(1) do not apply to the USDOC's examination of OYAK, raise serious concerns regarding the reviewability of an investigating authority's determinations.

B. The United States Has Failed to Rebut Turkey's Claim that the USDOC Failed to Provide a Reasoned and Adequate Explanation for its Public Body Findings

10. The USDOC's determinations are also inconsistent with Article 1.1(a)(1) of the SCM Agreement because the USDOC failed to provide a "reasoned and adequate" explanation for its findings that OYAK, Erdemir, and Isdemir, are public bodies for two reasons. First, the evidence cited by the USDOC does not support its public body findings. Second, the USDOC improperly refused to consider evidence which contradicted its findings. Specifically, the USDOC failed to give proper consideration to conflicting evidence on the record regarding the relationship between the Government of Turkey and OYAK (or Erdemir and Isdemir) "and, in particular, the degree of control by the {Government of Turkey} and the degree of autonomy enjoyed by" OYAK or Erdemir and Isdemir, such as evidence of the latters' commercial conduct. The United States makes several arguments in response, none of which has any merit.

11. *First*, the United States argues that Turkey essentially asks the Panel to act as an initial trier of facts. The United States is incorrect; Turkey merely asks that the Panel examine the USDOC's conclusions in a critical and searching manner, based on the information on the record and the explanations given by the USDOC in its published determinations, to determine if the USDOC's conclusions are "reasoned" and "adequate." Turkey also encourages the Panel to focus its analysis on the evidence actually relied upon by the USDOC in finding that OYAK, Erdemir, and Isdemir are public bodies.

12. *Second*, the United States argues that Turkey focuses narrowly on individual pieces of evidence and ignores that the USDOC's determinations were based on the totality of the evidence on the record. Turkey submits that the United States ignores the Appellate Body's guidance that there is no error in a panel's review of individual pieces of evidence, even where the investigating authority draws its conclusions from the totality of the evidence. The Panel should assess whether the particular pieces of evidence relied upon by the USDOC, taken individually and as a whole, support the inferences and conclusions drawn by the USDOC in its public body determinations. Turkey respectfully submits that they do not.

13. *Third*, the United States argues that evidence on the record of indicia of government control support the USDOC's public body determinations. As Turkey has previously explained, indicia of government control are insufficient to support a public body determination without evidence that the alleged government control has been exercised in a meaningful way. Turkey respectfully submits that there was, in fact, *no* evidence on the record of the Government of Turkey *ever* exercising its alleged control, or ability to control, OYAK (or Erdemir and Isdemir). Moreover, the evidence on the record demonstrates that OYAK, Erdemir, and Isdemir are autonomous and independent from the Government of Turkey. The USDOC improperly *refused* to consider this evidence, and its evaluation of this evidence would not risk conflating the "financial contribution" and "benefit" analyses, as the United States argues.

C. The United States Has Failed to Rebut Turkey's Claim that the USDOC's Practice of Rejecting In-Country Benchmarks for Benefit Based Solely on Evidence of Government Ownership or Control of Domestic Producers is Inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement

14. Turkey demonstrated in its First Submission that the USDOC has a practice of rejecting in-country benchmarks for benefit based solely on evidence of government ownership or control of domestic suppliers and that this practice is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, both "as such" and "as applied" in the OCTG investigation. Turkey observes that the United States has not disputed that it would be impermissible under Articles 1.1(b) and 14(d) for the USDOC to reject in-country prices based solely on evidence of government ownership or control of domestic suppliers or even attempted to rebut Turkey's claim that this practice as applied in the OCTG investigation is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

15. The United States argues instead that Turkey has not sufficiently demonstrated that the USDOC's practice of rejecting in-country benchmarks for benefit based solely on evidence of government ownership or control of domestic suppliers exists as a rule or norm of "general" and "prospective" application. The United States' argument is incorrect. Turkey has provided evidence, including the Preamble to the USDOC's regulations and numerous examples of cases, demonstrating that the USDOC, systematically and as a matter of practice, rejects in-country market prices based *solely* on a finding of majority or substantial government ownership or control of domestic suppliers and with *no* consideration or investigation of whether in-country market prices are, in fact, distorted. Thus, there can be no uncertainty as to the existence or content of this practice or its "general" and "prospective" application with regard to an unidentified number of economic operators in future benefit determinations.

16. The United States also argues that Turkey has failed to establish the existence of a rule of "general" and "prospective" application because the USDOC exercised its discretion to depart from this practice on remand in the OCTG investigation and in the subsequent WLP, HWRP, and CWP proceedings. However, the USDOC's exercise of its discretion to deviate from its normal practice, under protest and at the direction of a U.S. domestic court, is not dispositive evidence that the USDOC's practice is not a rule of "general" or "prospective" application, challengeable "as such." Turkey notes in this regard that it submitted several other examples of cases following the OCTG investigation in which the USDOC has continued to apply the challenged practice. Moreover, nowhere has the USDOC or the United States confirmed that the USDOC will no longer apply the challenged practice in future cases.

D. The United States Has Failed to Rebut Turkey's Claim that the USDOC Did Not Identify, Based on Positive Evidence on the Record, a "Subsidy Programme" or Evaluate the Two Factors in the Last Sentence of Article 2.1(c) of the SCM Agreement

17. Turkey demonstrated in its First Submission that the USDOC's specificity determinations in the underlying proceedings are inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement for two reasons. First, the USDOC failed to sufficiently identify or substantiate, based on positive evidence on the record as required under Article 2.4, the existence of a "subsidy programme" related to the provision of hot rolled steel. Second, the USDOC failed to consider the two factors in the last sentence of Article 2.1(c). The United States has failed to rebut either of these two arguments.

18. *First*, the United States argues that evidence regarding Turkey's National Restructuring Plan, OYAK's alleged policies of boosting output for export-oriented production, and two statements in Erdemir's Annual Reports demonstrate the existence of a "subsidy programme." Turkey notes that the USDOC did not rely on *any* of this evidence in its *de facto* specificity determinations. Moreover, Turkey disputes that this evidence demonstrates the existence of a subsidy programme for the provision of hot rolled steel for less than adequate remuneration.

19. *Second*, the United States argues that evidence of a series of transactions for the provision of hot rolled steel for less than adequate remuneration demonstrates the existence of a subsidy programme. Turkey respectfully submits that a list of transactions, some of which are above and some of which are below a benchmark price, is not positive evidence of a *systematic* series of actions, let alone a *plan* or *scheme* to provide hot rolled steel for less than adequate remuneration.

20. Moreover, there is *no* explanation whatsoever in the USDOC's determinations for how the evidence cited by the United States in its submissions demonstrates or otherwise reflects a *systematic* series of actions, or a "plan" or "scheme" to provide hot rolled steel for less than adequate remuneration. Thus, to the extent the USDOC purports to have relied on this evidence, it failed to provide a reasoned and adequate explanation for its specificity determinations.

21. *Third*, the United States argues that the USDOC implicitly considered the two factors in the final sentence of Article 2.1(c) because there was evidence on the record of the length of time Erdemir and Isdemir have been in operation and because of certain statements in Erdemir's annual reports. Turkey respectfully submits that these facts are not evidence of the duration of the alleged subsidy programme, particularly in light of the fact that Erdemir and Isdemir were privatized in 2006. Moreover, the USDOC did not rely upon or even cite this evidence, or any of the other evidence the United States discusses in its submissions, in its *de facto* specificity determinations in the challenged proceedings. Thus the United States' argument is simply another example of *post hoc* rationalization.

E. The United States Has Failed to Rebut Turkey's Claim that the USDOC Improperly Used Facts Available and Drew Adverse Inferences for the Purpose of Punishing Respondents, Resulting in Inaccurate Subsidy Determinations That Are Inconsistent with Article 12.7 of the SCM Agreement

22. Turkey explained in its First Submission that the USDOC's use of facts available and drawing of adverse inferences in the OCTG, WLP, and HWRP proceedings is inconsistent with Article 12.7 of the SCM Agreement. In particular, in the OCTG investigation, the USDOC's determination to use facts available and draw adverse inferences is inconsistent with Article 12.7 for two reasons: first, because the USDOC failed to take "due account" of the difficulties Borusan experienced in gathering the requested information; and second, because the USDOC, in drawing adverse inferences, chose the *worst* facts available, in order to punish Borusan for its alleged non-cooperation. The USDOC's use of facts available in the WLP and HWRP investigations is also inconsistent with Article 12.7 for the latter reason—in drawing adverse inferences, the USDOC purposefully selected the *worst* possible facts available in order to punish respondents for their alleged failure to cooperate.

23. The United States appears to not dispute that the USDOC uses facts available and draws adverse inferences for the purpose of punishing respondents, or that the Appellate Body has found such practices to be inconsistent with Article 12.7, because it could result in inaccurate subsidization determinations. Instead, the United States argues that the USDOC's use of facts available was not punitive in these cases because the USDOC selected facts that were a "reasonable replacement" for the missing "necessary information" and because it did not result in inaccurate subsidy determinations. Each of these arguments fails.

24. *First*, the USDOC did not select facts that "reasonably replace" the missing necessary information. The USDOC did not engage in a process of "reasoning and evaluation" involving "a degree of comparison" of all the substantiated facts on the record, but instead simply chose the worst possible facts in order to punish respondents.

25. *Second*, the USDOC failed to identify or explain the connection between the selected "facts available" and the missing "necessary information." Thus, the resulting determinations cannot be considered "accurate" for purposes of Article 12.7. In this regard, Turkey submits that the lack of a connection between the allegedly missing "necessary information" and the rates selected by the USDOC is particularly egregious with regard to the programs for which the USDOC used rates calculated in the 1996 investigation of Certain Pasta from Italy and the 1986 investigation of CWP.

F. The United States Has Failed to Rebut Turkey's Claim that the ITC's Cross-Cumulation of Subsidized and Non-Subsidized Imports in Injury Determinations is Contrary to Article 15.3 of the SCM Agreement

26. Turkey explained in its First Submission that the ITC has a practice, in assessing material injury, of cumulating imports that are subject to countervailing duty investigations or reviews with imports that are subject only to antidumping duty investigations or reviews, *i.e.*, non-subsidized imports. Turkey also explained that the ITC's practice of "cross-cumulating" subsidized and non-subsidized imports is inconsistent with Article 15.3 of the SCM Agreement both "as such" and as applied in the OCTG, WLP, HWRP, and CWP proceedings. In response, the United States argues that Turkey has failed to demonstrate that the ITC's practice exists or can be challenged "as such" and that cross-cumulation is permissible under Article 15.3. Neither of these arguments has any merit.

27. *First*, Turkey has met its burden of proof to show the ITC's practice of cross-cumulating exists and is challengeable "as such." Turkey has explained that the ITC cumulates all imports from countries as to which antidumping or countervailing duty petitions were filed (or investigations self-initiated) on the same day, and therefore cumulates subsidized and *non-subsidized* imports. The ITC developed this practice in its cases over time, both as a result of its own interpretation of the Tariff Act and the interpretation of U.S. domestic courts. Turkey has also demonstrated that the ITC's practice has "general" and "prospective" application, both in investigations and in reviews. The ITC considers its cross-cumulation practice to be *required* under the statute in investigation, and while the ITC has discretion to depart from its normal practice in reviews, the United States has not identified any cases in which the ITC has declined to cross-cumulate subsidized and non-subsidized imports when the conditions for cumulation are met.

28. *Second*, Turkey has explained that cross-cumulation is not permitted under Article 15.3 of the SCM Agreement, in any circumstances. This is confirmed by the Appellate Body's interpretation of Article 15.3 in *US – Carbon Steel (India)*, as well as the object and purpose of the SCM Agreement and its negotiating history. Contrary to the United States' argument, the text of Article 15.3 is not silent on this issue, and the United States has failed to identify any cogent reasons for why this Panel should interpret Article 15.3 in a manner that differs from the Appellate Body's approach in *US – Carbon Steel (India)*.

29. Moreover, the United States' reliance on the Appellate Body's reasoning in *US – Oil Country Tubular Goods Sunset Reviews* and *EC – Tube or Pipe Fittings* is misplaced. The Appellate Body *did not* address the permissibility of cross-cumulation of subsidized imports and dumped (non-subsidized) imports in those cases. Turkey respectfully submits that the *cross-cumulation* of subsidized and *non-subsidized* imports presents distinct concerns from the cumulative assessment of subsidized (or dumped) imports from multiple countries, and indeed is contrary to the very object and purpose of the SCM Agreement.

II. EXECUTIVE SUMMARY OF TURKEY'S OPENING STATEMENT AT THE SECOND MEETING OF THE PANEL

30. In its prior submissions, Turkey explained that the United States' determinations in the challenged proceedings suffer from a number of manifest defects in violation of core obligations under the SCM Agreement. In today's statement, Turkey will not repeat those points. Instead, we will focus on a few overarching points raised by the United States in its submissions and some of the key issues at stake in this dispute.

A. The Panel Should Reject the United States' Challenge to Factual Evidence Submitted by Turkey in Its Responses to the Panel's Questions

31. The first issue Turkey would like to discuss is the United States' argument in its Second Submission that the Panel should reject factual evidence which Turkey submitted in its responses to the Panel's questions—including evidence regarding the USDOC's practice of rejecting in-country benchmarks and the ITC's practice of cross-cumulation—as "untimely and contrary to the Panel's Working Procedures." Turkey respectfully submits that the complained-of evidence falls within the scope of paragraph 7 of the Panel's Working Procedures both because this evidence is necessary to rebut arguments made by the United States and to answer questions posed by the Panel.

32. Turkey recalls that Article 11 of the DSU does not establish time limits for the submission of evidence to a panel. Moreover, contrary to the United States' arguments, a complainant is not required to submit *all* factual evidence in its First Submission in order to make a *prima facie* case. Turkey observes that the United States failed to cite a single example of a panel or Appellate Body refusing to consider factual evidence submitted in response to questions from the panel following the First Substantive Meeting of the parties. The United States has also failed to demonstrate how Turkey's submission of additional factual information in response to questions from the Panel has prejudiced its ability to present its defense.

B. The United States Has Failed to Rebut Turkey's Claim that the USDOC Applied an Incorrect Legal Standard and Failed to Provide Reasoned and Adequate Explanations for Its Public Body Determinations Under Article 1.1(a)(1) of the SCM Agreement

33. Turkey will next address some of the United States' counter arguments regarding Turkey's claims under Article 1.1(a)(1) of the SCM Agreement. *First*, the United States argues that the USDOC did apply the correct legal standard, at least with regard to Erdemir and Isdemir, because the USDOC considered numerous indicia of the Government of Turkey's meaningful control and that this evidence demonstrated that Erdemir and Isdemir possess, exercise, or are vested with governmental authority. However, as Turkey has previously noted, not once in any of the four proceedings at issue did the USDOC refer to the correct legal standard for "public body." Instead, the USDOC simply substituted its preferred concept of "meaningful control" for the public body standard articulated by the Appellate Body. The Appellate Body in *US – Carbon Steel (India)* did not adopt the concept of "meaningful control" as the legal standard for "public body," and indeed criticized the panel in that dispute for doing so.

34. The United States also argues that standard for "public body" articulated by the Appellate Body erroneously collapses the concepts of "public body" and "government" or "government agency." While the United States may disagree with the Appellate Body's interpretation of Article 1.1(a)(1) of the SCM Agreement, it has failed to provide any cogent reasons for why this Panel should not follow the Appellate Body's guidance and apply this standard to OYAK, Erdemir, and Isdemir.

35. *Second*, the United States argues that the record evidence supports the USDOC's conclusion that the Government of Turkey exercised meaningful control over Erdemir and Isdemir. As Turkey has previously demonstrated, the *substantive legal question* to be answered by the USDOC, and this Panel, is whether one or more of the characteristics of a public body exist, *i.e.*, whether OYAK, Erdemir, and Isdemir *possess*, *exercise*, or are *vested with* governmental authority, not whether the Government of Turkey exercised meaningful control over them.

36. Moreover, the alleged "formal indicia" of government control cited by the USDOC are insufficient to support a public body determination without further analysis and corroborating evidence of an entity's *conduct*. In this regard, consideration of evidence of OYAK's, Erdemir's, and Isdemir's conduct does not conflate the issues of "financial contribution" and "benefit," as the United States argues. The USDOC's outright refusal to consider evidence of OYAK's, Erdemir's, and Isdemir's conduct demonstrates a clear failure to provide a reasoned and adequate explanation for its determinations.

37. *Third*, the United States is incorrect that the USDOC did not, and did not need to, make a public body finding regarding OYAK. As Turkey has previously observed, the USDOC articulated its preferred standard for "public body" in the OCTG investigation and applied that standard to OYAK in all of the challenged determinations; the USDOC thus plainly *found* OYAK to be a public body. The United States' assertions to the contrary are nothing more than *post hoc* rationalization. Furthermore, the United States is incorrect that it was unnecessary for the USDOC to make a public body finding regarding OYAK because the USDOC did not find that OYAK itself provided a countervailable subsidy.

C. The United States Has Failed to Rebut Turkey's Claim that the USDOC's Practice of Rejecting In-Country Benchmarks Is Contrary to Articles 1.1(b) and 14(d) of the SCM Agreement

38. The next issue Turkey would like to address is the USDOC's practice of rejecting in-country prices as potential benchmarks for benefit with no consideration of price distortion. Turkey has already demonstrated that this practice exists as a rule or norm of general and prospective application and is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, both "as such" and "as applied" in the OCTG investigation. Turkey would like to make two brief additional points regarding the United States' arguments.

39. *First*, the United States argues that in several of the examples Turkey provided the USDOC considered evidence of price distortion such as import penetration. Turkey submits that according to the Appellate Body's guidance in *US – Countervailing Measures (China)* and *US – Carbon Steel (India)*, an investigating authority cannot presume that government ownership or control of domestic producers results in price distortion but rather must conduct a market analysis that explains how the alleged government ownership or control results in price distortion. Evidence of import penetration may be relevant to such a market analysis, but in the examples cited by the United States that is not how the USDOC used evidence of import penetration.

40. *Second*, the United States argues that because the USDOC exercised its discretion to depart from its normal practice in the WLP, HWRP, and CWP determinations, Turkey cannot establish a rule or norm necessarily leading to WTO-inconsistent action. The United States' argument appears to be based on a GATT-era distinction between mandatory and discretionary legislation, which is not relevant in this case. Indeed, Turkey submits that the fact that the USDOC does not apply the complained-of practice in all instances, or that it has the discretion to depart from its normal practice, does not mean the practice is not challengeable "as such," or that the practice does not *necessarily* result in a WTO inconsistency.

D. The United States Has Failed to Rebut Turkey's Claim that the USDOC Failed to Identify a Subsidy Programme, Within the Meaning of Article 2.1(c), or Evaluate the Specificity Factors in Article 2.1(c)

41. The next issue Turkey will address is the USDOC's failure to identify a "subsidy programme," within the meaning of Article 2.1(c) of the SCM Agreement, or evaluate the factors in the last sentence of Article 2.1(c). Turkey demonstrated in its prior submissions that the USDOC failed to sufficiently identify or substantiate the existence of a "subsidy programme" related to the provision of hot rolled steel. In response, the United States points to certain evidence on the record, namely the respondents' transaction-specific accounting and statements in Erdemir's annual reports.

42. Turkey observes that the USDOC did not cite any of this evidence now referenced by the United States in its *de facto* specificity findings. Moreover, to the extent the USDOC purports to have relied upon this evidence in its *de facto* specificity findings, it failed to provide a reasoned and adequate explanation for how this information demonstrates a "plan," "scheme," or "systematic series of actions" to provide subsidies.

43. Turkey also demonstrated in its First Submission that the USDOC failed to take into account the two factors identified in the last sentence of Article 2.1(c) of the SCM Agreement, namely the length of time the alleged "subsidy programme" was in operation and the extent of diversification of the Turkish economy. In response, the United States argues that the USDOC's implicit consideration of these factors is reflected in the USDOC's examination of certain pieces of record evidence.

44. Turkey explained in detail in its Second Submission why this evidence is not relevant to an analysis of the two factors in the last sentence of Article 2.1(c). Moreover, as Turkey also previously explained, the USDOC did not rely upon or even *cite* this evidence in any way in its *de facto* specificity findings. Thus, there is *no* indication in the USDOC's determinations that it explicitly or even *implicitly* considered the two factors in the last sentence of Article 2.1(c), which it was obligated to do regardless of whether any interested party raised the issue.

E. The United States Has Failed to Rebut Turkey's Claim that the USDOC Impermissibly Drew Adverse Inferences in Selecting among the Facts Available for the Purpose of Punishing Respondents

45. Next, Turkey addresses several of the United States' arguments regarding Turkey's claims under Article 12.7 of the SCM Agreement that the USDOC improperly applied adverse inferences in selecting among facts available, including by doing so for the express purpose of punishing respondents in the OCTG, WLP, and HWRP investigations.

46. *First*, the United States argues with respect to the OCTG investigation that the USDOC appropriately resorted to facts available and that the outcome was less favorable to Borusan does not mean the application of facts available was punitive or otherwise inconsistent with Article 12.7. The United States also argues that Turkey has failed to explain how the USDOC's use of facts available was not accurate because Borusan's actual prices for hot rolled steel for the Halkali and Izmit mills could have been lower than the lowest price it paid for the Gemlik mill.

47. Turkey submits that the United States' argument is yet another example of *post hoc* rationalization. Moreover, it is entirely speculative and has no basis in the actual record of the case. The USDOC did not engage in any reasoning or evaluation of which of the substantiated facts available on the record of the OCTG investigation could "reasonably replace" the missing necessary information. Instead, the USDOC simply applied an adverse inference to select the *lowest* price Borusan paid for hot rolled steel. The USDOC's reasoning suggests that it viewed this price as the *worst* possible information on the record and that it selected this price to punish Borusan for alleged non-cooperation.

48. *Second*, the United States argues that Turkey dramatically expanded the scope of its arguments with respect to the WLP proceeding in its responses to the Panel's questions. Turkey has already explained that its claim under Article 12.7 regarding the WLP proceeding is not limited to certain subsidy programs, as the United States suggests, but rather relates to the USDOC's application of "facts available" in general. In any event, and as previously discussed, a complainant is not required to submit all arguments and evidence in its First Submission to make a *prima facie* case and Turkey submitted the evidence in question in response to a question from the Panel, as expressly permitted under paragraph 7 of the Panel's Working Procedures.

49. *Third*, the United States argues that Turkey has failed to demonstrate that the subsidy rates the USDOC selected in the WLP and HWRP proceedings were not "accurate," because the rates were based on information provided in other Turkish countervailing duty proceedings and reflect the actual subsidy practices of the Turkish government. Turkey strongly disputes that subsidy rates calculated in a previous Turkish countervailing duty proceeding can be used as "facts available" to replace *any* missing "necessary information," if the subsidy programs are "similar" or if a rate is otherwise "based on information provided by cooperating companies." As Turkey has previously explained, there was no connection between the USDOC's selected facts available and the missing "necessary information" in the challenged proceedings. Moreover, the USDOC's methodology of selecting the *highest* possible rates—or, in other words, the *worst* possible information—as "facts available" is clearly intended to be punitive, as Turkey has discussed in its prior submissions.

F. The United States Has Failed to Rebut Turkey's Claims Regarding the ITC's Practice of Cross-Cumulating Subsidized and Non-Subsidized Imports, Both in Investigations and in Sunset Reviews, in Violation of Article 15.3 of the SCM Agreement

50. The final issue Turkey addresses is the ITC's practice of cross-cumulating subsidized and non-subsidized imports in injury determinations and sunset reviews, which is inconsistent with

Article 15.3 of the SCM Agreement both "as such" and as applied in the challenged proceedings. Turkey has already addressed the United States' challenge to the factual evidence which Turkey submitted in its responses to the Panel's questions. Turkey will briefly respond to three additional points raised by the United States in its Second Submission.

51. *First*, the United States argues that Turkey failed to make a *prima facie* case in support of its claims under Article 15.3 because Turkey failed to engage in an interpretation of Article 15.3 according to the customary rules of interpretation of international law. Turkey explained why the United States' argument, and its contrary interpretation of Article 15.3, are incorrect in Turkey's prior submissions. What is more, and in any event, Turkey does not believe that the United States' argument is correct that to meet its burden of proof, a party must engage in a detailed interpretation of the legal provisions on which it relies. Indeed, these are two very different issues.

52. *Second*, the United States argues that Turkey failed to adequately describe all of the conditions of competition which the ITC examines to determine if the conditions for cumulation are met. Turkey disputes that it has not accurately described the factors which the ITC evaluates in determining whether to exercise its discretion to cumulate imports in sunset reviews, although it also does not believe that this is necessarily its burden. Regardless, however, this does not alter the fact that the ITC's conditions for cumulation, and thus its exercise of discretion in reviews, *do not even relate* to whether subject imports are subsidized or not.

53. *Third*, the United States argues that if investigating authorities are not mandated to follow the provisions of Article 15 in making a likelihood-of-injury determination under Article 21.3, then Article 15 cannot prohibit cross-cumulation in sunset reviews. Turkey does not argue that all of the requirements for injury determinations in Article 15 apply with equal force in sunset reviews. Rather, Turkey considers that the cumulative assessment of subsidized and dumped, *non-subsidized* imports for purposes of determining injury is fundamentally inconsistent with Article 15.3, in light of its context and the object and purpose of the SCM Agreement.

54. None of the United States' arguments explain why or how it would be a correct interpretation of the SCM Agreement to prohibit cross-cumulation in investigations but allow it in sunset reviews. Indeed, it would be an absurd and irrational result if, after having reached a positive injury determination based on the effects of only *subsidized* imports, investigating authorities were permitted in sunset reviews to also cumulatively consider the effects of *dumped*, non-subsidized imports for purposes of determining whether revocation of a countervailing duty order is likely to result in recurrence of injury.

ANNEX B-3

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. PRELIMINARY RULING REQUEST

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

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

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

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

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

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

5. Article 6.2 requires two elements to be included in a panel request, namely: (a) identification of the specific measures at issue; and (b) a brief summary of the legal basis of the complaint. These elements comprise the "matter referred to the DSB," which is the basis for a panel's terms of reference under Article 7.1 of the DSU. "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."

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

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

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

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

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

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

11. When the DSB establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint." As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."

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

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

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

14. Turkey's "as such" claim with respect to the benchmark determination is not within the Panel's terms of reference. For completeness, the United States notes that Turkey's challenge also

fails on the merits. Turkey alleges that "[t]he USDOC has a practice, in assessing whether a good is provided for less than adequate remuneration thereby conferring a benefit, of rejecting in-country prices as a benchmark based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good, with no consideration of whether in-country prices are distorted."

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

16. Turkey's showing with respect to USDOC's alleged rule falls far short of its burden. In support of its claim, Turkey points only to a statement in the final benchmark determination for OCTG – which, as explained, was reversed by a U.S. domestic court and amended by USDOC – and the preliminary benchmark determinations in four other investigations, one of which also was reversed in the final benchmark determination. Turkey has not explained how these determinations support its claim, only merely citing to conclusory sentences from the determinations. Turkey also attempts to support its claim by citing to language in the preamble of USDOC's regulations; however, Turkey concedes just two paragraphs prior in its submission that the USDOC regulation is consistent with Article 14(d) of the SCM Agreement.

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

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

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

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

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

21. USDOC also described the extensive overlap between OYAK's leadership structure and the Turkish Armed Forces, as well as other organs of the GOT. In the OCTG final determination, USDOC explained that a study by the Turkish Economic and Social Studies Foundation concluded

that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control."

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

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

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

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

26. As for the CWP determination, in attempts to undermine USDOC's finding, Turkey points repeatedly to Borusan's case brief in the proceeding. A case brief in a USDOC administrative proceeding, at which point parties are not permitted to submit new record evidence, is simply argument made by an interested party in a proceeding. Moreover, the statements that Turkey has pulled from Borusan's case brief are themselves unsupported by record evidence, and are merely assertions presented by an interested party. Thus, by relying on administrative case briefs and the law firm position paper, Turkey does no more than proffer, in a conclusory manner, its alternative interpretation of the record facts.

27. Turkey argues that USDOC refused to consider evidence that demonstrates that OYAK operates independently of the government, and that Erdemir operates on a commercial basis. However, USDOC considered this information and provided a reasoned and adequate explanation for its rejection. As USDOC explained, "a firm's commercial behavior is not dispositive in determining whether that firm is a government 'authority.'" Specifically, USDOC explained, "this line of argument conflates the issues of the 'financial contribution' being provided by an authority

and 'benefit.'" This reasoning is consistent with the approach taken by dispute settlement panels in prior proceedings, for example, in *Korea – Commercial Vessels (Panel)*. Moreover, this reasoning is supported by the structure of the SCM Agreement. Accordingly, contrary to Turkey's claims, consideration of whether a financial contribution was provided consistent with market principles is not germane to the determination of the existence of a financial contribution, as determined by USDOC.

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

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

29. Article 12.7 provides a Member's authority to make determinations on the basis of the facts available. The extent to which the investigating authority must evaluate the possible "facts available," and the form that evaluation may take, "depend[s] on the particular circumstances of a given case." A non-cooperating party's knowledge of the consequences of failing to provide information can be taken into account by an investigating authority, along with other procedural circumstances in which information is missing, in ascertaining those "facts available" on which to base a determination. "[A]n investigating authority must nevertheless evaluate and reason which of the 'facts available' reasonably replace the missing 'necessary information', with a view to arriving at an accurate determination."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

final determination with respect to the program in each of the cases. Specifically, the respondents provided USDOC with a complete transaction-specific accounting of the provision of HRS for LTAR. USDOC in each proceeding relied on this evidence in identifying the subsidy program alleged by petitioners.

42. Turkey also asserts in its submission that USDOC did not consider in its specificity determination the factors listed in the final sentence of Article 2.1(c). However, Turkey has not even asserted a *prima facie* case of inconsistency, because it fails to explain how USDOC allegedly neglected the factors set out in the third sentence of Article 2.1(c).

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

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

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

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

46. "[A] panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document." A "high [evidentiary] threshold" must be reached by a complaining party, who must clearly establish that the alleged "rule or norm" is attributable to the responding Member; its precise content; and that it does have general and prospective application.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

with the Provision of HRS for LTAR did indeed breach Article 12.7. If Turkey had intended to raise legal claims regarding the application of facts available with respect to subsidy programs other than the Provision of HRS for LTAR program, it should have identified those claims in its panel request.

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

65. Turkey also claims that USDOC's determination to apply facts available in the WLP proceeding was not a "program-specific determination," but was based on respondent Borusan's decision not to participate in verification. However, Turkey's characterization of USDOC's findings regarding Borusan cannot have the effect of curing the deficiencies in its panel request, and does not change the fact that the only claim Turkey raised in its panel request regarding Article 12.7 was with respect to the Provision of HRS for LTAR subsidy program.

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

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

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

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

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

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

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

U.S. RESPONSE TO PANEL QUESTION 7

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

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

74. The text of Article 1.1(a)(1) does not define "government or any public body within the territory of a Member," nor does it prescribe the relationship between these two types of entities. The United States has explained that a proper interpretation of the text, in context, demonstrates that a public body is any entity that has the ability or authority to transfer government financial resources, including, for example, because that entity is meaningfully controlled by the government. The Appellate Body also has found that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions" such that the entity could be deemed a "public body" under Article 1.1(a)(1).

75. USDOC having found the GOT's meaningful control through OYAK of Erdemir and Isdemir (which were then found to be "public bodies"), the inquiry before the Panel with respect to OYAK is whether OYAK was found as a matter of fact to be capable of exercising meaningful control over Erdemir and Isdemir, such that the controlled entities would be public bodies within the meaning of Article 1.1(a)(1). Nothing in the text of that provision, or in the interpretations described above, suggests that only a particular type of governmental entity, such as a government "organ," could exercise such control over another entity. Rather, the characteristics of such an entity might be consistent with those of a government "organ" or "agency," or they might be consistent with those of a "public body," for example, or any other "governmental" entity.

76. While no legal standard under the SCM Agreement would apply to USDOC's findings with respect to OYAK, the Panel may find relevant to its factual assessment of OYAK's status in Turkey the characteristics examined by other panels or the Appellate Body with respect to "government," "public body," and other governmental entities in other contexts. As discussed, the record evidence concerning OYAK before USDOC exhibits the attributes associated with "government" in this broader sense. Therefore, this record evidence provided a sufficient factual basis for USDOC to examine OYAK as an entity through which the GOT meaningfully controlled Erdemir and Isdemir, and supported its determination that Erdemir and Isdemir are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement.

U.S. RESPONSE TO PANEL QUESTION 59

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

Members that are beyond what has been provided for in the covered agreements – an act strictly prohibited under Article 3.2.

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

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

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

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

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. PRELIMINARY RULING REQUEST

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

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

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

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

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

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

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

6. Turkey argues that the United States was "sufficiently notified" of the legal basis of Turkey's claim and that the United States' "due process" rights were only affected to a limited extent. Turkey also argues that the United States "could have asked for clarification following Turkey's request for the establishment of a panel" or "for an extension of time so as to have sufficient time to prepare its responses" to Turkey's first written submission. However, Turkey's arguments in this respect are not relevant to the Panel's analysis under DSU Article 6.2. Article 6.2 requires two elements; if either of these two elements is not properly identified, the matter would not be

within the panel's terms of reference. Moreover, compliance with the requirements of Article 6.2 "must be objectively determined on the basis of the panel request as it existed at the time of filing" and be "demonstrated on the face" of the panel request. Thus, the Panel need not make a finding of whether the United States was "sufficiently notified" or the extent to which its "due process rights" were affected in order to find the additional claims under Article 12.7 to be outside its terms of reference.

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

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

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

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

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

11. The Appellate Body's findings in *US – Upland Cotton*, however, are not applicable to this dispute. In *US – Upland Cotton*, the issue was whether two subsidy measures (i.e., contract payments) could be within the panel's terms of reference if the legislative basis for those measures had expired prior to the panel's establishment. The situation before this Panel is very different. The OCTG final determination in which USDOC used an out-of-country benchmark was successfully challenged by Turkish respondents at the U.S. Court of International Trade (USCIT), was remanded to USDOC, and was subsequently reversed by USDOC with regard to benefit in the OCTG remand determination. USDOC issued an amended final determination on March 10, 2016, which effectuated USDOC's remand determination to use in-country benchmarks. On that date, the OCTG final determination ceased to exist and have any legal effect with respect to the use of out-of-country benchmarks.

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

13. Turkey disputes that the original OCTG benefit determination ceased to have legal effect by claiming that "there was a possibility that USDOC's remand determination would be reversed, and that the original benefit determined reinstated." However, that legal action in U.S. courts might have caused USDOC to further amend the duty rates, or to alter the legal basis of those rates, at a later date, does not mean that the superseded determination continued to have legal effect. Moreover, if a challenge were permitted based on Turkey's arguments, it would mean that a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26. Turkey claims that USDOC's public body determinations concerning Erdemir and Isdemir are inconsistent with Article 1.1(a)(1) because USDOC "refused to consider evidence regarding their commercial conduct." Turkey errs in suggesting that evidence of commercial, profit-maximizing behavior precludes a finding that an entity is controlled by the government. To the contrary, while such evidence may be relevant to an investigating authority's determination, nothing in Article 1.1 suggests that, where meaningful control by the government is otherwise demonstrated, a public body cannot also exhibit commercial behavior.

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

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

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

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

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

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

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

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

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

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

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

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

36. Moreover, as detailed in the United States' Preliminary Ruling Request, Turkey's panel request limited its claims under Article 12.7 with respect to the WLP investigation to the Provision of HRS for LTAR program only. Since Turkey has opted not to raise *any* substantive arguments in any of its submissions with respect to the Provision of HRS for LTAR program, Turkey has not properly raised any claims under Article 12.7, and thus the Panel should not make any findings in relation to these claims.

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

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

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

40. Fourth, Turkey claims that USDOC's resulting subsidy determination "cannot be described as 'accurate' because there is no connection between the allegedly missing 'necessary information' and the rates selected by the USDOC as 'facts available.'" However, Turkey has pointed to no evidence on the record to suggest that the rates chosen by USDOC were not accurate, or that other information on the record would have been more appropriate for use because it was more accurate. And in fact, for each subsidy program, USDOC's calculation of the subsidy rates was based on information provided by cooperating companies in the same or other Turkish

countervailing duty investigations. The chosen rates reflect the actual subsidy practices of the Turkish government as reflected in the actual experiences of companies in Turkey, including Borusan's fellow respondent in the WLP investigation, and thus serve as a "reasonable replacement" for information that was missing from the record. Turkey has therefore failed to demonstrate that USDOC's application of facts available is inconsistent with Article 12.7.

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

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

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

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

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

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

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

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

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

47. Turkey's showing with respect to USITC's alleged "practice" in original investigations has fallen far short of its burden. In support of its claim, Turkey's first written submission pointed to the three original injury determinations at issue in this dispute. However, as the United States explained in its previous submissions, the fact that USITC cumulated the effects of subsidized and

non-subsidized imports in the investigations at issue does not demonstrate that the alleged practice has been "systemic[ally] appli[ed]" or that it has general and prospective application. Moreover, the fact that an investigating authority may have employed a practice in the past "would not be sufficient to accord such a practice an independent operational existence."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

60. Turkey's arguments that USDOC did not consider the two factors in Article 2.1(c) are equally unavailing. Turkey claims that the evidence presented by the United States is *post hoc*. However, where the path of an investigating authority's determination is reasonably discernable, an adjudicator should meet with that reasoning rather than avoid it on the basis of form. This

principle is apparent in past cases. For example, the panels in *US – Softwood Lumber IV* and *EC – Countervailing Measures on DRAM Chips* both upheld the investigating authority's consideration of the factors provided in the final sentence of Article 2.1(c) where such consideration was implicit. Likewise, in *US – DRAMS*, the Appellate Body found that an investigating authority need not cite or discuss every piece of record evidence supporting its conclusion.

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

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

U.S. RESPONSE TO PANEL QUESTION 64

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

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

64. Turkey appears to suggest that an entity may be deemed a public body only when the entity is "exercising" governmental authority. This is incorrect, however, even under the public body approach of the Appellate Body. The Appellate Body has "explained that the term public body in Article 1.1(a)(1) of the SCM Agreement means 'an entity that possesses, exercises or is vested with governmental authority'." Under the framework elaborated by the Appellate Body, an entity might be deemed a public body when there is evidence that the entity possesses or is vested with governmental authority, even if there is no evidence that the entity is exercising governmental authority at the time of the particular transaction at issue. Likewise, in the United States' view, an entity's ability or authority to transfer government resources is sufficient to find an entity as a public body.

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

U.S. RESPONSE TO QUESTION 74

66. The Appellate Body has stated that "[w]hether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates." Thus, the question is not whether the conduct under Article 1.1(a)(1) is governmental. Rather, the question is whether the entity engaging in the conduct is governmental.

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

U.S. RESPONSE TO QUESTION 86

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

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil would like to comment on the interpretation of Article 12.7 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Brazil understands that a proper reading of that provision would lead to the conclusion that recourse to facts available is possible only with the purpose of identifying replacements for the "necessary information" that is missing from the record. This understanding is corroborated by the Appellate Body findings in *US –Carbon Steel* that "Article 12.7 is not directed at mitigating the absence of 'any' or 'unnecessary' information, but is rather concerned with overcoming the absence of information required to complete a determination."[1]

2. Brazil notes that nothing in the wording or context of Article 12.7 suggests it could be used in a punitive manner. On the contrary, as found by the Panel of *EC - Countervailing Measures on DRAM Chips*[2], that provision allows an authority to make determinations on the basis of the facts available, but not on the basis of mere assumptions or inferences. In fact, when the provisions of the Covered Agreements open the possibility to draw adverse inferences they are explicitly determined in the text, as in paragraph 7 of Annex V of the SCM Agreement.

3. In addition, Brazil points out that Article 12.7 allows for the use of "the facts available"[3] and not merely "facts available". This reinforces Brazil's interpretation that all facts available to the authority would have to be considered in order to fill in the gap of the missing information. Consequently, the investigating authority is not allowed to "cherry-pick" those facts that would lead to a biased determination of subsidy, while disregarding other facts that may point in a different direction.

4. The importance of preventing a Member's investigating authority to pick and choose which facts to consider cannot be overstated. It is the investigating authorities' duty to perform a process of reasoning and evaluation that takes into account all the facts available on the record. Brazil notes that the United States acknowledges that, when faced with a lack of information regarding the purchase price of Hot Rolled Steel (HRS) as an input by some plants of one of the interested parties, it invoked facts available to select "the lowest price on the record for the Gemlik Facility's HRS purchases"[4].

5. This is not a proper application of Article 12.7 of the SCM Agreement. The admission by the United States that it selected the lowest price available on record as the basis for its inferences regarding the price paid by other facilities indicates that the record also contained other prices paid for the same product over the investigated period. Brazil believes that recourse to facts available does not allow a Member to select the lowest price and disregard the other data.

6. Brazil is cognizant of the fact that, as mentioned by the United States in its First Written Submission, "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"[5]. That, however, does not allow the departure from the facts actually available on the record nor does it exempt the investigating authority from the duty to "evaluate and reason which of the 'facts available' reasonably replace the missing 'necessary information', with a view to arriving at an accurate determination."[6] The authority must, therefore, weigh all the information and evidence available in order to reach a reasonable conclusion.

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[1] Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products*, para. 4.416.

[2] Panel Report, *EC - Countervailing Measures on DRAM Chips,* para. 7.245.

[3] Emphasis added.

[4] United States FWS, para. 146.

[5] United States FWS, para. 133.

[6] Appellate Body Report, *US — Carbon Steel (India),* para. 4.426.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. PUBLIC BODY RELATED CLAIMS UNDER ARTICLE 1.1 ASCM

1. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* found that a public body is properly understood as one that is governmental in nature. The performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body.[1] Whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member may be a relevant consideration. The classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies.[2] State ownership is a relevant but not decisive criterion.[3]

2. The Appellate Body concluded that a public body is an entity that possesses, exercises or is vested with governmental authority, which is to be determined on a case-by-case basis having regard to all the relevant facts. Evidence that an entity is in fact exercising governmental functions, particularly if there is a sustained and systematic practice, may serve as evidence that it possesses or has been vested with governmental authority. Evidence that 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. However, the existence of mere formal links is unlikely to suffice to establish the necessary possession of governmental authority. The mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, or that the government has bestowed it with governmental authority. On the other hand, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.[4] The Panel would therefore have to assess whether the USDOC's determinations reveal sufficient evidence of the existence of government control and of the exercise of such control by the GOT over Erdemir and Isdemir.

3. The EU considers that the question whether OYAK constitutes a "government" entity would be a particularly relevant factor to be considered for the qualification of Erdemir and Isdemir as public bodies, notably for the question of government ownership and hence the existence of government control. In this context, the EU considers that the conditions of Article 1.1(a)(1) ASCM apply and are relevant for an assessment of OYAK even if it provided no financial contribution. The USDOC did not qualify OYAK as a "public body" but as a GOT "organ".[5] The EU considers that the relationship of an organ with the government would appear to be more closely linked than that of a public body with the government. The term "government organ" connotes a closer relationship with the government than the more generic term "public body". The Appellate Body distinguished in Article 1.1(a)(1) ASCM between the term "government" in the narrow sense and the term "government" in a parenthetical phrase which means, collectively, government in the narrow sense and any public body.[6] Hence if OYAK is not a public body, it must necessarily form part of the government in the narrow sense in order to be qualified as "government". The Appellate Body has not provided a definition of the term government in the narrow sense and whether an entity falls into this category will therefore have to be determined on a case-by-case basis in view also of the internal laws and organisation of the Member in question. Possible examples could include the police, ministries or the judiciary. The Panel may therefore have to assess whether the pension fund OYAK falls into that category.

[1] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.
[2] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 295-297.
[3] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 309-316.
[4] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 317-322.
[5] United States' First Written Submission, paras. 75, 84, 97.
[6] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 286, 288.

II. BENEFIT RELATED CLAIMS UNDER ARTICLES 1.1(B) AND 14(D)

4. The EU recalls that the Appellate Body found that the primary benchmark under Article 14(d) is the prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision.[7] The use of out-of-country benchmarks is rather the exception.[8] But the Appellate Body has found, for example, that prices of private suppliers in a country could not be used as benchmarks because of the government's predominant role in the market.[9] The Appellate Body also held that the question whether a relevant entity is to be qualified as "government" (including as a "public body") does not automatically answer the question of whether the prices of goods provided by private or government-related entities in the country of provision are to be considered as market determined for the purpose of selecting a benefit benchmark.[10] Hence, even assuming that Erdemir and Isdemir are public bodies (and control a substantial part of the market), this fact alone may not evidence market distortion. Assuming Erdemir and Isdemir are public bodies, the government could be considered as a predominant or significant supplier of the market through these entities which would be relevant considerations for a demonstration of market distortion. The Appellate Body found previously that the more "predominant" a government is as a supplier in the market in question, the less relevant other evidence will become for a finding of price distortion.[11] However, if the government is only a "significant" supplier, evidence from other sources will always be required.[12] There is no clear dividing line between the concepts of "predominant" and "significant" supplier. In previous cases, predominance was found where the government had above 90% market share.[13] Therefore, an important element in the assessment of market distortion – even if not the only element - is the level of the market share held by the government as supplier regarding the product in question.

5. Having said that, given that the USDOC's original out-of-country benchmark was replaced by an in-country benchmark, the EU recalls that "as a general rule, the measures included in a panel's term of reference must be measures that are in existence at the time of the establishment of the panel" pursuant to Article 6.2 of the DSU.[14] [emphasis added]. This means that, in a case of expiry of the measure prior to panel establishment, a panel should normally exercise its discretion to the effect of not making findings regarding the expired measure. In addition, in the present case the measure not only expired but was replaced by a different measure which addressed and resolved the concern of the complaining Member. Previous panels in similar circumstances declined to make findings.[15] The EU therefore considers that the Panel should not make findings in this respect.

III. SPECIFICITY UNDER ARTICLE 2.1(C)

6. A subsidy programme in the form of a "plan or scheme of some kind" under Article 2.1(c) may be manifested in written instruments or it may take less explicit forms such as a systematic series of actions.[16] With respect to subsidies in the form of a provision of goods for less than adequate remuneration as in the present case, the Appellate Body found that a subsidy programme cannot be evidenced by the mere fact that financial contributions have been granted to certain enterprises. Rather, an investigating 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,[17] possibly over a period of time.[18] The EU agrees. The fact that some of the transaction prices are higher than the benchmark price whereas other prices are lower than the benchmark price may be one of the elements relevant for the assessment of the existence of a subsidy programme. If the list of transactions alone does not demonstrate a series of systematic actions, the investigating authority must otherwise demonstrate the existence

[7] Appellate Body Report, *US – Carbon Steel (India),* para. 4.154.
[8] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.
[9] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.
[10] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.43.
[11] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.
[12] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 443.
[13] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 455; Panel Report, US –Coated Paper (Indonesia), para. 7.80.
[14] Appellate Body Report, *EC — Chicken Cuts*, para. 156.
[15] Panel Report, US – Gasoline, para. 6.19, Panel Report, Argentina – Textiles and Apparel, para. 6.15.
[16] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.
[17] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.
[18] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.142.

of a policy of providing goods at less than adequate remuneration (e.g., through policy documents or statements).

IV. ARTICLE 12.7 ASCM (ADVERSE FACTS AVAILABLE)

7. The purpose of Article 12.7 is to "overcome a lack of information" and to enable investigating authorities to continue with the investigation and make determinations.[19] The Appellate Body found that Article 12.7 ASCM "permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination."[20] The Appellate Body also found that in view of this objective of Article 12.7 ASCM, an investigating authority may not use any information in whatever way it chooses but that there are limitations. The first limitation is that an investigating authority must take into account all the substantiated facts provided by an interested party and the second limitation is that the "facts available" to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide.[21] The EU considers that the legal requirement that facts available must "reasonably replace" missing information should be interpreted in light of the overall objective of Article 12.7 ASCM of arriving at an "accurate determination." [22]

8. A key decision in the present case is which (adverse) inferences may be drawn from non-cooperation and which facts may be available to support a determination. The authority is not permitted to identify two different equally possible inferences, and then select the inference that is more adverse to the interests of a particular interested party, solely because it is more adverse (for example, in order to "punish" non-cooperation).[23] Rather, the authority must draw the inference that best fits the facts that have been evidenced. However, the facts that may be taken into account for this purpose include such things as the precise question that has been put; the procedural circumstances; the availability of the evidence being sought; and all the circumstances surrounding the absence of the requested information from the record. Thus, the behaviour of an interested party as "procedural circumstance" can colour the inferences that can be reasonably drawn in any particular instance. The more uncooperative a party is in fact, the more attenuated and extensive the inferences that it may be reasonable to draw.

9. Whether or not a WTO Member has acted inconsistently with Article 12.7 ASCM might therefore depend less upon the particular label that has been used (e.g., "adverse inference"), and more upon a specific examination of all the surrounding facts and procedural context. The EU considers that one element that an investigating authority may consider when weighing the evidence is whether and to what extent the available information on the record is reliable. There may be situations where all or part of the information provided by an interested party that could – in principle - be used as facts available may be "tainted" by non-cooperation which may justify the authority to use information e.g. from a different producer or from a different subsidy programme. Depending on the circumstances, an authority may in such scenario decide to discard the entire data set of the particular producer and instead rely on information provided by a different producer or on information from a different subsidy programme. However, an investigating authority must properly reason and evaluate why it selected the facts that it did, consider all the evidence on record and may not select exclusively certain "adverse" evidence in order to punish non-cooperation.

V. CROSS-CUMULATION UNDER ARTICLE 15.3 ASCM

10. The EU recalls that the Appellate Body in *US – Carbon Steel (India)* addressed the legality of cross-cumulating subsidized and dumped imports under Article 15.3 ASCM. The Appellate Body agreed with the panel's findings that "the consistent use of the term "subsidized imports" in Article 15 ASCM limits the scope of the investigating authority's injury assessment to subsidized

[19] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.245.

[20] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, para. 293. In a similar vein, the Appellate Body has also stated that the use of inferences in order to select adverse facts that punish non-cooperation would lead to an inaccurate determination and thus not accord with Article 12.7 ASCM, Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468.

[21] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, para. 294.

[22] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.416 and 4.419.

[23] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419.

imports only." The Appellate Body further found that the consistent references to "subsidies" and "subsidised imports" require investigating authorities to ensure that their examinations are directed at the effects of subsidized imports and exclude non-subsidized imports."[24] It concluded that "we see no basis in the text of Article 15.3 ASCM for cumulatively assessing the effects of subsidized imports with those of non-subsidized imports."[25] In the EU's view, the Appellate Body's case law on cross-cumulation is relevant also for Turkey's claim under Article 15.3 ASCM.

[24] Appellate Body Report, *US – Carbon Streel (India)*, para. 4.591.
[25] Appellate Body Report, *US – Carbon Streel (India)*, para. 4.593.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. THE DEFINITION OF "PUBLIC BODY" UNDER ARTICLE 1.1 OF THE SCM AGREEMENT

1. In this dispute, Turkey challenges the determination of the U.S. Department of Commerce ("USDOC") that Eregli Demir ve Celik Fabrikalari T.A.S. ("Erdemir") and its affiliate Iskenderun Iron & Steel Works Co. ("Isdemir") are "public bodies" as defined under Article 1.1 of the SCM Agreement.[1]

2. The Appellate Body has explained that a "public body" is "an entity that possesses, exercises or is vested with governmental authority." [2] The Appellate Body has further found that "evidence that a government exercises meaningful control over an entity and its conduct" may serve as evidence that the relevant entity "possesses governmental authority and exercises such authority in the performance of governmental functions,"[3] and is thus a public body.

3. In determining whether a government exercises "meaningful control" over an entity, the Appellate Body has explained that "formal indicia of control," such as the government's ownership interest in the entity and the government's power to appoint and nominate directors, are "certainly relevant."[4] However, without further evidence and analysis of several other factors, those indicia "do not provide a sufficient basis" for a public body determination.[5] Factors other than formal indicia that the Appellate Body has found relevant include whether board directors appointed by the government are independent,[6] and the extent to which the government in fact exercised meaningful control over the relevant entity and over its conduct.[7]

4. Taking this into account, Japan considers that the relevant factors in determining whether the Government of Turkey ("GOT") exercises meaningful control over Erdemir and Isdemir include not only formal indicia of control, such as share ownership and the government's power to appoint directors, but also whether, and to what extent, the GOT influences the management of these entities (*i.e.*, whether the business decisions of the entities are independent from the GOT), the legal status and structure of the entities, and the legal status of their property, as compared with those of other private steel producers in Turkey. Thus, Japan considers that a key question before the Panel is whether Erdemir and Isdemir are independent from the GOT, and whether these entities are structured in a manner that ensures that management decisions are made independently and without government interference.

5. Japan notes the United States' explanation that, as part of its public body determination, the USDOC examined the involvement of Ordu Yardimlasma Kurumu ("OYAK"), which the United States contends is an "organ of the GOT," in Erdemir, including OYAK's majority interest in Erdemir.[8] The term "government organ" is not contained in the SCM Agreement, and no WTO precedent has exactly defined this term. Moreover, the United States itself does not provide a definition of the term in this proceeding. Japan considers that the relationship between the GOT and OYAK is relevant only to the extent that it is part of the factual analysis of whether the involvement of OYAK in Erdemir, and by extension, in Isdemir, contributes to establishing "meaningful control" by the GOT over these entities.

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[1] For example, First Written Submission of Turkey, paras. 94-95.
[2] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[3] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[4] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.43 and 4.54; *See also* Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[5] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.43.
[6] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.45.
[7] Appellate Body Report, *US— Carbon Steel (India)*, paras. 4.52-4.54.
[8] *See* First Written Submission of the United States, paras. 97, 100.

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

6. Turkey alleges that the USDOC improperly determined that Erdemir and Isdemir provided hot rolled steel to the respondents for less than adequate remuneration under Article 14(d), thereby conferring a benefit under Article 1.1(b), because the USDOC erroneously rejected in-country prices as potential benchmarks based solely on evidence of government ownership or control of domestic producers.[9] Turkey's claim raises the question of the weight that should be placed on the role of the government in the market in determining whether market prices are distorted, thus permitting an investigating authority to reject in-country prices.

7. Article 14(d) establishes that the adequacy of remuneration is to be determined "in relation to prevailing market conditions for the good or service in question in the country of provision or purchase." What an investigating authority must do in assessing the proper benchmark "will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents."[10] In-country prices are the primary benchmark for the calculation of benefit under Article 14(d),[11] but "an investigating authority may use a benchmark other than private prices of the goods in the country of provision, when it has been established that private prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods."[12]

8. The weight that should be placed on the government's role in the market may differ depending on whether the government's role is "predominant" or "significant". When the government is a predominant supplier, the Appellate Body has found that the government would likely have the market power to affect the pricing by private providers through its own pricing, inducing them to align with government prices.[13] In these circumstances, "evidence of factors other than government market share will have less weight in the determination of price distortion than in a situation where the government has only a 'significant' presence in the market."[14] Price distortion may also be established where the government is a significant supplier, but there must be evidence pertaining to factors other than government market share,[15] such as the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers.[16]

9. Whether the government is a "predominant" or "significant" supplier, Japan considers that the investigating authority must consider all of the evidence that is put on the record.[17] Thus, the determination of an appropriate benchmark requires an assessment of the specific facts of the case, taking into consideration the characteristics, structures, and participants of the market, as well as the role of the government in the relevant market. The weight that the investigating authority places on each of these facts may depend on the predominance or significance of the government in the supplier market.

10. Having said that, as the Panel pointed out in its question to the third parties, the USDOC issued an amended determination which relied on in-country prices prior to panel establishment.[18] Japan recalls that "as a general rule, the measures included in a panel's term of reference must be measures that are in existence at the time of the establishment of the panel" pursuant to Article 6.2 of the DSU,[19] and that "panels are allowed to examine a measure 'whose legislative basis has expired, but whose effects are alleged to be impairing the benefits accruing to the

[9] First Written Submission of Turkey, paras. 181-183.
[10] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.153.
[11] Appellate Body Report, *US – Softwood Lumber IV*, para. 97.
[12] Appellate Body Report, *US – Softwood Lumber IV*, para. 119.
[13] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 455.
[14] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 455.
[15] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 443.
[16] Appellate Body Report, *US— Carbon Steel (India)*, para. 4.157, fn. 754.
[17] First Written Submission of Turkey, para. 185, fn. 446 (citing Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 453).
[18] Panel's Questions to Third Parties, question 4.
[19] Appellate Body Report, *EC — Chicken Cuts*, para. 156.

requesting Member under a covered agreement' at the time of the establishment of the panel."[20] Therefore, Japan considers that if the original determination had already been superseded by an amended determination and had ceased to have legal effect when the Panel was established, the original determination would fall outside the Panel's terms of reference and should not be examined.

III. DETERMINATION OF SPECIFICITY UNDER ARTICLE 2.1 OF THE SCM AGREEMENT

11. Turkey challenges the USDOC's determination that the provision of hot rolled steel for less than adequate remuneration was *de facto* specific within the meaning of Article 2.1 of the SCM Agreement because the number of industries or enterprises using the program was limited to eight industries identified by the GOT.[21]

12. Assuming that the use of the subsidy program was strictly limited to the specific industries identified by the GOT, Japan believes that the USDOC could properly find the provision of hot rolled steel to be "limited" under Article 2.1(c). However, Japan notes that there may be instances where an entity outside of the enumerated industries may also benefit from the provision of hot rolled steel for less than adequate remuneration. Thus, it is Japan's view that the investigating authority cannot rest its finding of specificity only on the identification of a limited number of industries or entities, if it is found that the provision of the good or service in question for less than adequate remuneration can benefit an entity that is outside of the enumerated industries or enterprises.

13. Japan also notes the Panel's questions to third parties on what must be shown to demonstrate a "series of systematic actions" that constitute a subsidy programme under Article 2.1(c) when the subsidy programme consists of a list of transactions.[22] Japan notes the Appellate Body's guidance in *US – Countervailing Measures (China)* that "[t]he mere fact that financial contributions have been provided to certain enterprises is not sufficient … to demonstrate … a plan or scheme for purposes of Article 2.1(c)."[23] Rather, "an investigating 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."[24] Japan considers that this determination must be made on a case-by-case basis, and that there is not a bright-line rule to determine how much, or what kind of, evidence is "adequate" to determine the existence of a "systematic series of actions." Japan does not consider that the requirement to have "adequate evidence" means that each individual transaction must be lower than the benchmark to demonstrate the existence of a subsidy programme. Such rigid construct could potentially permit circumvention of countervailing duties, and would go against the objective of Article 2.1(c), which is to cover *de facto* specific subsidies, including through the use of a subsidy programme, which may appear non-specific on its face.

IV. APPLICATION OF FACTS AVAILABLE UNDER ARTICLE 12.7 OF THE SCM AGREEMENT

14. Turkey challenges the USDOC's application of adverse inferences with respect to the respondents' reported data in several countervailing duty investigations.[25] In particular, Turkey challenges the USDOC's use of facts available under Article 12.7 of the SCM Agreement, in part because the USDOC drew adverse inferences in selecting among facts available, in order to punish the respondent for its alleged non-cooperation.[26]

15. Japan agrees that Article 12.7 does not permit the application of "facts available" in a punitive manner. Article 12.7 states that, "[i]n 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." The Appellate Body has explained

[20] Appellate Body Report, *EC – Selected Customs Matters*, para. 184, referring to Appellate Body Report, *US – Upland Cotton*, para. 263.
[21] First Written Submission of Turkey, paras. 213-220.
[22] Panel's Questions to Third Parties, question 5.
[23] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.
[24] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.
[25] First Written Submission of Turkey, paras. 195-196, 323-325, and 434-436.
[26] First Written Submission of Turkey, paras. 196, 326, 437.

that "Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. Thus, the provision permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination."[27]

16. The Appellate Body has also explained that "Article 12.7 requires an investigating authority to use 'facts available' that reasonably replace the missing 'necessary information,' with a view to arriving at an accurate determination," and that this "calls for a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case."[28] Thus, the determination of what information constitutes a "reasonable replacement" must be made on a case-by-case basis, in light of the available evidence. The circumstances of a case that may be taken into consideration may include procedural circumstances relating to the missing information, such as any difficulties experienced by interested parties that have not provided the "necessary information,"[29] and the knowledge of a non-cooperating party of the consequences of failing to provide information.[30]

17. Japan recognizes that the Appellate Body has found in *US – Carbon Steel (India)* that the grant of authorization to use adverse inferences under the SCM Agreement was not in itself "as such" inconsistent with Article 12.7, insofar as it was possible to apply the U.S. statute in a manner that comports with Article 12.7.[31] However, Japan does not understand the Appellate Body's ruling as allowing Members to apply adverse inferences in a manner intended to punish a non-cooperating respondent. In fact, while recognizing that an investigating authority may use inferences and may consider the procedural circumstances of the missing information in determining which "facts available" constitute reasonable replacements, the Appellate Body noted that "the use of inferences in order to select adverse facts that punish non-cooperation would lead to an inaccurate determination and thus not accord with Article 12.7."[32]

18. That Article 12.7 does not permit Members to apply adverse inferences in a punitive manner is further supported by Article 6.8 and Annex II of the Anti-Dumping Agreement, which sets out several conditions that the investigating authority must meet in order to apply "facts available." While the SCM Agreement does not include a reference to Article 6.8 or Annex II, the Appellate Body has confirmed that these provisions of the Anti-Dumping Agreement provides guidance in interpreting the SCM Agreement. According to the Appellate Body, "it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."[33]

19. Annex II is titled "Best Information Available in Terms of Paragraph 8 of Article 6." By the very terms of its title, the Annex makes clear that the purpose of using "facts available" is to use the "*best* information available." A WTO panel has further stated that Article 6.8 and Annex II are meant to ensure that "even where the investigating authority is unable to obtain the 'first-best' information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps 'second-best' facts."[34]

20. Paragraph 3 of Annex II states that "[a]ll information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion … should be taken into account when determinations are made." Paragraph 5 also states that "[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability." Pursuant to paragraphs 3 and 5, even if an investigating authority uses "facts available," it is nonetheless required to take into account all substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of the party.

[27] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293.
[28] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.435.
[29] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.422.
[30] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426.
[31] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483.
[32] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468.
[33] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.
[34] Panel Report, *US – Hot-Rolled Steel*, para. 7.55.

21. Finally, neither Article 12.7 of the SCM Agreement nor Article 6.8 (incorporating Annex II) of the Anti-Dumping Agreement refers to the use of "adverse facts available" or "adverse inferences." Rather, paragraph 7 of Annex II states that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate." In Japan's view, this language acknowledges that the "best information available" may be less favorable than the interested parties' own data, but does not grant permission for the investigating authority to bring about an outcome that is punitive and that does not reasonably reflect an accurate margin calculation based on the available facts.

22. In sum, the authority to use "facts available" under Article 12.7 of the SCM Agreement does not permit the investigating authority to apply adverse inferences in a manner that runs counter to the authority's overarching obligation to make an accurate determination. Thus, it is Japan's view that an investigating authority must select among "facts available" a "reasonable replacement" for missing information that seeks to achieve an "accurate determination." Article 12.7 does not permit Members to apply adverse inferences in a manner that would punish non-cooperating respondents.

V. CROSS-CUMULATION UNDER ARTICLE 15.3 OF THE SCM AGREEMENT

23. Turkey challenges the U.S. International Trade Commission's ("ITC") "cross-cumulation" of imports from countries that were subject to both anti-dumping and countervailing duty investigations with imports from countries that were subject only to anti-dumping investigations.[35] As Turkey notes, the Appellate Body in *US – Carbon Steel (India)* found that "the effects of imports other than such subsidized imports must not be incorporated in a cumulative assessment pursuant to Article 15.3."[36] Thus, the ITC's practice of cross-cumulating imports that are subject to only anti-dumping investigations with those that are subject to countervailing duty investigations would appear to be inconsistent with the Appellate Body's guidance.

24. That said, Japan notes that the Appellate Body's ruling, if taken at face value, would appear to leave a logical gap with regards to the principal objective of Article 15.3 of the SCM Agreement, as well as the parallel provisions under Article 3.3 of the Anti-Dumping Agreement. In Japan's view, the purpose of Article 15.3 is to capture circumstances where the causal relationship between the injury and subsidized imports may escape scrutiny simply because it would be difficult to identify, individually, the injurious effects of subsidized imports that originate from multiple countries. In other words, just as the effects of subsidized (or dumped) imports originating from several countries may not be adequately taken into account in a country-specific analysis, Japan considers that the combined effects of subsidized and dumped imports from several countries may not be adequately taken into account if cross-cumulation is prohibited.

[35] For example, First Written Submission of Turkey, paras. 221-232.

[36] First Written Submission of Turkey, para. 227 (citing Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.579, 4.593).

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO

1. Mexico is grateful for this opportunity to present its views on this dispute, and notes that its oral statement will be confined to the complaints regarding cross-cumulation raised by Turkey in its first written submission.

2. With respect to this issue, Turkey maintains that the United States' practice of cross-cumulating, which consists in cumulating the harmful effects of the subsidized imports with those caused by non-subsidized imports, is inconsistent "as such" with Article 15.3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Turkey also affirms that cross-cumulation is inconsistent with that same article as applied to the proceedings regarding Oil Country Tubular Goods (OCTG), Welded Line Pipe (WLP), Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes (HWRP), and Circular Welded Carbon Steel Pipes and Tubes (CWP).

3. As can be seen from Turkey's first written submission, the Appellate Body's findings in *US – Carbon Steel (India)* on cross-cumulation are the key to resolving this issue because, as Turkey rightly points out, in that dispute the Appellate Body expressly ruled that cumulatively assessing the effects of subsidized imports with the effects of non-subsidized imports was inconsistent with Article 15.3 of the SCM Agreement.

4. Mexico notes in this connection that the facts examined in *US – Carbon Steel (India)*, in particular those pertaining to cross-cumulation, are unquestionably similar to the facts pertaining to the practice in dispute in this case. In both cases: (i) simultaneous applications were submitted for the initiation of anti-subsidy and anti-dumping proceedings, and the United States investigating authority performed a cumulative assessment of the effects of the subsidized imports with the effects of the dumped imports; and (ii) the authority that applied the cross-cumulation was the International Trade Commission (ITC).

5. Similarly, Mexico notes that the practice of cross-cumulation was grounded on Section 1677(7)(G)(i) of the United States Tariff Act. While Mexico is aware that the Appellate Body Report in *US – Carbon Steel (India)* states that it is unclear whether this Section requires the USITC to carry out the cross-cumulation, paragraphs 223, 224, 343 and 456 of Turkey's first written submission apparently provide verbatim quotes of the relevant ITC rulings in which the ITC itself expressly states that Section 1677(7)(G)(i) of the US Tariff Act requires the Commission to cumulate. Mexico has no reason to suppose that the ITC is not required to cumulate when the ITC itself expressly states that it is required to do so.

6. It is clear to Mexico that the text of Article 15.3 of the SCM Agreement permits the cumulation of imports from several countries only where they are simultaneously subject to countervailing duty investigations, and points (a) and (b) of the said Article are complied with.

7. At the same time Mexico notes that, contrary to what the United States claims, the text of Article 15.3 of the SCM Agreement is not silent with respect to the possibility of cumulating imports subject to countervailing duty investigations with imports that are not subject to countervailing duty investigations. On the contrary, Mexico believes that Article 15.3 expressly conditions the cumulation of imports on their being subject to countervailing duty investigations. It is clear that if that condition is not met, cumulative assessment is plainly and simply not permitted.

8. This interpretation is perfectly consistent with the rulings of the Panel and the Appellate Body in *US – Carbon Steel (India)*. In that dispute, the Appellate Body ruled that to assess cumulatively the effects of imports, Article 15.3 of the SCM Agreement requires, in principle, that those imports be "*subject to countervailing duty investigations*". In the words of the Appellate Body, "*[t]he provision that investigating authorities may, if the conditions set out in the*

last clause of Article 15.3 are fulfilled, cumulatively assess the effects of 'such' imports thus requires that the imports be 'subject to countervailing duty investigations[1]'".

9. Moreover, the Appellate Body undertook a contextual interpretation of Article 15.3 of the SCM Agreement and reached the conclusion that paragraphs 1, 2, 4 and 5 of Article 15 as well as other provisions throughout Part V of the Agreement required that the injury analysis in the context of a countervailing duty procedure be limited to consideration of the effects of subsidized imports.[2] It is therefore clear that where there is cumulation of imports in the assessment of injury, that cumulation must be limited to subsidized imports.

10. Both the Panel and the Appellate Body in *US – Carbon Steel (India)* reached similar conclusions with respect to the causation analysis. In that dispute, they ruled that under Article 15.5 of the SCM Agreement, non-subsidized imports come within the scope of "any known factors other than the subsidized imports which at the same time are injuring the domestic industry", so that the injuries caused by non-subsidized imports must not be attributed to the subsidized imports, because they are "other factors".

11. Mexico notes that in its first written submission, the United States puts forward a number of arguments in defence of cross-cumulation that are identical to the arguments it presented in *US – Carbon Steel (India)* that were ruled by the Appellate Body to be without foundation. For example, it repeats the argument that Article 15.3 is silent on whether the cumulation of the effects of subsidized imports with the effects of dumped imports is permitted, in spite of the fact that the Appellate Body expressly states, in paragraph 4.589, that "*Article 15 is not silent on the question of cumulation of the effects of subsidized imports with the effects of non-subsidized imports*" since, as the Appellate Body also mentions in the same paragraph, from the requirement that the imports must simultaneously be subject to countervailing duty investigations, "*it follows that a cumulative assessment pursuant to Article 15.3 must not encompass the effects of non-subsidized imports*."

12. In another example of this reiteration of the same arguments, the United States repeats, in this dispute, that an analysis that focuses solely on subsidized imports or dumped imports would prevent the investigating authority from taking account of the injurious effects of all unfairly traded imports. However, this issue was clearly settled by the Panel in paragraph 7.343 of its report and confirmed by the Appellate Body in paragraph 4.596 of its report with the statement that the object of the analysis to be made under Article 15 is injury caused by subsidized imports, and not injury caused by unfairly traded imports.

13. The United States also reiterates that Article VI:6(a) of the General Agreement on Tariffs and Trade (GATT) 1994 supports its interpretation of cross-cumulation as being consistent with the provisions of Article 15 of the SCM Agreement, since the expression "as the case may be" suggests that there are situations in which the determination of injury may involve dumping, subsidization, or both. However, in paragraphs 4.598 and 4.599 of its report, the Appellate Body ruled that Article VI.6(a) of the GATT referred to two separate elements, dumping and subsidization, so that the expression "as the case may be" clarifies that injury may be caused by either the effect of the subsidy or, in another case, the effect of dumping. Accordingly, the Appellate Body ruled that the United States' interpretation simply did not apply to Article VI:6(a) of the GATT.

14. At the same time, since the cross-cumulation used by the ITC has already been subject to dispute settlement and the Appellate Body upheld the Panel's findings of inconsistency with paragraphs 1, 2, 3, 4 and 5 of Article 15 of the SCM Agreement, it is a source of concern to Mexico that the United States should continue to apply this injury analysis methodology which, in addition to infringing Members' rights, prevents the dispute settlement system from meeting its objectives of providing the multilateral trading system with security and predictability. Thus, regardless of whether cross-cumulation constitutes a practice, we are struck by the fact that this is the second dispute against the same Member in which we are assessing the same methodology that was already found to be inconsistent with that Member's WTO obligations.

15. In other words, the fact that the United States persists in applying a measure in the full knowledge that it is inconsistent with its multilateral obligations, and that it has not provided a

[1] Appellate Body Report, *US – Carbon Steel (India)*, para 4.579.
[2] Appellate Body Report, *US – Carbon Steel (India)*, para 4.586.

defence that is any different from the defence it presented in the case in which cross-cumulation was found to be inconsistent with Article 15 of the SCM Agreement, means that although the United States is aware of the Appellate Body's legal interpretation and ultimately of its multilateral obligations, it has decided to continue to act in a manner inconsistent with those obligations.

16. However, leaving aside the concern that this attitude inspires, we believe that the Panel should bear in mind, as the Appellate Body has stressed, that "ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[3] Consequently, the Panel must "[follow] the Appellate Body's conclusions in earlier disputes", since doing so " is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[4]

17. Finally, Mexico thanks you for your attention and the interpreters for their work. We look forward to any questions you may have.

[3] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.
[4] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.