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REPORT OF THE PANEL

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TUR-165	US Court of International Trade, Guangdong v. United States	United States Court of International Trade, Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States, (2nd Fed. Supp. 2013), pp. 1381-1382
TUR-187	USITC Final Determination on circular welded carbon-quality steel pipe from India, Oman, the United Arab Emirates, and Viet Nam	USITC, circular welded carbon-quality steel pipe from India, Oman, the United Arab Emirates, and Viet Nam, Final Determination (December 2012)
TUR-205	Court of Appeals for the Federal Circuit decision, Bingham & Taylor v. United States	US Court of Appeals for the Federal Circuit decision, Bingham & Taylor v. United States, No. 86-1440 (2nd Fed. Rep. 1987)
TUR-240	CWP CVD Final Determination Memorandum	Decision Memorandum dated 5 October 2015 from the USDOC on the final results in the countervailing duty administrative review of certain welded carbon steel pipe and tube from Turkey
TUR-242	USITC Final Determination on stainless steel wire rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Chinese Taipei	USITC, stainless steel wire rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Chinese Taipei, Final Determination (December 1998)
TUR-243	USITC Preliminary Determination on certain cut-to-length steel plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia	USITC, certain cut-to-length steel plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia, Preliminary Determination (April 1999)

Exhibit	Short Title (if any)	Description
TUR-244	USITC Preliminary Determination on carbon and certain alloy steel wire rod from Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela	USITC, carbon and certain alloy steel wire rod from Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela, Preliminary Determination (October 2001)
USA-1	OCTG Remand Redetermination	Final Results of Remand Redetermination, Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States, Maverick Tube Co. v. United States, Consol. Ct. No. 14-00229 (31 August 2015)
USA-4	TESEV study	İ. Akça, *Military-Economic Structure in Turkey: Present Situation, Problems, and Solutions*, TESEV Publications (Istanbul, July 2010)
TUR-9/TUR-63 (excerpts) USA-5 (full version)	Erdemir 2012 Annual Report	Erdemir 2012 Annual Report
USA-6	Medium Term Programme	GOT, *Medium Term Programme (2012-2014)* (Ankara, October 2011)
TUR-28/TUR-105 (excerpts) USA-7 (full version)	Erdemir 2013 Annual Report	Erdemir 2013 Annual Report
USA-8	Erdemir's Articles of Association	Erdemir's Articles of Association
USA-12	USDOC's letter on extension request	Letter dated 10 September 2013 from the USDOC to Borusan on extension request for oil country tubular goods from Turkey
USA-20	USDOC's letter on WLP verification	Letter dated 28 April 2015 from the USDOC to Borusan on the verification of welded line pipe from Turkey
USA-35	Exhibit 4 of Maverick's comments	Excerpt from Maverick's comments on the Government of Turkey's third supplemental questionnaire response (10 March 2015), Exhibit 4
USA-36	Final Determination Memorandum on truck and bus tires from China	Issues and Decision Memorandum dated 19 January 2016 for the Final Determination in the Countervailing Duty Investigation of truck and bus tires from the People's Republic of China
USA-37	Final Determination Memorandum on cold-rolled steel from Russia	Issues and Decision Memorandum dated 20 July 2016 for the final determination of certain cold-rolled steel flat products from the Russian Federation
USA-38	Expedited Review Memorandum on supercalendered paper from Canada	Issues and Decision Memorandum dated 17 April 2017 for the final results of expedited review of the countervailing duty order on supercalendered paper from Canada
USA-43	Excerpt from GOT's WLP initial questionnaire response	Excerpt from GOT initial questionnaire response on welded line pipe from Turkey (20 January 2015)
USA-44	Excerpt from GOT's HWRP initial questionnaire response	Excerpt from GOT initial questionnaire response on heavy walled rectangular welded carbon steel pipes and tubes from Turkey (28 October 2015)
USA-45	Excerpt from GOT's CWP initial questionnaire response	Excerpt from GOT initial questionnaire response on certain welded carbon steel pipe and tube from Turkey (10 December 2014)

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
BCI	Business Confidential Information
Borusan	Borusan Istikbal Ticaret and Borusan Mannesmann Boru Sanayi
CBERA	Caribbean Basin Economic Recovery Act
CWP	circular welded carbon steel pipes and tubes
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Erdemir	Eregli Demir ve Celik Fabrikalari T.A.S.
GATT 1994	General Agreement on Tariffs and Trade 1994
GOT	Government of Turkey
HRS	hot rolled steel
HWRP	heavy walled rectangular welded carbon steel pipes and tubes
Isdemir	Iskenderun Iron & Steel Works Co.
LTAR	less than adequate remuneration
MMZ	MMZ Onur Boru Profil uretim San Ve Tic. A.S.
OCTG	oil country tubular goods
OYAK	Ordu Yardimlasma Kurumu
Ozdemir	Ozdemir Boru Profil San ve Tic. Ltd. Sti.
POI	period of investigation
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TESEV	Turkish Economic and Social Studies Foundation
TPA	Turkish Privatization Authority
USDOC	US Department of Commerce
USITC	US International Trade Commission
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WLP	welded line pipe
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Turkey

1.1. On 8 March 2017, Turkey requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 28 April 2017. These consultations failed to settle the dispute.

1.2 Panel establishment and composition

1.3. On 11 May 2017, Turkey requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 19 June 2017, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Turkey in document WT/DS523/2, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered Agreements cited by the parties to the dispute, the matter referred to the DSB by Turkey in document WT/DS523/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those Agreements.[4]

1.5. On 4 September 2017, Turkey requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 14 September 2017, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Guillermo Valles
Members:	Ms Luz Elena Reyes de la Torre Mr José Antonio de la Puente León

1.6. Brazil, Canada, China, the European Union, Japan, Kazakhstan, the Republic of Korea, Mexico, the Russian Federation, the Kingdom of Saudi Arabia, and the United Arab Emirates notified their interest in participating in the Panel proceedings as third parties.[5]

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, on 8 November 2017, the Panel adopted its Working Procedures[6], Additional Working Procedures on Business Confidential Information (BCI)[7], and timetable. The Panel revised its timetable on 5 March and 22 June 2018 after consulting the parties.

1.8. The Panel held a first substantive meeting with the parties on 28 February and 1 March 2018. A session with the third parties took place on 1 March 2018. The Panel held a second substantive meeting with the parties on 29 and 30 May 2018. On 17 July 2018, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 14 September 2018. The Panel issued its Final Report to the parties on 20 November 2018.

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[1] Request for consultations by Turkey, WT/DS523/1 (Turkey's consultations request).
[2] Request for the establishment of a panel by Turkey, WT/DS523/2 (Turkey's panel request).
[3] DSB, Minutes of Meeting held on 19 June 2017, WT/DSB/M/398, p. 8.
[4] Constitution note of the Panel, WT/DS523/3.
[5] Constitution note of the Panel, WT/DS523/3/Rev.1.
[6] See the Panel's Working Procedures in Annex A-1.
[7] See the Panel's Additional Working Procedures on Business Confidential Information in Annex A-2.

1.3.2 Preliminary ruling request

1.9. With its first written submission on 20 December 2017, the United States requested a preliminary ruling pursuant to paragraph 6 of the Panel's Working Procedures that certain measures and claims are outside the Panel's terms of reference, because (a) certain measures were not identified in Turkey's request for consultations; (b) certain claims raised in Turkey's first written submission were not identified in Turkey's panel request; and (c) a measure ceased to have legal effect prior to the Panel's establishment.[8]

1.10. At the Panel's invitation, on 17 January 2018, Turkey submitted a written response to the United States' request for a preliminary ruling.[9] The Panel also posed questions to both parties concerning the United States' request following the first substantive meeting.[10] Furthermore, both parties made additional comments regarding the United States' preliminary ruling request in their subsequent submissions.[11]

1.11. The Panel addresses the United States' request for a preliminary ruling in its findings below.[12]

2 FACTUAL ASPECTS

2.1. This dispute concerns certain countervailing duty measures that the United States imposed in connection with its investigations of Turkish imports of certain oil country tubular goods (OCTG); welded line pipe (WLP); and heavy walled rectangular welded carbon steel pipes and tubes (HWRP); and in connection with a 2011 sunset review and 2013 administrative review of the countervailing duty order on Turkish imports of circular welded carbon steel pipes and tubes (CWP).

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Turkey requests that the Panel find that[13]:

a. The countervailing duty measures imposed on imports of OCTG are inconsistent with the United States' obligations under the following provisions of the SCM Agreement:

   i. Article 1.1(a)(1), as applied, because the US Department of Commerce (USDOC) failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation of its public body determinations with regard to Ordu Yardimlasma Kurumu (OYAK), Eregli Demir ve Celik Fabrikalari T.A.S. (Erdemir) and Iskenderun Iron & Steel Works Co. (Isdemir).

   ii. Articles 1.1(b) and 14(d), as applied, because of the USDOC's practice of rejecting in-country prices based solely on evidence of substantial government involvement and determination to reject Turkish prices with no consideration whether there was evidence those prices are actually distorted, and such practice is also inconsistent as such with Article 14(d).

   iii. Article 12.7, as applied, because the USDOC failed to take account of the difficulties Borusan Istikbal Ticaret and Borusan Mannesmann Boru Sanayi (Borusan) experienced in providing requested information and because the USDOC applied an adverse inference for the purpose of punishing Borusan for its supposed failure to cooperate.

   iv. Articles 2.1(c) and 2.4, as applied, because the USDOC failed to identify, or substantiate based on positive evidence on the record, a subsidy "programme" related

[8] United States' first written submission, paras. 7-49.
[9] Turkey's response to the United States' request for a preliminary ruling (17 January 2018).
[10] Panel's questions to the parties after the first substantive meeting Nos. 1-6.
[11] See, e.g. Turkey's statement at the second meeting of the Panel, paras. 7-8; United States' opening statement at the second meeting of the Panel, paras. 3-9; and United States' second written submission, paras. 7-46, 136, and 143.
[12] See Sections 7.3.1, 7.3.2, 7.5.1, 7.5.2, and 7.6.2 below.
[13] Turkey's first written submission, para. 563.

to the provision of hot rolled steel (HRS), and because the USDOC failed to consider the two factors specified in the last sentence of Article 2.1(c).

v. Article 15.3, as applied, because of the US International Trade Commission (USITC)'s practice of cumulating subsidized and non-subsidized imports for purposes of its material injury analysis, and because the USITC chose to cumulate imports of OCTG from countries subject to both antidumping and countervailing duty investigations (India and Turkey) with imports from countries subject to only antidumping investigations (Korea, Ukraine, and Viet Nam). Such practice is also inconsistent as such with Article 15.3.

vi. Articles 10 and 32.1, as applied, because the United States applied countervailing duties on the basis of determinations that are inconsistent with Articles 1, 2, 12, 14, and 15 of the SCM Agreement.

b. The countervailing duty measures imposed on imports of WLP are inconsistent with the United States' obligations under the following provisions of the SCM Agreement:

i. Article 1.1(a)(1), as applied, because the USDOC failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation on its public body determinations with regard to OYAK and Erdemir and Isdemir.

ii. Article 12.7, as applied, because the USDOC applied an adverse inference for the purpose of punishing Borusan and which resulted in an inaccurate subsidization determination that has no factual connection to the alleged subsidy programmes investigated.

iii. Articles 2.1(c) and 2.4, as applied, because the USDOC failed to identify, or substantiate based on positive evidence on the record, a subsidy "programme" related to the provision of HRS, and because the USDOC failed to consider the two factors specified in the last sentence of Article 2.1(c).

iv. Article 15.3, as applied, because of the USITC's practice of cumulating subsidized and non-subsidized imports for purposes of its material injury analysis, and because the USITC chose to cumulate Turkish imports of WLP, which were subject to both antidumping and countervailing duty investigations, with Korean imports of WLP, which were subject to only an antidumping investigation. Such practice is also inconsistent as such with Article 15.3.

v. Articles 10 and 32.1, as applied, because the United States applied countervailing duties on the basis of determinations that are inconsistent with Articles 1, 2, 12, and 15 of the SCM Agreement.

vi. Article 19.4 and Article VI:3 of the GATT 1994, as applied, because the United States applied countervailing duties in excess of the amount of subsidization attributable to WLP.

c. The countervailing duty measures imposed on imports of HWRP are inconsistent with the United States' obligations under the following provisions of the SCM Agreement:

i. Article 1.1(a)(1), as applied, because the USDOC failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation of its public body determinations with regard to OYAK and Erdemir and Isdemir.

ii. Article 12.7, as applied, because the USDOC applied adverse inferences for the purpose of punishing MMZ Onur Boru Profil uretim San Ve Tic. A.S. (MMZ) and Ozdemir Boru Profil San ve Tic. Ltd. Sti. (Ozdemir) and which resulted in inaccurate subsidization determinations that have no factual connection to the alleged subsidy programmes investigated.

iii. Articles 2.1(c) and 2.4, as applied, because the USDOC failed to identify, or substantiate based on positive evidence on the record, a subsidy "programme" related to the provision of HRS, and because the USDOC failed to consider the two factors specified in the last sentence of Article 2.1(c).

iv. Article 15.3, as applied, because of the USITC's practice of cumulating subsidized and non-subsidized imports for purposes of its material injury analysis, and because the USITC chose to cumulate imports of HWRP from Turkey, which were subject to both antidumping and countervailing duty investigations, with imports from countries subject to only antidumping investigations, Mexico and Korea. Such practice is also inconsistent as such with Article 15.3.

v. Articles 10 and 32.1, as applied, because the United States applied countervailing duties on the basis of determinations that are inconsistent with Articles 1, 2, 12, and 15 of the SCM Agreement.

vi. Article 19.4 and Article VI:3 of the GATT 1994, as applied, because the United States applied countervailing duties in excess of the amount of subsidization attributable to HWRP.

d. The countervailing duty measures imposed on imports of CWP are inconsistent with the United States' obligations under the following provisions of the SCM Agreement:

i. Article 1.1(a)(1), as applied, because the USDOC failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation of its public body determinations with regard to OYAK and Erdemir and Isdemir.

ii. Articles 2.1(c) and 2.4, as applied, because the USDOC failed to identify, or substantiate based on positive evidence on the record, a subsidy "programme" related to the provision of HRS, and because the USDOC failed to consider the two factors specified in the last sentence of Article 2.1(c).

iii. Article 15.3, as applied, because of the USITC's practice of cumulating subsidized and non-subsidized imports for purposes of its material injury analysis, and because the USITC chose to cumulate imports of *CWP from Turkey*, which were subject to both antidumping and countervailing duty orders, with imports of CWP from Brazil, India, Korea, Mexico, Chinese Taipei, and Thailand, which were subject only to antidumping duty orders. Such practice is also inconsistent as such with Article 15.3.

iv. Articles 10 and 32.1, as applied, because the United States applied countervailing duties on the basis of determinations that are inconsistent with Articles 1, 2, and 15 of the SCM Agreement.

3.2. The United States requests that the Panel reject Turkey' claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries that were provided to the Panel in accordance with paragraph 18 of the Working Procedures (see Annex B).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, European Union, Japan and Mexico are reflected in their executive summaries that were provided to the Panel in accordance with paragraph 19 of the Working Procedures (see Annexes C-1, C-2, C-3, and C-4).

6 INTERIM REVIEW

6.1. 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.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-3.

7 FINDINGS

7.1 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered Agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.[14]

7.1.2 Standard of review

7.2. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered Agreements.

7.3. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the authority provided a reasoned and adequate explanation as to (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.[15]

7.4. The Appellate Body has also stated that a panel reviewing an investigating authority's determination may not undertake a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the authority during the investigation and must consider all such evidence submitted by the parties to the dispute.[16] At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[17]

7.1.3 Burden of proof

7.5. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[18] Therefore, Turkey bears the burden of demonstrating that the challenged measures are inconsistent with the SCM Agreement. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, without effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[19] Each party asserting a fact should provide proof thereof.[20]

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[14] Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 104.
[15] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.
[16] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[17] Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; *US – Lamb*, paras. 106-107.
[18] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, p. 337.
[19] Appellate Body Report, *EC – Hormones*, para. 104.
[20] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, p. 335.

7.2 Turkey's claim under Article 1.1(a)(1) of the SCM Agreement in relation to the USDOC's public body determinations in the OCTG, WLP, HWRP, and CWP proceedings

7.2.1 Introduction

7.6. In the challenged proceedings, the USDOC found that Erdemir and its subsidiary Isdemir are public bodies which provided respondent companies with HRS for less than adequate remuneration (LTAR). As the basis for its public body determinations, the USDOC found that the Government of Turkey (GOT) exercised "meaningful control" over the two entities. This finding of meaningful control was based in part on a finding of "significant involvement" of the GOT in the Turkish military pension fund OYAK, which holds a controlling ownership stake in Erdemir.[21] The GOT has no direct ownership interest in Erdemir and Isdemir.

7.7. Turkey claims that the USDOC found that OYAK, Erdemir, and Isdemir are each subject to "meaningful control" by the GOT, and in doing so, determined that OYAK, Erdemir, and Isdemir are public bodies. Turkey claims that the USDOC's determinations that OYAK, Erdemir, and Isdemir are public bodies are inconsistent with Article 1.1(a)(1) of the SCM Agreement. In particular, Turkey claims that the USDOC applied the incorrect legal standard under Article 1.1(a)(1) in its public body determinations. In addition, Turkey claims that the USDOC failed to provide a reasoned and adequate explanation for its determinations because the evidence on the record that the USDOC cited does not support its public body findings, and because the USDOC failed to consider evidence that contradicted its public body determinations.[22]

7.8. The United States argues that Turkey's claim with respect to OYAK must fail because the USDOC did not find that OYAK is a public body and was not required to do so. The United States otherwise requests the Panel to find that the USDOC's public body determinations with respect to Erdemir and Isdemir are consistent with Article 1.1(a)(1) of the SCM Agreement.

7.9. We first recall the legal framework applicable to the public body inquiry before addressing the parties' arguments regarding Turkey's claims.

7.2.2 The legal standard applicable to the public body enquiry

7.10. Article 1.1(a)(1) of the SCM Agreement provides that a subsidy shall be deemed to exist if a financial contribution is provided by a government or any public body within the territory of a Member. The particular conduct of the government or public body must fall within any of the subparagraphs (i) to (iii) in Article 1.1(a)(1), or pursuant to subparagraph (iv), a government or public body may make payments to a funding mechanism, or otherwise entrust or direct a private body to carry out one or more of the type of functions illustrated in subparagraphs (i) to (iii).[23]

7.11. The Appellate Body has explained that a public body within the meaning of Article 1.1(a)(1) "must be an entity that possesses, exercises or is vested with governmental authority".[24] In evaluating whether an entity is a public body, a relevant enquiry is whether "an entity is vested with authority to exercise governmental functions".[25] The Appellate Body has further explained 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".[26] In addition, "just as no two governments

[21] In the challenged determinations, the USDOC indicated that record evidence shows that the GOT exercised "meaningful control" over OYAK and the GOT's "meaningful control" of OYAK extends to Erdemir and Isdemir. (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85) p. 33; WLP CVD Final Determination Memorandum, (Exhibit TUR-122) p. 35; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46) pp. 21-22; and CWP CVD Final Determination Memorandum, (Exhibits TUR-22 (excerpt) and TUR-240 (full version)), p. 28).

[22] Turkey's first written submission, paras. 94-95, 99, 105-106, 143-144, 244-245, 249, 255-256, 293-294, 358, 362, 364, 368-369, 405-406, 468-469, 473, 475, 479-480, and 516-517.

[23] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

[24] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

[25] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[26] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317 ("Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be

are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[27]

7.12. Different types of evidence may be relevant to show that a government has bestowed authority on a particular entity, including such as when a statute legal instrument expressly vests authority in an entity.[28] Absent express statutory delegation of governmental authority, evidence that an entity is *in fact* exercising governmental functions may serve as evidence that the entity in question possesses or has been vested with governmental authority, particularly when the evidence points to a sustained and systematic practice.[29]

7.13. The Appellate Body has also observed 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".[30] The Appellate Body has cautioned, however, that "the mere ownership or control over an entity by a government, without more, is not sufficient to establish that the entity is a public body".[31] Rather, "where 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".[32]

7.14. Finally, in evaluating whether the conduct of a particular entity is that of a public body within the meaning of Article 1.1(a)(1), an investigating authority "must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant".[33]

7.2.3 The Panel's evaluation of Turkey's Article 1.1(a)(1) claims in connection with the challenged proceedings

7.15. Turkey has requested findings that the USDOC's evaluation of Turkish military pension fund OYAK, and Erdemir and Isdemir are inconsistent with Article 1.1(a)(1) of the SCM Agreement. At the core of its claims, Turkey argues that the USDOC "created an elaborate chain of governmental control linking the GOT to OYAK to [Erdemir and Isdemir]" and found that OYAK, Erdemir and Isdemir are public bodies.[34] Turkey submits that the USDOC applied an incorrect legal standard twice: first, in its assessment of OYAK, and second, in its assessment of Erdemir and Isdemir. Turkey also claims that the USDOC failed to provide a reasoned and adequate explanation for its determinations based on the evidence on the record. Turkey also emphasizes, in contrast to other occasions in which the

in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense") and para. 297 ("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 for determining whether or not a specific entity is a public body.")

[27] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

[28] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, para. 4.10.

[29] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[30] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, para. 4.10.

[31] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318 ("[w]e stress, however, that apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority.")

[32] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[33] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319. Further, investigating authorities are "under an obligation to actively seek out information relevant to the analysis of whether a financial contribution had been made", including information relevant to the potential characterization of entities as public bodies, to be able to provide a reasoned and adequate explanation of their conclusions. (Ibid. para. 344).

[34] Turkey's first written submission, paras. 95, 245, 358, and 469.

USDOC has assessed that entities are public bodies based on government ownership, that the GOT does not have any ownership stake in Erdemir or its subsidiary Isdemir.[35]

7.16. WTO panels or the Appellate Body have not previously addressed the issue of whether an investigating authority may establish that an entity is a public body through establishing a "chain" of governmental control linking that entity to the government, such as under the facts of this dispute. We note that Turkey does not in principle challenge that it may be possible to establish that a government may provide a financial contribution via such a chain of control over various entities. Rather, the parties disagree as to whether the legal standard under Article 1.1(a)(1) applies to each entity found to exist in the alleged chain of control.[36]

7.17. The United States argues that the text of Article 1.1(a)(1) clarifies that the requirements surrounding the determination of whether an entity is a public body only apply to entities that provide a financial contribution.[37] Thus, the United States argues that Turkey's separate Article 1.1(a)(1) claim cannot be considered with respect to OYAK, because the USDOC never attributed a financial contribution to OYAK, and therefore never made a public body determination in respect of that entity.[38] The United States considers that we should focus our legal assessment on the USDOC's evaluation of Erdemir and Isdemir. The United States also argues 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.[39] However, for completeness, the United States also submits that we could examine the USDOC's factual findings regarding the relationship between the GOT and OYAK to determine whether the USDOC was entitled to treat OYAK as governmental, such that its meaningful control over Erdemir and Isdemir justified the treatment of those entities as public bodies. The United States asserts that nothing in the text of Article 1.1(a)(1), or in the relevant interpretations of that provision, suggests that OYAK needed to be a particular type of governmental entity, such as a government "organ". OYAK only needed to exhibit the characteristics of a government "organ" or "agency", or a "public body" or any other "governmental" entity.[40] The United States submits that the USDOC considered OYAK as an "organ of the GOT" in its assessment of Erdemir and Isdemir.[41] The United States has also asserted that OYAK was governmental in the broader sense.[42]

7.18. In response, Turkey submits that the United States' argument that the disciplines of Article 1.1(a)(1) only apply in respect of entities that provide financial contributions is unfounded.[43] Turkey submits that, under Article 1.1(a)(1), it is first necessary to determine whether an entity is governmental or a private body before analysing whether the conduct of an entity falls within subparagraphs (i) to (iv) of Article 1.1(a)(1). Accordingly, Turkey argues that the analysis of whether an entity is governmental or a private body is thus a separate step from the assessment of whether the particular conduct of an entity is determined to be a financial contribution under Article 1.1(a)(1) and the United States should not be relieved of any obligation in respect of OYAK.[44]

7.19. Turkey considers it clear that the USDOC analysed OYAK as a public body, as the USDOC analysed OYAK pursuant to the same US standard that it analysed Erdemir and Isdemir, i.e. as subject to "meaningful control" of the government.[45] Turkey also considers that an investigating

[35] Turkey's first written submission, paras. 97, 247, 360, and 471.
[36] Turkey's second written submission, para. 28.
[37] United States' first written submission, para. 78; response to Panel question No. 7, para. 30.
[38] The United States submits that a public body finding in respect of OYAK "was neither necessary, nor appropriate, because USDOC did not find that OYAK provided a countervailable subsidy". (United States' first written submission, para. 79). See also United States' response to Panel question No. 7, paras. 28-29; Turkey's statement at the first meeting of the Panel, para. 20; and Turkey's second written submission, paras. 22-26.
[39] United States' second written submission, para. 74.
[40] United States' second written submission, paras. 75-77.
[41] United States' first written submission, para. 97; response to Panel question No. 7, para. 32.
[42] United States' responses to Panel question No. 7, paras. 28-32, and No. 9, paras. 34-38; second written submission, paras. 75-77.
[43] Turkey's statement at the first meeting of the Panel, paras. 27-29; second written submission, paras. 31-32.
[44] Turkey's statement at the first meeting of the Panel, paras. 27-29; second written submission, paras. 31-32.
[45] Turkey's first written submission, paras. 103, 253, 366, and 477; statement at the first meeting of the Panel, para. 20; response to Panel question No. 8, paras. 24-26; second written submission, paras. 21-23;

authority need not make explicit finding or statement that an entity is a public body, but may make implicit findings in its determinations, as panels and the Appellate Body have recognized.[46] Turkey also argues that the United States' evaluation of OYAK as a "government organ" is not supported in the reasoning and findings of the determinations at issue.[47]

7.20. As a general matter, we do not reject that it may be possible to establish that an entity is a public body through establishing a chain of governmental control linking that entity to the government. However, to properly attribute[48] the actions of that entity to the government, the governmental character of entities in the alleged chain will be relevant to the assessment. In this regard, an entity may be "governmental" in either the broad sense or the narrow sense, or directly or through a government's entrustment or direction of a private body. We recall in this regard that the Appellate Body has explained that "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".[49] In addition, the Appellate Body 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".[50]

7.21. Finally, although the United States considers that no legal standard under the SCM Agreement would apply to the USDOC's findings with respect to OYAK, we note the United States' statement that the Panel may find relevant to its factual assessment of OYAK the characteristics examined by other panels or the Appellate Body with respect to "government", "public body", and other governmental entities in other contexts.[51] The parties therefore appear to agree that OYAK's status is relevant to the assessment of Erdemir and Isdemir.

7.22. With this framework in mind, we will consider whether the USDOC's public body determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.2.3.1 Whether the USDOC's public body determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement

7.23. In claiming that the USDOC's public body determinations in respect of Erdemir and Isdemir are inconsistent with Article 1.1(a)(1), Turkey argues that the USDOC both failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation of the basis of its public body findings based on evidence on record.

7.24. Turkey raises a series of arguments with respect to the USDOC's analysis of OYAK and its relationship with the GOT. First, Turkey considers that neither OYAK's creation by statute, nor the USDOC's interpretation of certain provisions of Law No. 205, support the USDOC's finding that the GOT exercises control over OYAK and by extension, over Erdemir and Isdemir.[52] Second, Turkey argues that OYAK's property and tax treatment under Turkish law is consistent with that of other Turkish pension funds.[53] Third, Turkey argues that, because OYAK's member contributions are private funds, the mandatory nature of participation for some members does not support USDOC's findings.[54] Fourth, Turkey argues that the members participating in OYAK's governing bodies are acting in their individual capacities, and not as government officials.[55] Fifth, Turkey argues

statement at the second meeting of the Panel, para. 43; and comments on United States' response to Panel question No. 65, paras. 9-12.

[46] Turkey's comments on United States response to Panel question No. 69, paras. 17-18 (quoting Appellate Body Report, *Japan – DRAMs (Korea)*, para. 214).

[47] Turkey's statement at the first meeting of the Panel, para. 21.

[48] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

[49] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.

[50] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, para. 4.10.

[51] United States' second written submission, para. 77. The United States also argues that because Turkey's arguments concerning OYAK are raised separately from its challenge against the USDOC's determinations concerning Erdemir and Isdemir, we should decline to review Turkey's OYAK arguments because they are made on an independent basis. (United States' second written submission, para. 74).

[52] Turkey's first written submission, paras. 111-114, 261-264, 374-377, and 485-488.

[53] Turkey's first written submission, paras. 115-119, 265-269, 378-382, and 489-492.

[54] Turkey's first written submission, paras. 120-122, 270-272, 383-385, and 493-495.

[55] Turkey's first written submission, paras. 123-131, 273-281, 386-393, and 496-504.

that the USDOC did not consider contradictory record evidence that OYAK is an autonomous, private pension fund that is in fact a non-profit foundation, and acts independently of the government in making investment decisions.[56]

7.25. Turkey argues that the other evidence that the USDOC identified in relation to Erdemir and Isdemir, at most, demonstrates GOT's alleged ability to control Erdemir, and otherwise, the limited statements in Erdemir's 2012 and 2013 Annual Reports do not support a finding that Erdemir and Isdemir possess, exercise, or are vested with governmental authority.[57]

7.26. The United States has acknowledged that the Appellate Body considers that "the term public body in Article 1.1(a)(1) of the SCM Agreement means 'an entity that possesses, exercises or is vested with governmental authority'"[58], and argues that the USDOC's public body analysis in relation to Erdemir and Isdemir is consistent with the Appellate Body's interpretation of Article 1.1(a)(1).[59] The United States argues that the USDOC properly determined that Erdemir and Isdemir are public bodies in the challenged proceedings based on consideration of the totality of evidence, including the involvement of OYAK in Erdemir.[60]

7.27. In the challenged proceedings, the USDOC based its determination that Erdemir and Isdemir are public bodies on numerous considerations, including that OYAK holds a majority of shares of Erdemir through its wholly-owned holding company, Ataer Holding AS, and that Erdemir owns more than 92% of its subsidiary Isdemir.[61]

7.28. Regarding OYAK specifically, the USDOC found "extensive GOT involvement in OYAK" and that the GOT exercised "meaningful control" over OYAK.[62] The USDOC observed that 1961 Military Personnel Assistance and Pension Fund Law (Law No. 205) establishing OYAK states that the GOT created OYAK "as an institution related to the Ministry of National Defense".[63] Pursuant to Law No. 205, the USDOC observed that OYAK's property has by law the "same rights and privileges of state property", that OYAK is exempt from corporate and other taxes, and that members of the

[56] Turkey's first written submission, paras. 132-135, 282-285, 394-397, and 505-508; second written submission, paras. 35-38.

[57] Turkey's first written submission, paras. 147-152, 297-302, 409-413, and 520-525.

[58] United States' first written submission, para. 89, citing to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37.

[59] United States' first written submission, para. 89. The United States considers the Appellate Body to have erroneously collapsed the term "public body" into "government" (or government agency) in its interpretation, failing to properly interpret the meaning of the term in its context. Nevertheless, the United States explains that "[f]or purposes of this discussion, however, we explain the approach of the Appellate Body and, later, that the analysis of USDOC satisfies that approach". (Ibid.).

[60] United States' first written submission, para. 96; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 36 ("[t]herefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of HRS for LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies"); HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 23 ("[t]herefore, based on the totality of the record evidence, as described under the 'Analysis of Programs – Provision of HRS for LTAR' section above, we continue to find Erdemir and Isdemir to be public bodies"); Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 30 ("[t]herefore, based on the record evidence as a whole, as described under the 'Analysis of Programs – Provision of HRS for LTAR' section, above, we continue to find Erdemir and Isdemir to be public bodies"); OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 35 ("[b]ased on the record evidence as a whole, as described above under the 'Analysis of Programs – Provision of HRS for LTAR' section, we find Erdemir and Isdemir to be public bodies"). See also United States' first written submission, paras. 97-120; and second written submission, para. 83.

[61] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 20 (stating that Erdemir owns 92.91% of Isdemir); WLP CVD Final Determination Memorandum, (Exhibit TUR-122), pp. 13-14 (stating that Erdemir owns 95% of Isdemir); HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 11 (stating that Erdemir owns 95% of Isdemir); and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 8 (stating that Erdemir owns 95.07% of Isdemir). The USDOC noted that the GOT sold a 49.93% ownership stake in Erdemir to OYAK in 2006. In light of the fact that Erdemir holds 3% of its own shares as treasury stock, the USDOC found that OYAK holds the majority of Erdemir's outstanding shares. (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 20).

[62] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), pp. 21 and 33; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), pp. 14 and 35; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), pp. 11-12 and 21-22; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 8 and 28.

[63] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 11; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 8.

armed forces must by law contribute part of their salaries to OYAK.[64] The USDOC also reviewed OYAK's leadership structure, highlighting the following:

> OYAK's Representative Assembly comprises 50 to 100 members of the Turkish Armed Forces "designated by their respective commanders or superiors." The Representative Assembly, in turn, elects 20 of the 40 members of OYAK's General Assembly. Of the General Assembly's other 20 members, 17 are by statute government officials (*e.g.*, Ministers of Finance and Defense). Members of the General Assembly elect the eight-person Board of Directors.[65]

7.29. In the OCTG investigation, the USDOC also referred to a statement in a study published by the Turkish Economic and Social Studies Foundation (TESEV) that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control."[66] The United States contends that the evidence concerning OYAK before the USDOC exhibits the attributes associated with "government" in the broader sense.[67]

7.30. The USDOC next evaluated evidence which it considered "shows that the government's significant involvement in OYAK extends to Erdemir and Isdemir".[68] In the OCTG investigation, the USDOC referred to statements in Erdemir's 2012 Report that Erdemir "implemented policies which promoted the customers to engage in export-oriented production" and "supports the use of domestically mined resources for raw materials in view of … the added value created by the domestic suppliers in favor of the local industries".[69] In the WLP, HWRP, and CWP proceedings, the USDOC referred to Erdemir's 2013 Annual Report, stating that "'[t]hrough … flat steel sales to exporting industries,' Erdemir 'made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013' … and 'continues to create value added for Turkish industry through its initiatives to increase the use of domestic sources of raw materials.'"[70] The USDOC concluded that "[t]hese policies are in line with the GOT's stated policy in its 2012-2014 Medium Term Programme to improve Turkey's balance of payments".[71]

7.31. Finally, the USDOC evaluated evidence that members of OYAK and the Turkish Privatization Authority (TPA), and a "Representative of the Ministry of Finance" all participate on Erdemir's board of directors.[72] The USDOC additionally noted that the TPA holds veto power over any decision related to the closure, sale, merger, or liquidation of both Erdemir and Isdemir.[73] In the OCTG investigation,

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[64] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[65] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 8-9. (fns omitted)

[66] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21.

[67] United States' response to Panel question No. 7, para. 32.

[68] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[69] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21.

[70] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[71] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[72] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), pp. 21-22; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9. Specifically, both Erdemir's 2012 and 2013 Annual Reports state that the nine-member board is composed of three seats by OYAK, one by TPA, two by other investors, and three held independently. (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 22 and fn 163 (quoting Erdemir 2012 Annual Report, (Exhibit USA-5), pp. 54-55); WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; Erdemir 2013 Annual Report, (Exhibit USA-7), pp. 65-66; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; and HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12).

[73] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9. Erdemir's 2012

the USDOC observed that "OYAK effectively decides the composition of the majority of Erdemir's board through its majority shareholder voting rights in Erdemir".[74]

7.32. In our assessment, we must determine whether the findings and conclusions reached by the investigating authority are "reasoned" and "adequate"[75], in light of information provided by respondents in the investigation, and taking into account the totality of the evidence upon which the USDOC relied. In this regard, we bear in mind that:

> "[W]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the *totality* of the evidence, how the *interaction* of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation." In addition, if an investigating authority explains that the totality of the evidence supports the conclusion reached, a panel must undertake a critical examination of whether, in the light of the evidence on record, the investigating authority's conclusion was reasoned and adequate.[76]

7.33. However, a panel may bear in mind that errors in an investigating authority's examination of individual pieces of evidence "undoubtedly would affect an examination of the *totality* of the evidence".[77] Further, "[i]n reviewing individual pieces of evidence, for example, a panel should focus on issues such as the accuracy of a piece of evidence, or whether that piece of evidence may reasonably be relied on in support of the particular inference drawn by the investigating authority".[78]

7.34. In reviewing whether the USDOC's public body determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement, we will begin by assessing the USDOC's factual findings regarding the relationship between the GOT and OYAK. Thereafter, we will review the USDOC's factual findings in relation to Erdemir and Isdemir.

7.35. Regarding OYAK, the United States argues that "OYAK was … expressly established to provide retirement and social security benefits to members of the country's armed forces"[79], and argues that "ensuring that military members receive pensions and other benefits as a result of their service is

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Annual Report indicates that the TPA must approve "decisions regarding the closure, limitation upon restriction, or capacity curtailing of any of the integrated steel production plants or the mining plants owned by the Company and/or by the affiliates". (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; see also Erdemir 2012 Annual Report, (Exhibit USA-5), pp. 62-63). In the CWP, HWRP, and WLP determinations, USDOC examined Articles 21, 22, and 37 of Erdemir's Articles of Association and found that the TPA holds veto power over any decision related to the closedown, sale, merger, or liquidation, as well as capacity adjustments, for both Erdemir and Isdemir.

[74] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 22. Erdemir's 2012 Annual Report states that "[e]ach shareholder or the representative of the shareholder attending on [*sic*] Ordinary or an Extraordinary General Assembly Meetings shall have one voting right for each share". (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 34). Erdemir's Articles of Association state that "Board of Directors consists of minimum 5 and maximum 9 members to be selected by the General Assembly of Shareholders under the provisions of Turkish Commercial Code and Capital Markets Board Law". (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 34). In addition, Erdemir's Articles of Association state that "[e]ach share has only one voting right" and that the "Board of Directors consists of minimum 5 and maximum 9 members to be selected by the General Assembly of Shareholders". (Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9 and fn 45; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14 and fn 69; and HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12 and fn 60; see also Erdemir's Articles of Association, (Exhibit USA-8), Articles 10 and 21).

[75] Appellate Body Report, *US – Carbon Steel (India)*, fn 610:

> [A] panel must examine whether the conclusions reached by the investigating authority are reasoned and adequate, and that such an examination must be critical, and be based on the information contained on the record and the explanations given by the authority in its published report. … Thus, there must be, in the investigating authority's determinations, an explanation of how the evidence on the record supports its factual findings.

See also Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, fn 278; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

[76] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 131. (emphasis original; fn omitted)

[77] Appellate Body Report, *US – Countervailing Duty Investigations on DRAMS*, para. 154. (emphasis original)

[78] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 188.

[79] United States' response to Panel question No. 9, para. 35.

indicative of a governmental function".[80] In its determinations, the USDOC found relevant that, pursuant to Law No. 205, OYAK was established "as an institution related to the Ministry of National Defense"[81]; that OYAK's governing bodies are comprised of military and certain governmental personnel, which elect the eight-person board of directors[82]; that OYAK is ensured funding through mandatory contribution requirements, which it can enforce as a matter of law[83]; and that OYAK was granted certain property and tax privileges.[84] The USDOC also found relevant a statement in the TESEV study that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control".[85]

7.36. Turkey objects that OYAK is part of the Turkish public social security system, and rejects that OYAK is performing "governmental functions".[86] Turkey has contended throughout these proceedings that OYAK is a private occupational pension fund that is not part of Turkey's mandatory "first pillar" public social security system.[87] Turkey further submits that OYAK is a "non-profit foundation".[88]

7.37. In the USDOC's public body determinations in the four proceedings at issue, the USDOC did not identify OYAK's role of providing retirement and social security benefits as being a government function. OYAK's annual reports, which were on the record before the USDOC, describe OYAK as a private supplemental pension fund that is not funded through the Turkish government.[89]

[80] United States' response to Panel question No. 14, para. 47.

[81] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 11; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 8.

[82] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 8-9 (fns omitted). As noted by the United States, Article 3 of Law No. 205 specifies that OYAK's Representative Assembly is to be composed entirely of members of the Turkish Armed Forces, who are "designated by their respective commanders or superiors". Article 4 of Law No. 205 states that the General Assembly shall be composed of the following members: the Minister of National Defence; the Minister of Finance; the Chief of the General Staff; the Commanders of the Land Forces, the Naval Forces and the Air Forces, or their Chiefs of Staff; the General Commander of the Gendarmeries or his Chief of Staff; the President of the Court of Accounts of the Republic of Turkey; the President of the Board of Audit of the Prime Ministry of the Republic of Turkey; the Chairman of the Board of the Banks Association of Turkey; the Chairman of the Union Chambers and Commodity Exchanges of Turkey; and six staff from the Ministry of National Defence or General Staff. Article 4 also provides that the General Assembly shall include "[f]rom the private sector, three persons distinguished in financial and economic fields, who will be appointed by the Minister of National Defence for three-year terms of office". (See, e.g. Law No. 205 (HWRP questionnaire), (Exhibit TUR-30), Article 4). The General Assembly, in turn, elects three members of OYAK's board of directors, drawing from candidates nominated by the Minister of National Defence and Chief of the General Staff. The four other members of the board of directors, as well as the Chairman of the board of directors, are selected by an Election Committee composed of the Minister of National Defence, the Minister of Finance, the President of the Court of Accounts of the Republic of Turkey, the President of the Board of General Audit of the Prime Ministry of the Republic of Turkey, the Chairman of the Union Chambers and Commodity Exchanges of Turkey, and the Chairman of the Board of the Banks Association of Turkey. Article 11(i) of Law No. 205 specifies that, among other duties, the board of directors is charged with determining "the methods for managing the assets of the Fund". (See, e.g. Law No. 205 (HWRP questionnaire), (Exhibit TUR-30)).

[83] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9. Law No. 205 states that membership and contributions are mandatory for members of the Turkish armed forces, and may be subject to penalty and collection if unpaid. (See, e.g. Law No. 205 (HWRP questionnaire), (Exhibit TUR-30), Articles 17 and 18).

[84] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), pp. 11-12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 8-9. Law No. 205 states that OYAK's property "shall enjoy the same rights and privileges as State property" and that OYAK is to be exempted from corporate and other taxes. (See, e.g. Law No. 205 (HWRP questionnaire), (Exhibit TUR-30), Articles 35 and 37).

[85] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21.

[86] Turkey's second written submission, para. 38.

[87] Turkey's first written submission, paras. 10-11; second written submission, paras. 35-38.

[88] Turkey's second written submission, para. 38.

[89] OYAK 2012 Annual Report (OCTG questionnaire), (Exhibit TUR-57), p. 2 ("OYAK is not a part of the government's social security institutions and does not and has not, at any time, seized any share from the budgets of such institutions"); OYAK 2013 Annual Report (WLP questionnaire), (Exhibit TUR-106), p. 5 ("OYAK

OYAK's annual reports further specify that OYAK does not use public resources or receive any other form of public support, and the government has no ownership stake in OYAK.[90]

7.38. Although the USDOC highlighted the statement in Article 1 of Law No. 205 that OYAK was established "as an institution related to the Ministry of National Defense"[91], and provisions of Law No. 205 concerning OYAK's tax and property status and governing structure, Article 1 of Law No. 205 also provides that "[OYAK] shall be subject to the provisions of this Law and private law and shall be a corporate body with financial and administrative autonomy."[92] In our view, the fact that OYAK is granted financial and administrative autonomy under Turkish law is relevant to the analysis of whether OYAK acts according to the mandate of the GOT or in pursuit of Turkish government policies or objectives.[93] We recall the Appellate Body in *US – Carbon Steel (India)* explained that panels should not overlook evidence on the record relevant to assessing the relationship between the government and an entity under investigation "and, in particular, the degree of control by the [government] and the degree of autonomy enjoyed by" such an entity.[94] Therefore, in weighing the relevance of OYAK's status under Turkish law, OYAK's financial and administrative autonomy is also relevant.

7.39. We do not consider the fact that OYAK's governing bodies are comprised of military and certain governmental personnel, which elect the eight-person board of directors, that OYAK is ensured mandatory contributions for pension purposes, and that OYAK may benefit from its certain property and tax status, is sufficient to establish that OYAK acts pursuant to governmental authority or is under the meaningful control of the GOT. The Appellate Body has explained that evidence of "formal indicia of control", such as a government's power to appoint and nominate directors to the board of an entity may be relevant to the assessment of whether the conduct of an entity is that of a public body.[95] However, the Appellate Body also observed that "a government's power to appoint directors to the board of an entity and the issue of whether those directors are independent, would seem to be distinct factors" in assessing the governmental character of an entity.[96] We see nothing in the evidence that the USDOC considered in its analysis of OYAK to suggest that military and government personnel within OYAK have made decisions under the direction of the GOT in pursuit of governmental economic policies. In its assessment of OYAK, in addition to citing provisions of Law No. 205, the USDOC referred to a single statement in the TESEV study that "a review of the membership and administrative structure of OYAK reveals that the military is clearly in control".[97] Although the USDOC appears to equate Turkish military presence in OYAK with governmental control based on this statement, the USDOC did not weigh other statements in the TESEV study describing OYAK's "core function as a holding company", and that OYAK's mission statement identifies the goals to "protect[] first and foremost the actuarial balance in its operations" and to "offer the highest rates

is not a part of the government's social security institutions and does not, and has not at any time, received any share from the budgets of such institutions"); OYAK 2014 Annual Report (HWRP questionnaire), (Exhibit TUR-29), p. 7 ("OYAK is not a part of the government's social security institutions and does not, and has not at any time, received any share from the budgets of such institutions"); OYAK 2013 Annual Report (CWP questionnaire), (Exhibit TUR-10), p. 5 ("OYAK is not a part of the government's social security institutions and does not, and has not at any time, received any share from the budgets of such institutions.")

[90] OYAK 2012 Annual Report (OCTG questionnaire), (Exhibit TUR-57), p. 2; OYAK 2013 Annual Report (WLP questionnaire), (Exhibit TUR-106), p. 5; OYAK 2014 Annual Report (HWRP questionnaire), (Exhibit TUR-29), p. 7; and OYAK 2013 Annual Report (CWP questionnaire), (Exhibit TUR-10), p. 5.

[91] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 11; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 8.

[92] Law No. 205 (HWRP questionnaire), (Exhibit TUR-30), Article 1.

[93] As we discuss in further detail below, in the context of its assessment of Erdemir and Isdemir, the USDOC reasoned that the GOT exercised its control (in part, through OYAK) to "implement[] policies which promoted [Erdemir and Isdemir's] customers to engage in export-oriented production" and to "support[] the use of domestically mined resources for raw materials in view of … the added value created by the domestic suppliers in favor of the local industries". The USDOC states that "[t]hese policies are in line with the GOT's stated policy in its 2012-2014 Medium Term Programme to improve Turkey's balance of payments." (OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21).

[94] Turkey's first written submission, para. 155 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.44).

[95] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.43.

[96] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.45.

[97] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21.

of return to its members".[98] In our view, these additional statements do not support an inference that OYAK officials act at the behest of the GOT.[99]

7.40. Taking into account the evidence on the record, including that OYAK is granted financial and administrative autonomy under Turkish law, we are not persuaded that the evidence that the USDOC relied upon demonstrates that OYAK is under the meaningful control of the GOT, or that OYAK is part of the GOT in either the broad sense or the narrow sense. Accordingly, we find that the USDOC was not justified in attributing to the GOT any control that OYAK may exercise over Erdemir and Isdemir.

7.41. We recall the United States' argument that the USDOC based its consideration on the totality of evidence, which includes but is not limited to OYAK's involvement in Erdemir. In particular, the USDOC also considered relevant participation by the Ministry of Finance and TPA on Erdemir's board of directors. The USDOC found that the TPA "holds veto power over any decisions [sic] related to the closure, sale, merger, or liquidation of both Erdemir and Isdemir".[100] The United States argues that this "affords the GOT, through the TPA, an ability to determine critical aspects of Erdemir's and Isdemir's operations".[101] The United States has also pointed to the fact that, as a condition of purchasing Erdemir from the GOT in 2006, OYAK agreed to increase Erdemir's steel production capacity by 3.5 million tonnes through the creation of Isdemir in 2008.[102] Finally, the USDOC referred to selected statements from the 2012 and 2013 Erdemir Annual Reports, which the USDOC found to be "in line"[103] with the Turkish policy to improve the balance of payments.

7.42. As we have found in respect of military and government officials in OYAK's governing bodies, Ministry of Finance and TPA participation on Erdemir's board of directors amount to formal "indicia" of control that is insufficient to establish that the GOT meaningfully controls Erdemir and Isdemir.[104] For instance, although the United States has emphasized the *ability* of the TPA to determine critical aspects of Erdemir and Isdemir's operations, as Turkey argues[105], the USDOC has not pointed to evidence on the record that TPA has at any point since Erdemir's privatization exercised its veto power or sought to influence Erdemir's pricing, production or financial decisions. We do not share the United States' view that events taking place at the time of Erdemir's privatization in 2006 are indicative of whether Erdemir and Isdemir were acting in pursuit of Turkish governmental policies in the years after Erdemir's privatization.

[98] TESEV study, (Exhibit USA-4), p. 10. In addition, while noting that OYAK benefits from special privileges under private and public law which facilitates its pursuit of revenue-generating activities, the TESEV study indicates that OYAK investments and profits are never used for military spending and projects. (TESEV study, (Exhibit USA-4), pp. 8 and 10).

[99] In support of its argument that the members participating in OYAK's governing bodies are acting in their individual capacities, and not as government officials, Turkey refers to a position paper offered by a law firm that was on the record of the OCTG, HWRP, and WLP proceedings, as well as a case brief submitted by petitioner Borusan in the CWP proceeding. (See, e.g. Turkey's first written submission, paras. 126, 276, and 389 (referring to Application of State aid rules to OYAK (OCTG questionnaire), (Exhibit TUR-66), paras. 3.10-3.18; Application of State aid rules to OYAK (WLP questionnaire), (Exhibit TUR-99), paras. 3.1-3.18; and Application of State aid rules to OYAK (OCTG questionnaire), (Exhibit TUR-39), paras. 3.10-3.18)). See also Turkey's first written submission, para. 499 (referring to Excerpt from Borusan's CWP Case Brief, (Exhibit TUR-5), pp. 13-14). The United States argues that these documents are unsupported by record evidence and Turkey's reliance on these documents should carry little weight. (United States' first written submission, paras. 108-112; second written submission, paras. 89-93). We have not taken these documents into account in our assessment here.

[100] See, e.g. OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21.

[101] United States' second written submission, para. 117.

[102] United States' second written submission, para. 102 (referring to Exhibit 4 of Maverick's comments, (Exhibit USA-35), as cited in WLP CVD Final Determination Memorandum, (Exhibit TUR-122), pp. 33-34). Turkey argues that this evidence should not be considered as it was not relied upon by the USDOC in any of the underlying proceedings, in determining that Erdemir and Isdemir are public bodies. (Turkey's response to Panel question No. 16, para. 42). We note that the USDOC referred to evidence submitted by petitioner Maverick in the "Comments" section of the WLP determination, but did not refer to the information in its own analysis.

[103] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[104] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[105] See, e.g. Turkey's second written submission, para. 64.

7.43. As the only evidence that Erdemir has acted in pursuit of governmental policy, the USDOC considered that statements from Erdemir's 2012 and 2013 Annual Reports demonstrated that Erdemir's conduct was "in line"[106] with Turkish policy to improve the balance of payments. The USDOC referred to the objective set out in the 2012-2014 Medium Term Programme "to decrease high dependency of production and exports on imports, especially for intermediate and capital goods, policies and supports enhancing domestic production capacity will be carried on".[107] As set out in paragraph 7.30 above, the USDOC referred to statements that: "the [Erdemir] Group also implemented policies which promoted the customers to engage in export-oriented production"[108]; "ERDEMIR Group also supports the use of domestically mined resources for raw materials in view of the close proximity of the resources to our production sites and the added-value created by the domestic suppliers in favour of the local industries"[109]; Erdemir "continues to create-value-added for Turkish industry through its initiatives to increase the use of domestic sources of raw materials"[110]; and Erdemir "made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013".[111]

7.44. We do not share the USDOC's assessment that these statements support the inference that Erdemir and Isdemir acted in pursuit of objectives set out in the 2012-2014 Medium Term Programme. Erdemir's 2012 and 2013 Annual Reports do not themselves refer to the 2012-2014 Medium Term Programme or any other government macroeconomic programme. Absent clear indication that Erdemir acts pursuant to governmental authority, the mere fact that Erdemir's own business strategies include encouraging customers in export-oriented industries to increase production or encouraging the use of domestic sources of raw materials – even if such efforts might align with GOT macroeconomic policy objectives – does not show that Erdemir and Isdemir exercise governmental authority.

7.45. Other statements in Erdemir's 2012 Annual Report support our understanding that Erdemir's business strategies are consistent with those of a private, profit-seeking company. For instance, Erdemir's 2012 Annual Report indicates that "ERDEMIR Group managed to boost its sales by 22% in 2012 with the assistance of industries which are export-driven".[112] Erdemir's 2012 Annual Report also notes that raw material "entails a very large share in the total costs" and is procured from abroad, and also explains that Erdemir monitors raw material markets "in line with two objectives, firstly, to search for alternative raw material resources and, secondly, to augment access to economical raw material suppliers", further highlighting the importance of "supply safety" to production and the need to find "the most cost-effective raw material resources".[113]

7.46. Finally, the United States has referred to additional statements in Erdemir's 2012 and 2013 Annual Reports in this dispute, beyond those that were identified in the challenged determinations. These include statements that: "[p]roducing flat steel products is crucial for the development of Turkish steel industry, and Isdemir plays a significant role in enhancing the capacity of flat steel production"; Erdemir's "goal is to meet the country's ever-growing need for flat steel and pave the way for the development and growth of Turkish industry"; and "Isdemir also began manufacturing flat products in 2008 with the Modernization and Transformation Capital Investments undertaken after Isdemir's acquisition by Erdemir that year. This largest single investment in the history of the Republic of Turkey served to mitigate the imbalance between long and flat steel production in the country."[114] Turkey objects to the United States' reference to these statements in this dispute as *ex post* justifications.

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[106] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[107] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21 and fn 160. See also Medium Term Programme, (Exhibit USA-6), p. 23.

[108] Erdemir 2012 Annual Report, (Exhibit USA-5), p. 29.

[109] Erdemir 2012 Annual Report, (Exhibit USA-5), p. 35.

[110] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 18.

[111] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 34.

[112] Erdemir 2012 Annual Report, (Exhibit USA-5), p. 29. Erdemir's 2013 Annual Report indicates that it "made 35% of its flat steel sales to the steel pipe-manufacturing sector, one of the largest exporting sectors in Turkey". (Erdemir 2013 Annual Report, (Exhibit USA-7), p. 34).

[113] Erdemir 2012 Annual Report, (Exhibit USA-5), p. 35.

[114] United States' first written submission, paras. 102-103; response to Panel question No. 26, para. 89 (referring to Erdemir 2012 Annual Report, (Exhibit USA-5), p. 5; and Erdemir 2013 Annual Report, (Exhibit USA-7), p. 6).

7.47. As Turkey notes, the USDOC did not directly address these excerpts in any of the determinations. Setting aside the question of whether the USDOC might have taken these statements into account in its determinations, we do not consider that general references to developing the Turkish steel industry and Turkish industry more generally change our assessment reached above.

7.48. Based on our review above, we therefore find that the USDOC failed to establish based on evidence on the record that OYAK is under the meaningful control of the GOT, or that OYAK is part of the GOT in either the broad sense or the narrow sense. We are therefore not persuaded that OYAK's control over Erdemir and Isdemir justifies attributing the actions of those entities to the GOT.

7.49. In addition, we find that the remaining evidence that the USDOC relied upon in the context of assessing Erdemir and Isdemir in the challenged proceedings is insufficient on its own to establish that Erdemir and Isdemir possess, exercise, or are vested with governmental authority to constitute public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. We find that most of the evidence that the USDOC relied upon amounts to evidence of "indicia" of government control. As we explained above, we are also not convinced that statements that the USDOC identified in Erdemir's 2012 and 2013 Annual Reports provide evidence that Erdemir and Isdemir's corporate objectives and accomplishments are aligned with GOT stated macroeconomic policies in its 2012-2014 Medium Term Programme, in particular, the objective to improve Turkey's balance of payments either by "decreas[ing] high dependency of production and exports on imports" through "policies and supports enhancing domestic production capacity".[115]

7.50. For the foregoing reasons, we therefore find that Turkey has demonstrated that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement. In particular, we find that the USDOC failed to apply the standard applicable to the public body inquiry under Article 1.1(a)(1) by failing to establish that Erdemir and Isdemir possess, exercise, or are vested with governmental authority to perform a government function. In addition, we find that the USDOC acted inconsistently with Article 1.1(a)(1) by failing to provide a reasoned and adequate explanation for its determinations based on consideration of the information contained in the record and the explanations given by the authority in its published report.

7.2.3.2 Whether the USDOC failed to consider relevant evidence on the record related to Erdemir's commercial conduct

7.51. Turkey also argues that the USDOC acted inconsistently with Article 1.1(a)(1) by failing to consider evidence on record that arguably demonstrates that Erdemir and Isdemir operate on a commercial basis and independently from OYAK and the GOT.[116]

7.52. Referring to the guidance of the Appellate Body in *US – Carbon Steel (India)*, Turkey argues that an investigating authority conducting a public body determination must give proper consideration to evidence on the record regarding the relationship between the government and the entity at issue "and, in particular, the degree of control by the [government] and the degree of autonomy enjoyed by" the entity in question, such as evidence that the entity operates "in a commercial, de-regulated environment and conducts its operations and business on commercial principles".[117]

7.53. Specifically, Turkey argues that the totality of evidence demonstrates that Erdemir, its board, and its management act independently from both OYAK and the GOT. In the OCTG proceeding, Turkey argues that respondents presented arguments that "Erdemir does not sell coil at preferential prices", and that Erdemir's prices are higher than co-respondent Toscelik's cost of production and selling prices.[118] In the WLP, HWRP, and CWP proceedings, Turkey argues that the GOT presented arguments that Erdemir and Isdemir "operate[] only to maximize [their] profits as is the case for all

[115] Medium Term Programme, (Exhibit USA-6), p. 23.
[116] Turkey's first written submission, paras. 146, 153-165, 296, 303-316, 408, 414-426, 519, and 526-538.
[117] Turkey's first written submission, para. 155 (referring to Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.40 and 4.44).
[118] Turkey's first written submission, para. 154.

private companies" and that "Erdemir has always been a profitable company and reached a net operating profit worth of 484 million dollar in 2013".[119]

7.54. In addition, Turkey refers to information contained in the Input Producer Appendices and other documents on the record in the four proceedings, which Turkey argues provides evidence that (a) Erdemir is a publicly-traded company subject to strict audit and disclosure requirements with 47.63% of Erdemir's shares owned by private entities; (b) Erdemir has a corporate framework with established guidelines by which its board and executive officers make investment decisions based on maximizing profits; (c) Erdemir's executive officers and senior management are selected based on their professional expertise; (d) Erdemir's executive officers are independent from the GOT and none of Erdemir's senior managers are government officials; and (e) Erdemir's hot rolled steel pricing decisions are made based on worldwide price indexes and cost considerations, free from government involvement.[120]

7.55. Contrary to Turkey's assertion, the United States argues that the USDOC considered this information and provided a reasoned and adequate explanation for its rejection. Recalling the USDOC's explanation in its determinations, the United States submits that "a firm's commercial behavior is not dispositive in determining whether that firm is a government 'authority'", as "this line of argument conflates the issues of the 'financial contribution' being provided by an authority and 'benefit.'"[121] The United States submits that this reasoning is consistent with the approach taken by previous panels[122] and is also supported by the structure of the SCM Agreement, in that Article 1.1(a)(1) does not include consideration of whether the financial contribution is provided consistent with market principles.[123]

7.56. The United States further argues that Turkey conflates the distinct concepts of a company operating independently and autonomously from the government with that of a company exhibiting commercial profit-maximizing behaviour. The United States submits that Turkey has only referred

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[119] Turkey's first written submission, paras. 304, 415, and 527.

[120] Turkey's first written submission, paras. 157-162; 307-312; 418-423, and 530-535. See also Excerpt from Borusan's OCTG Case Brief, (Exhibit TUR-52); Erdemir and OYAK's OCTG Input Producer Appendix, (Exhibit TUR-61); Functioning and Governing Principles of Erdemir and Isdemir and Audit Committee Regulation (OCTG questionnaire), (Exhibit TUR-62); Change in the Share and Capital Structure of Erdemir and Isdemir (OCTG questionnaire), (Exhibit TUR-64); Target Base Price Determination Diagram (OCTG questionnaire), (Exhibit TUR-67); Excerpt from Tosçelik's OCTG Case Brief, (Exhibit TUR-81), pp. 6-7; OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 34; Erdemir and Isdemir's Input Producer Appendix (WLP questionnaire), (Exhibit TUR-103); Functioning and Governing Principles of Erdemir and Isdemir and Audit Committee Regulation (WLP questionnaire), (Exhibit TUR-104); Excerpt from Erdemir 2013 Annual Report (WLP questionnaire), (Exhibit TUR-105); Price Determination Methodology and HRS Price Index (WLP questionnaire), (Exhibit TUR-110); Tosçelik's WLP Case Brief, (Exhibit TUR-119), p. 12; Input Producer Appendix (HWRP questionnaire), (Exhibit TUR-26); Functioning and Governing Principles of Erdemir and Isdemir (HWRP questionnaire), (Exhibit TUR-27); Excerpt from Erdemir 2013 Annual Report (HWRP questionnaire), (Exhibit TUR-28); Price Determination Methodology and HRS Price Index (HWRP questionnaire), (Exhibit TUR-33); Input Producer Appendix (CWP questionnaire), (Exhibit TUR-7); Responsibilities of Erdemir (CWP questionnaire), (Exhibit TUR-8); Excerpt from Erdemir 2012 Annual Report (CWP questionnaire), (Exhibit TUR-9); Performance of Erdemir (CWP questionnaire), (Exhibit TUR-13); and Price Determination Methodology and HRS Price Index (CWP questionnaire), (Exhibit TUR-14).

[121] United States' first written submission, para. 114 (quoting OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 35; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 22; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 36; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 29); second written submission, para. 110.

[122] For example, the United States refers to the statement by the panel in *Korea – Commercial Vessels* that:

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

(Panel Report, *Korea – Commercial Vessels*, para. 7.28)

In response to a question from the Panel, the United States submits that the Appellate Body in *Brazil – Aircraft* and the panel in *US – Anti-Dumping and Countervailing Duties (China)* also recognized financial contribution and benefit as independent concepts. (United States' response to Panel question No. 25, para. 81 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 157; and Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.29)).

[123] United States' first written submission, paras. 115-116.

to evidence with respect to commercial behaviour, which does not demonstrate that Erdemir and Isdemir operate autonomously from the GOT.[124]

7.57. The United States submits that Turkey has not in any event demonstrated Erdemir's independence from the GOT based on its financial decision-making processes. In this respect, Erdemir's board of directors, which includes OYAK and TPA officials, also approves the selection of senior managers, thus allowing it to participate in the decision-making process regarding pricing and production. The United States submits that the fact that high-level managers may be selected based on their professional expertise does not rebut the GOT's influence. Lastly, although Turkey raises the fact that Erdemir is a publicly traded company subject to certain audit and disclosure requirements, the United States argues that Turkey has not cited any evidence or provided explanation to demonstrate that compliance with these requirements somehow means Erdemir's behaviour is free of government influence.[125]

7.58. We recall that, in evaluating whether the conduct of a particular entity is that of a public body within the meaning of Article 1.1(a)(1), an investigating authority "must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant".[126] In addition, the Appellate Body has observed that an investigating authority undertaking a public body analysis should take into account all evidence on the record regarding the relationship between the government and the entity at issue, which may include evidence that the entity operates "in a commercial, de-regulated environment and conducts its operations and businesses on commercial principles".[127]

7.59. We note that the United States has taken a number of stances in relation to evidence on the record regarding Erdemir and Isdemir's commercial conduct. On the one hand, citing the USDOC in the determinations at issue, the United States has submitted that a firm's commercial behaviour is "not dispositive" in determining whether that firm is a public body.[128] On the other hand, the United States submits that the USDOC considered all the evidence that was submitted, but concluded that the evidence on Erdemir's commercial behaviour "simply was outweighed, in [the] USDOC's view, by the ample record evidence to the contrary that supported [the] USDOC's determinations".[129]

7.60. The United States has also submitted that information regarding an entity's "commercial conduct" does not undermine the USDOC's findings, as it is possible that a government or government-controlled entity may act in a commercial manner.[130] Finally, as noted above, the

[124] United States' response to Panel question No. 26, para. 84; second written submission, paras. 106 and 109.

[125] United States' second written submission, paras. 111-114.

[126] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319. Further, investigating authorities are "under an obligation to actively seek out information relevant to the analysis of whether a financial contribution had been made", including information relevant to the potential characterization of entities as public bodies, so as to be able to provide a reasoned and adequate explanation of their conclusions. (Ibid. para. 344).

[127] Turkey's first written submission, para. 155 (referring to Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.40 and 4.44). In its third-party submissions, Japan has argued that an important aspect of the analysis is whether an entity is structured in a manner that ensures that management decisions are made independently, arguing that evidence of "[e]stablished guidelines on corporate governance, such as stringent disclosure and auditing regulations, or operation of an independent corporate body, such as an investment advisory board, may be evidence of such independence". (Japan's third-party submission, para. 12; third-party statement, para. 5).

[128] United States' first written submission, para. 114 (as USDOC explained "a firm's commercial behavior is not dispositive in determining whether that firm is a government 'authority'"). See also ibid. para. 117 ("consideration of whether a financial contribution was provided consistent with market principles is not germane to the determination of the existence of financial contribution"). See also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 35; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 36; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 22; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 29-30.

[129] United States' first written submission, para. 118.

[130] United States' second written submission, paras. 109 and 111.

United States disputes that the submitted information and explanation reflects behaviour free of government influence.

7.61. Based on our review of the underlying determinations, we understand that the USDOC found that evidence regarding Erdemir's commercial conduct was not legally "relevant" (or not "dispositive")[131] to the public body analysis. In light of the Appellate Body's guidance that evidence that an entity conducts its operations and business on commercial principles may be relevant to the public body assessment, we are of the view that the USDOC's failure to consider this information in any meaningful way runs contrary to an investigating authority's obligation to evaluate and give due consideration to all relevant characteristics of the entity. Rather, we consider that, in making its public body determinations in respect of Erdemir and Isdemir, the USDOC should have at least engaged with evidence submitted in the underlying proceedings related to Erdemir's commercial conduct, rather than simply dismissing the information as irrelevant.

7.62. Accordingly, in addition to our findings above, we find that Turkey has demonstrated that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement for having failed to consider relevant evidence on the record.

7.2.3.3 Whether the USDOC's assessment of OYAK is also inconsistent with Article 1.1(a)(1) of the SCM Agreement

7.63. Turkey also requests a separate finding that the USDOC determined that OYAK is a public body in a manner inconsistent with Article 1.1(a)(1) of the SCM Agreement, in addition to findings in relation to Erdemir and Isdemir. Turkey submits that the USDOC applied the same legal standard under US law for "public body" to OYAK as it did to Erdemir and Isdemir, and considers that findings in relation to OYAK would assist in resolving the dispute.[132]

7.64. Based on our findings above that Turkey has demonstrated that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in its determinations regarding Erdemir and Isdemir, we do not consider it necessary to separately rule on whether the USDOC determined that OYAK is a public body in a manner inconsistent with Article 1.1(a)(1) to resolve the matter before us. We are of the view that we have adequately addressed flaws in the USDOC's analysis regarding OYAK in our assessment above. Accordingly, we make no separate finding regarding any public body determination that the USDOC may have made in respect of OYAK.

7.2.4 Conclusions regarding Turkey's claims under Article 1.1(a)(1) of the SCM Agreement

7.65. In the four challenged countervailing duty proceedings, the USDOC relied upon record evidence to reach its conclusion that the GOT exercises "meaningful control" over Erdemir and Isdemir, including through its control of OYAK, and accordingly, the USDOC found Erdemir and Isdemir to be public bodies, and hence "authorities", pursuant to Section 771(5)(B) of the Tariff Act of 1930.[133]

7.66. We found that the USDOC failed to apply the standard applicable to the public body enquiry under Article 1.1(a)(1) of the SCM Agreement in its assessment of "meaningful control", by failing to establish that Erdemir and Isdemir possess, exercise, or are vested with governmental authority to perform a government function, as required by the Appellate Body's interpretation of Article 1.1(a)(1). We further found that the USDOC failed to provide a reasoned and adequate explanation for its determinations based on consideration of the information contained in the record

[131] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 35; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 36; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 22; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 30.

[132] Due to the central role of OYAK in the USDOC's determinations regarding Erdemir and Isdemir, Turkey believes that an effective resolution of the dispute "would be best served by a clear panel finding on OYAK's, as well as Erdemir's and Isdemir's, status as a 'public body'". (Turkey's response to Panel question No. 8, para. 32).

[133] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 22; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), pp. 13-15; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), pp. 11-12; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 8-9.

and the explanations given by the authority in its published report, and for failing to consider relevant evidence on the record.

7.67. In our assessment, we are mindful that the United States based its finding on the totality of evidence. However, we found that the USDOC failed to establish based on evidence on the record that OYAK is under the meaningful control of the GOT, or that OYAK is part of the GOT in either the broad sense or the narrow sense. In particular, we observed that OYAK is granted financial and administrative autonomy under Turkish law. We also found that much of the evidence that the USDOC considered in relation to OYAK constitutes mere "formal indicia" of government control, and the USDOC did not identify otherwise establish that OYAK has taken decisions in pursuit of government economic policies. We are therefore not persuaded that OYAK's control over Erdemir and Isdemir justifies attributing the actions of those entities to the GOT.

7.68. In addition, we concluded that the evidence that the USDOC relied upon in the context of assessing Erdemir and Isdemir in the challenged proceedings is insufficient on its own to establish that Erdemir and Isdemir possess, exercise, or are vested with governmental authority to constitute public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. We found that most of the evidence that the USDOC relied upon amounts to evidence of "indicia" of government control. We did not find that the remaining evidence supported the United States' argument that Erdemir effectuates governmental interests by pursuing policies and objectives that are consistent with the GOT's macroeconomic policies as reflected in the 2012-2014 Medium Term Programme, namely, policies aimed at improving Turkey's balance of payments either by "decreasing high dependency of production and exports on imports" through "policies and supports enhancing domestic production capacity".[134] We also found that the USDOC should have engaged with evidence submitted in the underlying proceedings related to Erdemir's commercial conduct, rather than simply dismissing the information as irrelevant. In light of our findings regarding Erdemir and Isdemir, we did not consider it necessary to separately rule on whether the USDOC public body determinations in respect of OYAK are also inconsistent with Article 1.1(a)(1) in order to resolve the dispute.

7.3 Turkey's claims under Articles 1.1(b) and 14(d) of the SCM Agreement in relation to the benefit determination in the OCTG proceeding

7.3.1 Introduction

7.69. Turkey claims that 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".[135] Turkey claims that this practice is inconsistent with Article 14(d) of the SCM Agreement, both "as such" and as applied in the OCTG investigation. Turkey also claims that, because the USDOC failed to properly establish that Erdemir and Isdemir provided HRS to the respondents for LTAR under Article 14(d), the USDOC 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.

7.70. In its first written submission, the United States requested that the Panel make a preliminary ruling excluding from its terms of reference Turkey's challenge concerning the alleged "practice" mentioned above, on the basis that Turkey failed to identify such a measure and accompanying "as such" claims relating to the measure in its request for consultations. In addition, the United States requested the Panel to make a preliminary ruling that the OCTG Final Determination which forms the basis of Turkey's as applied claim in relation to the alleged "practice" is also outside the Panel's terms of reference, on the basis that the determination had ceased to exist and have legal effect prior to the Panel's establishment.

7.71. In addressing Turkey's claims, we first address the United States' requests concerning the Panel's terms of reference, before turning to the parties' arguments regarding the merits of Turkey's claims.

[134] Medium Term Programme, (Exhibit USA-6), p. 23.
[135] Turkey's first written submission, para. 172.

7.3.2 The United States' request to exclude measures and claims from the Panel's terms of reference

7.3.2.1 Whether Turkey's panel request adds a challenge regarding an alleged benefit "practice" that was not the subject of Turkey's request for consultations

7.72. The United States has first requested the Panel to rule that Turkey's panel request improperly includes measures and claims regarding an alleged benefit "practice" that were not the subject of consultations.

7.73. The United States submits that Turkey clearly limited its challenge in its consultations request with respect to the USDOC's benefit determination exclusively to the preliminary and final benefit determinations in the OCTG proceeding.[136] By limiting its challenge in its consultations request to the preliminary and final benefit determinations in the OCTG proceeding, the United States submits that Turkey has attempted to improperly expand the scope of the dispute by including, first, a new measure, i.e. an alleged "practice" of rejecting in-country prices as benchmarks "based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good"[137]; and, second, by raising an "as such" claim that this alleged practice is inconsistent with Article 14(d) of the SCM Agreement.[138]

7.74. Turkey argues that the Panel should reject the United States' request. First, contrary to the United States' position, Turkey argues that the identification of the measures at issue in its consultations request is broader in scope as Turkey did identify "practices" as measures that are the subject of the dispute.[139] Second, Turkey argues that Article 4.4 of the DSU does not require a complainant to identify the practice in question with the same degree of specificity and particularity in its consultations request as in its panel request.[140] Third, Turkey argues that the manner in which it identified the measures at issue does not limit Turkey from raising an "as such" claim in its panel request.[141]

7.75. The United States' request requires the Panel to consider whether Turkey's challenge to the "practice" as specified in its panel request and associated "as such" claim should be excluded from the Panel's terms of reference on the basis that the alleged practice and the "as such" claim against this practice were not identified in Turkey's request for consultations. This issue involves the relationship between the measures that are identified in the consultations request and the panel request.

7.76. We recall the relevant legal standards applicable under Articles 4.4 and 6.2 of the DSU. Thereafter, we consider whether, based on the content of Turkey's request for consultations and panel request, Turkey has improperly expanded the scope of its challenge.

7.77. Article 4.4 of the DSU provides:

> All … requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

7.78. Article 6.2 of the DSU provides:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than

[136] United States' first written submission, paras. 18-20.
[137] United States' first written submission, para. 21 (quoting Turkey's panel request, para. 8.(A).2.a).
[138] United States' first written submission, para. 21 (referring to Turkey's panel request, para. 8.(A).2.a).
[139] Turkey's response to the United States' request for a preliminary ruling, paras. 16-17.
[140] Turkey's response to the United States' request for a preliminary ruling, para. 18.
[141] Turkey's response to the United States' request for a preliminary ruling, paras. 19-22.

> standard terms of reference, the written request shall include the proposed text of special terms of reference.

7.79. Although similar, these provisions contain important textual differences. While Article 4.4 of the DSU provides that a request for consultations must identify the "measure at issue", Article 6.2 provides that a panel request must identify the "specific measure at issue". This difference in the language between Articles 4.4 and 6.2 makes it clear that, in identifying the measure at issue, greater specificity is required in a panel request than in a consultations request.[142] Further, while Article 4.4 provides that a consultations request must identify the "legal basis for the complaint", Article 6.2 specifies that a panel request must "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

7.80. The Appellate Body has explained that the measures and claims identified in a panel request may constitute a natural evolution of the consultations process.[143] In this respect, a "precise and exact identity"[144] is not required between the measures identified in the request for consultations and the measures identified in the panel request.[145] The Appellate Body has also explained that the "legal basis" for a complaint in a panel request may reasonably evolve from the consultations request, so long as the addition of provisions do not have the effect of changing the essence of the complaint.[146] Thus, in respect of measures or claims, as long as a complainant does not "expand the scope"[147] or change the "essence" of the dispute[148] in its panel request as compared to its consultations request, the contents of that panel request will determine the panel's terms of reference.[149]

7.81. When a party alleges that a panel request has impermissibly expanded the scope of the dispute or changed its essence, a panel must scrutinize the extent to which the identified measure or claim at issue has evolved or changed from the consultations request to the panel request. The determination of whether the identification of the specific measure at issue or claim in the panel request expanded the scope or changed the essence of the dispute must be made on a case-by-case basis, considering the context in which the measures exist and operate.[150]

7.82. We must therefore assess whether Turkey expanded the scope or changed the essence of the dispute in its panel request as compared to its request for consultations, through the inclusion as a specific measure in its panel request, a "practice[] followed by the United States in the identified countervailing duty proceedings related to … the rejection of in-country prices in the assessment of benefit"[151], and through the inclusion of an "as such" claim against this practice.[152]

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[142] Appellate Body Reports, *Argentina – Import Measures*, para. 5.9.

[143] The Appellate Body has explained that the difference in language between Articles 4.4 and 6.2 reflects the underlying distinction between the consultations process and the panel process, in particular, that consultations facilitate the exchange of information that allows the parties to either reach a mutually agreed solution or refine the contours of the dispute. (Appellate Body Reports, *Argentina – Import Measures*, para. 5.10; *US – Upland Cotton*, para. 293; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54).

[144] Appellate Body Report, *Brazil – Aircraft*, para. 132.

[145] Appellate Body Reports, *Argentina – Import Measures*, para. 5.9; *Mexico – Anti-Dumping Measures on Rice*, para. 138; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

[146] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

[147] Appellate Body Report, *US – Upland Cotton*, para. 293.

[148] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 137-138.

[149] The Appellate Body has cautioned that a panel should not impose "too rigid a standard" of identity between the scope of the request for consultations and the request for the establishment of a panel, as this would substitute the consultations request for the panel request, which would undermine the stipulation in Article 7 of the DSU that the request for establishment of a panel will govern the panel's terms of reference unless the parties agree otherwise. (Appellate Body Reports, *Argentina – Import Measures*, para. 5.13; *US – Upland Cotton*, para. 293).

[150] See, e.g. Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

[151] Turkey's panel request, para. 7

[152] Regarding Turkey's "as such" claim, Turkey's panel request provides as follows:

> 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. Turkey considers that this USDOC practice is inconsistent with Article 14(d) of the SCM Agreement both "as such", as a practice, and as applied in this investigation.

(Turkey's Panel request, para. 8.(A).2.a)

7.83. As part of this enquiry, we are required to evaluate whether the identified measures and claims in the panel request have evolved from measures and claims identified in the request for consultations.

7.84. We note that section (A) of Turkey's request for consultations, entitled "Specific Measures at Issue", provides as follows:

> This request for consultations concerns 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; Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes; and Circular Welded Carbon Steel Pipes and Tubes, as identified in Annex 1.
>
> These measures include the determination by the United States to initiate the identified countervailing duty proceedings, the conduct of those proceedings, any preliminary or final countervailing duty or injury determinations issued in those proceedings, any definitive countervailing duties imposed as a result of those proceedings, as well as any notices, annexes, memoranda, orders, amendments, or other instruments issued by the United States, and related practices, in connection with the measures identified in Annex 1.[153]

7.85. This language in the first paragraph only identifies the preliminary and final countervailing duty measures that the United States imposed on OCTG, WLP, HWRP, and CWP, as identified in Annex 1.[154] This language is consistent with the United States' view that Turkey's challenge in its request for consultations is exclusively aimed at the preliminary and final countervailing duty measures imposed on Turkish OCTG, WLP, HWRP, and CWP imports.

7.86. The second paragraph also refers to the preliminary and final countervailing duty measures imposed in the four challenged proceedings. In addition, the second paragraph refers to "related practices", in connection with the measures identified in Annex 1. The United States acknowledges the reference to "related practices" in the description of the measures at issue, but argues that this reference is "so general" that it does not identify a particular "practice" at issue and cannot provide a basis for challenging the specific practices that are subsequently identified in Turkey's panel request.[155] We do not consider the reference to "related practices" is particularly clear, as it does not identify which are the practices that were followed in connection with the measures in Annex 1 that are the focus of Turkey's concerns. The generic modifier "related" is also not informative. When read in isolation, the reference to "related practices" in section (A) can at most be understood as related to any preliminary or final countervailing duty or injury determination issued in the four proceedings at issue, or any definitive countervailing duty imposed resulting from those proceedings.

7.87. The Appellate Body has made clear that a panel should view the requests for consultations on the whole when determining whether the language of the request provides a sufficient basis for considering particular measures are covered by a panel's terms of reference.[156]

7.88. In this regard, we note that section (B) of Turkey's request for consultations, entitled "Legal Basis of the Complaint" provides in part as follows:

> Turkey considers that the measures identified above, and in Annex 1, are inconsistent with the United States' obligations under the WTO Agreements. Turkey's concerns are particularly focused on, though not necessarily limited to, the following aspects of the measures and underlying administrative proceedings:
>
> …

[153] Fns omitted.

[154] Annex 1 lists certain documents for initiation; preliminary, post-preliminary, final, and amended final determinations; and countervailing duty orders as well as related decision memoranda, for each of the respective OCTG, WLP, and HWRP investigations and the CWP review at issue.

[155] United States' opening statement at the first meeting of the Panel, para. 7.

[156] Appellate Body Reports, *Argentina – Import Measures*, para. 5.14 (referring to Appellate Body Report, *US – Upland Cotton*, para. 291).

> 2. Benefit Determination: The United States' determination that sales of hot rolled steel conferred a benefit, within the meaning of Article 1.1(b), and were made for less than adequate remuneration, within the meaning of [sic] 14(d) of the SCM Agreement, including the Department's improper rejection of in-country prices for hot rolled steel as a benchmark for less than adequate remuneration.
>
> …
>
> Turkey considers that the United States' administrative proceedings and measures are inconsistent with Article VI:3 of the GATT 1994, Articles 10, 19.4, and 32.1 of the SCM Agreement, and the specific provisions cited above. Turkey's concerns relate to both the aspects of the measures and underlying administrative proceedings cited above as well as ongoing practices applied in administrative proceedings more generally.[157]

7.89. As can be understood from this excerpt, among other concerns, section (B) sets out that Turkey's concerns are focused on the United States' "Benefit Determination" in the OCTG investigation.[158] Notably, in addition, the end of this excerpt specifies that "Turkey's concerns relate to both the aspects of the measures and underlying administrative proceedings cited above *as well as ongoing practices applied in administrative proceedings more generally*".[159]

7.90. We thus understand that Turkey's consultations request is focused on several concerns, one of which relates to the United States' benefit determination in the OCTG investigation. Turkey's concerns relate to the preliminary and final countervailing duty measures imposed in the four challenged proceedings. However, Turkey's concerns may also be understood to relate to ongoing practices, in light of the reference to "ongoing practices applied in administrative proceedings more generally". In our view, the reference to "ongoing practices" may be linked to Turkey's identification of each the different aspects of the identified "legal basis" of its consultations request, one of which includes the alleged "improper rejection of in-country prices for HRS as a benchmark for less than adequate remuneration" referred to in connection with the benefit determination.

7.91. We recall that a "precise and exact identity"[160] is not required between the measures identified in the request for consultations and the measures identified in the panel request, and that the contents of the panel request may govern the panel's terms of reference so long as a complainant does not "expand the scope"[161] or change the "essence" of the dispute.[162]

7.92. Based on our review of Turkey's request for consultations on the whole, although the reference to "related practices" in the subsection "Specific Measures at Issue" is general in nature, a reasonable reading of section (B) discussing the "Legal Basis of the Complaint" indicates that Turkey's concerns relate not only to preliminary and final countervailing duty measures imposed in the four challenged proceedings, but also to ongoing practices applied in connection with benefit determinations in countervailing duty investigations. Accordingly, Turkey's reference to "related practices" in the subsection "Specific Measures at Issue" in Turkey's consultations request may be understood to include, *inter alia*, a practice in connection with the "improper rejection of in-country prices" as a benchmark.

7.93. In light of our understanding of Turkey's consultations request, we do not consider that Turkey improperly expanded the scope or changed the essence of the dispute by including a practice regarding the benefit determination as a specific measure at issue in its panel request.

7.94. Therefore, we disagree with the United States that Turkey's panel request improperly expanded the scope of the dispute by including as a new measure, an alleged "practice" of rejecting in-country prices as benchmarks "based solely on evidence that the government owns or controls

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[157] Fn omitted.

[158] We note that footnote 5 of Turkey's consultations request specifies that its claim in relation to the benefit determination is limited to the countervailing duty determinations in the OCTG proceeding.

[159] Emphasis added.

[160] Appellate Body Report, *Brazil – Aircraft*, para. 132.

[161] Appellate Body Report, *US – Upland Cotton*, para. 293.

[162] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 137-138.

the majority or a substantial portion of the market for the good". Rather, we consider that, while the panel request identifies the challenged "practice" measures with greater specificity, the manner in which this was done did not expand the scope or essence of the dispute as these "practice" measures were set forth in the request for consultations. Accordingly, we reject the United States' request to exclude the alleged benefit practice measure from our terms of reference.

7.95. We recall that the United States has argued that Turkey's panel request adds measures and *claims* regarding a benefit "practice" that were not the subject of Turkey's request for consultations.[163] The United States argues that Turkey's "as such" claim in connection with the alleged benefit "practice" must necessarily fall outside the Panel's terms of reference "[b]ecause [the alleged benefit practice measure is] not within the terms of reference".[164] The United States further argues that the issue "is not that Turkey described its claims with respect to the alleged practices as 'as such' claims in its panel request, but that Turkey failed to identify those alleged measures in its consultations request altogether".[165]

7.96. We thus understand that the basis for the United States' argument that Turkey's "as such" claim corresponding to the alleged benefit "practice" is outside our terms of reference, is that the alleged benefit practice measure is not within the terms of reference. As we have rejected that the alleged benefit practice measure is outside our terms of reference, we see no basis in the United States' request for finding that Turkey's "as such" claim in connection with the alleged benefit "practice" is outside the Panel's terms of reference.

7.97. We also recall that the "legal basis" for a complaint in a panel request may reasonably evolve from the consultations request, so long as the addition of provisions does not have the effect of changing the essence of the complaint.[166] In our view, the basis for Turkey's "as such" claim against the alleged benefit practice measure reasonably evolved from the description and reference to Articles 1.1(b) and 14(d) in the section discussing the "Legal Basis of the Complaint" in Turkey's consultations request, as well as reference to "ongoing practices" therein, demonstrating that Turkey's "as such" claim in its panel request is clearly connected to its request for consultations.

7.98. For the above reasons, we therefore reject the United States' request for a ruling that Turkey's challenge to an alleged "practice" in relation to the benchmark determination and its "as such" claim with respect to this alleged practice are outside the Panel's terms of reference.

7.3.2.2 Whether the Panel should make findings on the benchmark determination in the OCTG investigation which was successfully challenged in a US domestic court and reversed in a remand determination

7.99. With respect to Turkey's Articles 1.1(b) and 14(d) claims, the United States submits that Turkey challenges the benchmark determination in the OCTG Final Determination, which was amended and ceased to have legal effect prior to the establishment of the Panel. Therefore, the United States requests the Panel to make a preliminary ruling that this aspect of the OCTG Final Determination is outside the Panel's terms of reference.

7.100. The United States submits that, as a general rule, the measures included in a panel's terms of reference must be measures that exist at a panel's establishment.[167] The United States submits that the initial OCTG Final Determination was successfully challenged before a US domestic court, remanded to the USDOC, and reversed by the USDOC in a remand determination at least 15 months prior to the establishment of the Panel.[168] Therefore, the United States submits that the Panel needs to review the benchmark that is set out in the amended OCTG remand determination, and not the benchmark in the initial OCTG Final Determination. Notably, the United States submits that the remand determination no longer relies on out-of-country prices as a benchmark, but instead uses in-country prices.[169] Accordingly, the United States submits that Turkey cannot establish that the

[163] United States' first written submission, para. 21.
[164] United States' opening statement at the first meeting of the Panel, para. 6.
[165] United States' opening statement at the first meeting of the Panel, para. 8.
[166] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[167] United States' first written submission, para. 39.
[168] United States response to Panel question No. 5, para. 27; second written submission, para. 30.
[169] United States' first written submission, paras. 43-45 (referring to OCTG Remand Redetermination, (Exhibit USA-1), p. 18).

initial OCTG final benchmark determination was impairing benefits accruing to it at the Panel's establishment, and the panel should not make findings on this initial determination.[170]

7.101. Turkey disputes that the initial OCTG Final Determination has ceased to have legal effect for two reasons. First, Turkey observes that the remand determination referred to by the United States was appealed to the US Court of Appeals for the Federal Circuit, and that court only issued its decision on 30 May 2017, after Turkey had requested the Panel's establishment. Turkey argues that the decision of the US Court of Appeals for the Federal Circuit could have been further appealed to the United States Supreme Court, leaving open the possibility that the USDOC's remand determination would be reversed and the original benefit determination reinstated.[171] Second, Turkey argues that the initial OCTG Final Determination continues to have legal effect because it reflects the USDOC's long-standing practice of rejecting in-country benchmarks based on evidence of government ownership or control of domestic producers. Accordingly, Turkey submits that a ruling from the Panel is necessary to resolve whether the alleged continuing practice is consistent with the United States' WTO obligations.[172]

7.102. The United States' request raises the issue of whether the Panel should make findings on the initial OCTG Final Determination when addressing Turkey's claims under Article 1.1(b) and Article 14(d) of the SCM Agreement. Specifically, we understand that the United States has requested us to find outside our terms of reference the benchmark determination in the initial OCTG Final Determination in respect of Turkey's "as applied" claims under Article 1.1(b) and Article 14(d).

7.103. WTO panel and Appellate Body jurisprudence indicates that panels have discretion regarding whether to make findings in relation to measures that have expired or ceased to have legal effect.[173]

7.104. When deciding whether to make findings on expired measures, panels have declined to make findings on challenged measures that have expired before panel establishment.[174] Panels have also considered whether a measure is affecting the operation of any covered Agreement or impairing the benefits accruing to the requesting Member under a covered Agreement[175]; whether a complainant continued to request that the Panel make findings with respect to the measure[176]; whether an expired or repealed measure is likely to be reimposed or reoccur[177]; and whether the responding Member could impose duties on goods from the complaining Member in a manner that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in the dispute.[178]

7.105. We see no basis to make findings on the benefit determination in the USDOC's initial OCTG Final Determination in the context of addressing Turkey's "as applied" claims in this dispute. We agree with the United States that the benefit determination in the initial OCTG Final Determination ceased to have legal effect under US law following the publication of the amended OCTG Final Determination on 10 March 2016. Thus, the initial OCTG Final Determination ceased to have legal effect well in advance of the Panel's establishment on 19 June 2017.[179] We recall that panels may

[170] United States' second written submission, para. 35.
[171] Turkey's response to the United States' request for a preliminary ruling, para. 34.
[172] Turkey's response to the United States' request for a preliminary ruling, para. 35.
[173] Appellate Body Reports, *EU – PET (Pakistan)*, paras. 5.1-5.61; *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270; and *China – Raw Materials*, para. 263; and Panel Reports, *US – Poultry (China)*, para. 7.54; *EC – IT Products*, para. 7.165.
[174] Panel Reports, *US – Gasoline*, DSR 1996:I, p. 76, para. 6.19; *Argentina – Textiles and Apparel*, paras. 6.4 and 6.12-6.13. Panels have also considered measures that expired after panel establishment. (Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343; *Indonesia – Autos*, para. 14.9; *China – Electronic Payment Services*, para. 7.227; and *EC – Approval and Marketing of Biotech Products*, paras. 7.1307-7.1308).
[175] Appellate Body Report, *US – Upland Cotton*, para. 263; Panel Report, *US – Upland Cotton*, para. 7.118.
[176] Panel Reports, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 425, para. 6.2; *Indonesia – Autos*, paras. 14.134-14.135; and *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343. See also Appellate Body Report, *Peru – Agricultural Products*, paras. 5.18-5.19.
[177] Panel Reports, *US – Gasoline*, DSR 1996:I, p. 76, para. 6.19; *Argentina – Textiles and Apparel*, para. 6.14; *India – Additional Import Duties*, paras. 7.69-7.70; *US – Poultry (China)*, para. 7.55; *EC – IT Products*, para. 7.1159; *China – Electronic Payment Services*, para. 7.227; and *EC – Approval and Marketing of Biotech Products*, para. 7.1310.
[178] Panel Report, *EU – PET (Pakistan)*, para. 7.13.
[179] DSB, Minutes of Meeting held on 19 June 2017, WT/DSB/M/398.

exercise discretion on whether to make findings regarding expired measures, particularly with respect to measures that expired *before* panel establishment.[180]

7.106. In addition, the benchmark used in the amended benefit determination is based on in-country prices, which is at odds with Turkey's argument that the United States acted inconsistently with Articles 1.1(b) and 14(d) in the OCTG investigation because it relied on out-of-country benchmarks to determine whether HRS was provided to Turkish respondents for LTAR.[181] As the amended Final Determination that replaces the initial Final Determination is based on in-country benchmarks, we do not need to make "as applied" findings on the WTO consistency of the initial benefit determination to resolve the dispute. Tellingly, Turkey has not raised any Article 1.1(b) and Article 14(d) claim against the amended OCTG benefit determination that replaced the initial benchmark and benefit determinations.

7.107. In reaching this decision, we also agree with the United States that potential subsequent US domestic litigation or a risk that the USDOC would revert to using the out-of-country benchmark, should not factor into our assessment of whether to make "as applied" findings on the initial OCTG Final Determination. First, the mere potential for a subsequent appeal to the United States Supreme Court does not alter the fact that the initial OCTG Final Determination was replaced under US law and ceased to have legal effect.[182] Moreover, that any potential subsequent legal action might have allowed the USDOC to further amend the duty rates or alter the legal basis of those rates does not mean that the initial OCTG Final Determination continued to have legal effect.[183]

7.108. Turkey cites the Appellate Body's statement in *US – Upland Cotton* in support of its argument that a panel should rule on measures that expire prior to the establishment of a panel.[184] Turkey's argument is misplaced. In that case, the complainant had challenged a measure whose legislative basis had expired prior to a panel's establishment, but whose effects were alleged to be impairing the benefits accruing to the requesting Member under a covered Agreement at the establishment of the panel.[185] As noted above, the circumstances in this dispute are different, as the amended Final Determination that supersedes and replaces the initial Final Determination, is based on in-country benchmarks, thereby reverting from relying on out-of-country prices and eliminating

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[180] Panel Reports, *US – Gasoline*, para. 6.19; *Argentina – Textiles and Apparel*, paras. 6.4 and 6.12-6.13.

[181] On remand, the USDOC re-examined whether in-country prices could be used as a benchmark for LTAR, and issued the OCTG final remand determination on 31 August 2015, in which it reversed its determination and used in-country prices as a benchmark for determining whether HRS was provided to Turkish respondents for LTAR. Specifically, the USDOC concluded:

> [W]e are reversing our determination that actual transaction prices in Turkey are not appropriate to use as a benchmark for the HRS purchased by respondents during the POI. Accordingly, we find that HRS prices stemming from transactions within Turkey – including domestic purchases and imports into the country (*i.e.*, tier one prices) – may be considered appropriate, pursuant to the statutory and regulatory requirements, to use as benchmarks for the purposes of this remand redetermination. On this basis, we have recalculated the benefit to the [Turkish respondents] from their purchases of HRS produced by Erdemir and Isdemir.

(OCTG Remand Redetermination, (Exhibit USA-1), p. 18 (fn omitted))

[182] United States' opening statement at the first meeting of the Panel, para. 26. The United States notes that once the amended determination was issued, it changed the subsequent rates calculated for investigated producers and served as the legal basis for the collection of cash deposits on entries. As a result, producer Toscelik's subsidy rate was reduced to *de minimis* and the USDOC ceased collecting cash deposits on that company's entries prior to establishment. (Ibid.).

[183] We also agree with the United States that, if a complainant was allowed to argue that a potential domestic legal challenge might give rise to a WTO inconsistency at some point in the future, it would mean that a complainant could equally challenge a measure in which no inconsistency was identified or claimed, based on the possibility that a domestic legal challenge might result in an inconsistency at some future point in time. (United States' opening statement at the first meeting of the Panel, para. 26).

[184] Turkey's response to the United States' request for a preliminary ruling, paras. 12-13 (referring to Appellate Body Reports, *US – Upland Cotton*, para. 263; and *EC – Selected Customs Matters*, para. 184).

[185] Appellate Body Report, *US – Upland Cotton*, para. 270 ("[Articles 3.3 and 4.2 of the DSU] do not preclude a Member from making representations with respect to measures whose legislative basis has expired, if that Member considers, with reason, that benefits accruing to it under the covered Agreements are still being impaired by those measures.") The panel in *US – Upland Cotton* was asked to consider whether payments which had been made in the past under legislation that no longer existed at the time of establishment were within the panel's terms of reference. The panel found the payments were within its terms of reference and the Appellate Body found no error in the panel's finding. (Ibid. paras. 250-266; Panel Report, *US – Upland Cotton*, paras. 7.104-7.122; see also Appellate Body Report, *EC – Selected Customs Matters*, para. 184 (discussing *US – Upland Cotton*)).

the conduct alleged by Turkey to be inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

7.109. Turkey also cites the Panel Report in *Turkey – Rice* and the Appellate Body Report in *China – Raw Materials* in arguing that panels may make findings on measures which expired but for which the underlying legislative framework remained in force.[186] First, unlike the facts before us, both of those cases concerned measures that had expired after a panel's establishment and the issues did not arise as to whether those measures were within the panel's terms of reference.[187] Even so, Turkey has not challenged here the basic legislative framework and implementing regulations on calculating benchmarks for determining the adequacy of remuneration.[188]

7.110. Finally, Turkey argues that a finding regarding its "as applied" claim with respect to the USDOC's benefit determination in the OCTG investigation would differ from a finding regarding its "as such" claim because such a finding would be based on the USDOC's reasoning and evaluation of the facts in that instance. Thus, Turkey argues that "even if [the] Panel finds the USDOC's practice is not 'as such' inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, it may nonetheless find the practice as applied in the OCTG investigation to be inconsistent with those obligations".[189] Turkey submits that such a finding would resolve the dispute by affirming that the USDOC's application of a continuing practice was inconsistent with Articles 1.1(b) and 14(d). Turkey considers this would "provid[e] guidance for benefit determinations in future segments of the same proceeding, *i.e.*, administrative or sunset reviews, or other countervailing proceedings involving the alleged provision of hot rolled steel by the [GOT]".[190]

7.111. In this sense, we understand that Turkey considers that the initial OCTG Final Determination continues to have legal effect because it reflects the USDOC's alleged practice of rejecting in-country benchmarks.[191] As an initial matter, Turkey conflates the notion of the existence of a "practice" with whether a USDOC countervailing duty determination that was superseded by an amended determination continues to have legal effect under US law. As explained above, we disagree with Turkey that the initial OCTG Final Determination continues to have legal effect under US law following the publication of the amended OCTG Final Determination. In addition, in making its argument, Turkey's request for an "as applied" finding in respect of the initial OCTG Final Determination would serve as a second opportunity to challenge an alleged "practice". We disagree with Turkey that such an "as applied" finding would differ from a finding regarding Turkey's "as such" claim. The reason Turkey gives for requesting an "as applied" finding, i.e. providing guidance for future benefit determinations in the same proceeding, is precisely the reason why complaining WTO Members bring "as such" challenges against another Member's laws, practice or ongoing conduct: to seek to prevent that Member from continuing to apply the offending law or conduct in the future. "As such" challenges by a Member also avoid the need to bring further "as applied" challenges in the future. Therefore, we are not persuaded that we should rule on the USDOC's initial OCTG Final Determination in the context of addressing Turkey's "as applied" claims under Article 1.1(b) and Article 14(d).

7.112. For the foregoing reasons, we decline to rule on the USDOC's initial OCTG final benefit determination in the context of addressing Turkey's "as applied" claims under Article 1.1(b) and

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[186] Turkey's response to the United States' request for a preliminary ruling, para. 14 (referring to Panel Report, *Turkey – Rice*, para. 5.29; and Appellate Body Reports, *China – Raw Materials*, para. 264).

[187] Panel Report, *Turkey – Rice*, para. 5.29; Appellate Body Report, *China – Raw Materials*, para. 254.

[188] Turkey's first written submission, para. 176:

> The USDOC's regulation on calculating benchmarks for determining the adequacy of remuneration, 19 CFR 351.511(a)(2), establishes a hierarchy of potential benchmarks, referred to as "tiers," and properly specifies that the "preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation," referred to as the "tier one" benchmark or prices. The regulation, on its face, is consistent with the Appellate Body's interpretation of Article 14(d), as enunciated in *US – Anti-Dumping and Countervailing Duties (China)*[.]

Moreover, as the United States notes, Turkey itself appears to acknowledge that the text of the Preamble to 19 CFR 351.511 does not indicate the existence of a practice of systematically rejecting in-country prices. (Ibid. para. 179 ("[t]he Preamble suggests that the USDOC would conduct an investigation of whether 'actual transaction prices are significantly distorted,' prior to rejecting in-country market prices and resorting to an alternative benchmark."))

[189] Turkey's response to Panel question No. 6, para. 21.

[190] Turkey's response to Panel question No. 6, para. 21.

[191] Turkey's response to the United States' request for a preliminary ruling, para. 35.

Article 14(d) of the SCM Agreement, as we do not consider that findings would aid in providing a positive resolution to the dispute.

7.3.3 The Panel's evaluation of Turkey's "as such" challenge under Article 14(d) of the SCM Agreement

7.113. Under Article 14(d) of the SCM Agreement, a subsidy in the form of a provision of goods or services is deemed to confer a benefit to the recipient, within the meaning of Article 1.1(b), if it is "made for less than adequate remuneration".[192] Article 14(d) provides that "[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision".[193]

7.114. In making its "as such" claim that the United States acted inconsistently with Article 14(d), Turkey argues that 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".[194] Turkey argues that "this practice has been articulated and applied systematically by the USDOC in both prior and subsequent countervailing duty proceedings, and thus should be considered a rule of 'general and prospective application' subject to challenge … 'as such' … in this proceeding."[195]

7.115. Turkey argues that the Appellate Body has clarified that the relevant inquiry for selecting a proper benchmark under Article 14(d) is whether or not certain in-country prices are distorted, rather than whether such prices originate from a particular source (e.g. government-owned entities).[196] Moreover, Turkey argues that the Appellate Body has explained that a finding of government ownership and control of certain entities alone cannot serve as the sole basis for establishing price distortion.[197] Thus, Turkey argues that an investigating authority may not reject in-country prices based solely on evidence of substantial government ownership or control of domestic suppliers, with no consideration of whether those prices are in fact distorted.[198] Accordingly, Turkey claims that the USDOC's practice is therefore inconsistent "as such" with the Appellate Body's interpretation of Article 14(d).

7.116. At the outset, we observe that Turkey does not challenge the consistency "as such" of the United States' laws or regulations concerning calculating benchmarks for determining the adequacy for remuneration[199], but instead asserts that the USDOC has a practice which constitutes a rule or norm of general and prospective application. In light of this, we will consider below whether Turkey has established the existence of such a practice as a rule or norm of general and prospective application. If we find that Turkey has established the existence of such a practice, we will then evaluate whether such a practice is incompatible with the requirements of Article 14(d).

7.117. The Appellate Body has explained that any act or omission attributable to a WTO Member may be challenged in dispute settlement proceedings.[200] The specific measure at issue, whether it is written or unwritten, and how it is described, characterized, and challenged by a complainant, will

[192] Article 14(d) of the SCM Agreement.
[193] Article 14(d) of the SCM Agreement.
[194] Turkey's first written submission, para. 172.
[195] Turkey's first written submission, para. 175.
[196] Turkey's first written submission, para. 180 (referring to Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.105); second written submission, para. 80. See also Appellate Body Report, *US – Softwood Lumber IV*, para. 90 ("investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods.")
[197] Turkey's first written submission, para. 180 (referring to Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.105); second written submission, para. 80.
[198] Turkey's second written submission, para. 80.
[199] We recall, as explained in fn 188 above, that Turkey acknowledges that regulation 19 CFR 351.511(a)(2), which establishes a hierarchy of potential benchmarks for determining the adequacy of remuneration, on its face, is consistent with the Appellate Body's interpretation of Article 14(d), as enunciated in *US – Anti-Dumping and Countervailing Duties (China)*.
[200] Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.122; *US – Corrosion-Resistant Steel Sunset Review*, para. 82. See also Appellate Body Reports, *Guatemala – Cement I*, fn 47; *EC and certain member States – Large Civil Aircraft*, para. 794; and *Argentina – Import Measures*, paras. 5.106 and 5.109.

inform the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the challenged measure.[201]

7.118. In challenging a rule or norm of general and prospective application, a Member must demonstrate (a) that the alleged rule or norm is attributable to the responding Member; (b) the precise content of the alleged rule or norm; and (c) that the alleged rule or norm has general and prospective application.[202] A rule or norm has "general" application when it affects an unidentified number of economic operators.[203] Lastly, a rule or norm has "prospective" application "to the extent that it applies in the future".[204] In this regard, complainants are not required to show with "certainty" that a measure will continue to apply in the future.[205] However, when prospective application is not sufficiently clear from the constitutive elements of the rule or norm, it may be demonstrated through a number of factors, including: the existence of an underlying policy that the rule or norm implements; proof of systematic application of the challenged rule or norm; the extent to which the rule or norm provides administrative guidance for future conduct; and the expectations it creates among economic operators that the rule or norm will be applied in the future.[206] The examination of whether a rule or norm has general and prospective application may vary from case to case and other factors may also be relevant.[207]

7.119. When an "as such" challenge concerns an unwritten measure – as in the present dispute – the complaining party must reach a "high [evidentiary] threshold".[208] Thus, "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".[209]

7.120. We note that, in prior disputes, complainants have submitted both documentary evidence as well as extensive evidence of instances of systematic application, to demonstrate the existence of unwritten measures that have general and prospective application.[210] In its first written submission, Turkey submitted relatively limited evidence in support of its claim, consisting of (a) a single statement in the Final Issues and Decision Memorandum issued in the OCTG investigation at issue in this dispute concerning the benchmark determination[211]; (b) the preliminary CVD determination in the CWP proceeding at issue in this dispute[212]; and (c) a reference to three preliminary affirmative countervailing duty determinations involving Chinese imports.[213]

[201] Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.123; *Argentina – Import Measures*, paras. 5.108 and 5.110.

[202] Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.127 ("[w]hen an unwritten rule or norm is challenged 'as such', a complainant will be required to adduce arguments and supporting evidence to demonstrate the precise content, attribution, and general and prospective nature of the rule or norm"); *US – Zeroing (EC)*, para. 198; and *Argentina – Import Measures*, para. 5.104.

[203] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.130 (referring to Appellate Body Reports, *US – Underwear*, p. 21, DSR 1997:I, p. 29; and *EC – Poultry*, para. 113, in turn quoting Panel Report, *US – Underwear*, para. 7.65).

[204] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.157 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172 and 187; and *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

[205] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.

[206] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132. See also Appellate Body Reports, *US – Zeroing (EC)*, paras. 198, 201, and 204-205; and *US – Zeroing (Japan)*, paras. 85 and 88 (quoting Panel Reports, *US – Zeroing (Japan)*, para. 7.52; and *US – Oil Country Tubular Goods Sunset Reviews*, para. 187).

[207] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.133.

[208] Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.157; *US – Zeroing (EC)*, para. 198.

[209] Appellate Body Report, *US – Zeroing (EC)*, para. 196.

[210] See, for instance, Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, paras. 5.132 and 5.157; *US – Zeroing (EC)*, para. 198; *Argentina – Import Measures*, para. 5.117; and *US – Zeroing (Japan)*, paras. 81-88.

[211] Turkey's first written submission, para. 177.

[212] Turkey's first written submission, para. 179 and fn 437.

[213] Turkey's first written submission, para. 179 and fn 437 (referring to Preliminary AD/CVD Determination on Certain Steel Wheels from China; Preliminary AD/CVD Determination on Circular Welded Austenitic Stainless Pressure Pipe from China; and Preliminary CVD Determination on Circular Welded Carbon Quality Steel Line Pipe from China).

7.121. The United States considers that the evidence on which Turkey relies is "patently insufficient"[214] to support the existence of an unwritten measure and "in no way reflects proof of systemic application" or "a 'practice' at the time of the Panel's establishment".[215]

7.122. Following the first meeting with the parties, the Panel submitted a written question asking Turkey to explain how the evidence that Turkey *has presented* shows the existence of a practice, particularly considering that the USDOC amended its determination in the OCTG investigation.[216] In response, Turkey submitted that "the USDOC's exercise of discretion to depart from its normal practice of rejecting in-country prices … does not establish that the USDOC's practice is not ongoing", noting also that "the USDOC only departed from its normal practice following the adverse USCIT ruling in the OCTG investigation, and it did so under protest".[217] In addition, Turkey took the opportunity to submit 28 "examples" of countervailing proceedings in which the USDOC has applied its alleged practice on a systematic basis, including examples "which post-date the [US]CIT's April 2015 ruling remanding the USDOC's determination in the OCTG investigation".[218]

7.123. The United States has objected to us considering any of the examples provided in Turkey's response, on the ground that the evidence is untimely and contrary to the Panel's Working Procedures.[219] The United States argues that Turkey should have presented evidence in its first written submission or even at the first meeting, but having failed to do so, Turkey should not be permitted to make its case at a subsequent stage.[220] In response to questions from the Panel following the first meeting asking the United States for examples, the United States also submitted three examples in which it argues that the USDOC considered additional evidence of market distortions after determining that the government constituted the majority of the market for a good, in analysing whether in-country prices could be used as benchmarks.[221]

7.124. In our view, the evidence that Turkey refers to in its first written submission, and other evidence cited by Turkey and the United States does not demonstrate that the USDOC systematically bases its decision to rely on in-country, or out-of-country, prices exclusively on evidence as to whether the government owns or controls the majority or a substantial portion of the market. Accordingly, we consider that Turkey has failed to establish the existence of a practice in support of its claim that the USDOC systematically "reject[s] 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".[222]

7.125. We find most troubling Turkey's selective citation in its first written submission to the USDOC's benefit determination in the Final Issues and Decision Memorandum in the OCTG investigation, as follows:

> Notwithstanding the regulatory preference [in 19 CFR 351.511(a)(2)] for the use of prices stemming from actual transactions in the country, where the Department finds that the government owns or controls the majority or a substantial portion of the market for the good or service, the Department will consider such prices to be significantly

[214] United States' first written submission, para. 58.
[215] United States' first written submission, para. 69.
[216] Panel question No. 34 to Turkey.
[217] Turkey's response to Panel question No. 34, para. 69.
[218] Turkey's response to Panel question No. 34, para. 69.
[219] United States' second written submission, para. 52. We recall that paragraph 7 of our Working Procedures requires that "[e]ach party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purpose of rebuttal, answers to questions or comments on answers provided by the other party."
[220] In addition, the United States argues that Turkey also fails to explain how the newly submitted evidence establishes that the USDOC had a practice at the time of the Panel's establishment that demonstrates the existence of a rule or norm of general and prospective application. The United States submits that Turkey merely lists the title of 28 determinations taking place both before and after the OCTG investigation, and does not identify which parts of the subsidy programme analyses are alleged to support its claim. The United States argues that a panel should not make an affirmative case for a party through its own review of evidence. (United States' second written submission, para. 53).
[221] United States' response to Panel question Nos. 35 and 37 (referring to Final Determination Memorandum on cold-rolled steel from Russia, (Exhibit USA-37), p. 54; Expedited Review Memorandum on supercalendered paper from Canada, (Exhibit USA-38), p. 49; and Final Determination Memorandum on truck and bus tires from China, (Exhibit USA-36), pp. 19 and 44).
[222] Turkey's first written submission, para. 172.

> distorted and not an appropriate basis of comparison for determining whether there is a benefit.[223]

7.126. We recall, as discussed in Section 7.3.2.2 above, that the initial OCTG final benchmark determination was successfully challenged in a US domestic court by Turkish respondents, remanded to the USDOC and reversed by the USDOC in an amended determination that was published approximately 15 months prior to the establishment of the Panel. In the amended final OCTG determination, the USDOC reversed its decision to base its benchmark on out-of-country prices and relied on in-country prices for its amended benchmark.[224] In its amended determination, the USDOC explained as follows:

> [W]e are reversing our determination that actual transaction prices in Turkey are not appropriate to use as a benchmark for the HRS purchased by respondents during the POI. Accordingly, we find that HRS prices stemming from transactions within Turkey – including domestic purchases and imports into the country (*i.e.*, tier one prices) – may be considered appropriate, pursuant to the statutory and regulatory requirements, to use as benchmarks for the purposes of this remand redetermination. On this basis, we have recalculated the benefit to [the Turkish respondents] from their purchases of HRS produced by Erdemir and Isdemir.[225]

7.127. Initially, Turkey did not refer to the amended OCTG Final Determination in connection with its Articles 1.1(b) and 14(d) claims. Turkey has explained that the USDOC only revised its determination "under protest" and at the direction of a US domestic court[226] and considers that the reaction of the USDOC to the ruling confirms the existence of a practice. Therefore, Turkey does not consider that the USDOC's decision to deviate from its earlier determination should prevent the Panel from finding the existence of a practice of general and prospective application. Turkey also cites the Appellate Body in *EU – Biodiesel (Argentina)*, arguing that the fact that a Member may at times exercise discretion does not preclude a panel from finding that a measure violates certain WTO obligations "as such".[227]

7.128. First, we do not consider that Turkey's citation to the Appellate Body's Report in *EU – Biodiesel (Argentina)* is relevant to our assessment. In that dispute, the Appellate Body discussed panel and Appellate Body findings in past cases addressing discretionary aspects of WTO Members' municipal laws subject to "as such" challenges.[228] The Appellate Body did not, however, address the evidentiary burden relevant to the examination of an alleged unwritten measure as a rule or norm that has general and prospective application. In this dispute, we must assess whether Turkey has met its burden to demonstrate the existence of the alleged challenged practice.

7.129. While Turkey considers relevant that the USDOC revised its determination "under protest", the evidence before us suggests that the OCTG remand decision has influenced subsequent benchmark determinations, at least on certain occasions. For instance, in the subsequent CWP 2013 Final Determination Memorandum, the USDOC found that "the record of this review does not contain evidence of the GOT's direct or indirect involvement resulting in distortion of the Turkish HRS market during the POR sufficient to warrant using an out-of-country benchmark."[229] The USDOC explained:

> For example, the record does not contain evidence of GOT export restraints on HRS and the share of imports into the domestic market is higher than in certain past cases where

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[223] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 23.

[224] See para. 7.100 above. See also United States' first written submission, paras. 43-45 (referring to OCTG Remand Redetermination, (Exhibit USA-1), p. 18).

[225] OCTG Remand Redetermination, (Exhibit USA-1), p. 18. (fn omitted)

[226] Turkey's second written submission, para. 88.

[227] Turkey's second written submission, para. 88 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.229). In response to a question from the Panel, Turkey submits that it is possible for a measure to be applied "systematically" even if it is applied in "almost" all circumstances. Thus, Turkey argues that the discretionary nature of the USDOC's benefit practice does not detract from its systematic application. (Turkey's response to Panel question No. 84, para. 19).

[228] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.229 (referring to Appellate Body Reports, *US – 1916 Act*, fn 59; *US – Corrosion-Resistant Steel Sunset Review*, para. 100; and *US – Carbon Steel*, para. 162; and Panel Report, *US – Section 301 Trade Act*, paras. 7.53-7.54).

[229] CWP CVD Final Determination Memorandum, (Exhibit TUR-240), pp. 18-20.

> the Department pointed to low import levels as relevant information in rejecting tier one prices. The record information regarding any policies that the GOT may have with respect to the steel industry does not indicate that the GOT's pursuit of those policies results in a significant distortion of the Turkish HRS market. There is no indication otherwise that government involvement significantly distorts this market. Thus, the record of this investigation is absent additional facts present in other cases in which the agency found government distortion even where record evidence did not show that government-controlled producers accounted for a majority of the market for the good.[230]

7.130. Consequently, the USDOC concluded that it would use "the Borusan Companies' actual domestic and import prices for HRS to calculate the benefit from the Borusan Companies' purchases of HRS from Erdemir and Isdemir during the POR".[231] In our review of the Final Determinations in the WLP and HWRP proceedings at issue in this dispute, the USDOC similarly found that record evidence did not support a finding that the Turkish HRS market was so distorted that it cannot serve as an appropriate benchmark, despite the fact that Erdemir's and Isdemir's production accounted for a substantial portion of the domestic supply.[232]

7.131. Outside of the proceedings at issue in this dispute, other examples submitted by both parties confirm that the USDOC does not systematically 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, without considering other evidence of whether in-country prices are distorted. For instance, in certain cases, the USDOC considered government export restraints (e.g. export tariffs) and import levels, in addition to the level of government involvement in the market.[233] In at least one instance, the USDOC declined to resort to out-of-country prices as benchmarks for its benefit analysis even in presence of a substantial level of control on the production of the product concerned by the government.[234]

7.132. Turkey argues that, while the USDOC may in certain cases refer to factors beyond the level of government involvement in the market, such as the level of import penetration, the USDOC does not analyse these factors in the context of a market analysis or otherwise use it to determine if prices are in fact distorted because of government ownership or control.[235] Regardless of how the USDOC may evaluate other factors, we disagree with Turkey's contention that consideration of such

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[230] CWP CVD Final Determination Memorandum, (Exhibit TUR-240), pp. 18-20. (fns omitted)

[231] CWP CVD Final Determination Memorandum, (Exhibit TUR-240), pp. 18-20.

[232] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 16; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 13.

[233] Preliminary AD/CVD Determination on certain kitchen appliance shelving and racks from China, (Exhibit TUR-140), p. 690 (the USDOC found that a 10% export tariff on wire rod was imposed during the POI and that the share of imports of wire rod into the PRC was small (1.53%) relative to Chinese domestic production of wire rod); Preliminary CVD Determination on aluminium extrusions from China, (Exhibit TUR-146), p. 54318 (the USDOC found that the Government of China has imposed export tariffs on certain categories of primary aluminium); Final Determination CVD Memorandum on certain coated paper from China, (Exhibit TUR-147), p. 22 (imports of the product concerned as a share of domestic consumption were insignificant); Preliminary CVD Memorandum on certain tool chests and cabinets from China, (Exhibit TUR-164), p. 30 (the volume of imports as a percentage of domestic production and consumption (1.20% and 1.34%, respectively, for wide strip and 1.37% and 1.35%, respectively, for thin strip) was insignificant); Final Determination Memorandum on cold-rolled steel from Russia, (Exhibit USA-37), pp. 54-55 (considering, for instance, the presence of export restrictions (e. g. tariffs, licensing) and the lack of natural gas imports); Expedited Review Memorandum on supercalendered paper from Canada, (Exhibit USA-38), p. 49 (evidence indicated that the government's long-maintained export restrictions on log and wood residue, leading to price suppression and market distortions in British Columbia).

[234] Preliminary CVD Memorandum on certain new pneumatic off-the-road tires from China, (Exhibit TUR-162), p. 24 (in view of the significant level of imports of rubber (approximately 50% of the total consumption), the USDOC resorted to actual import prices as the basis for the calculation of a tier 1 benchmark). Turkey has referred to the 2013 US judicial decision, Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States in response to a separate question from the Panel. In its response, Turkey has itself acknowledged that the USDOC took into account "a number of factors indicating the substantial influence the [Government of China] held over the wire rod market, including the [Government of China]'s near-majority market share, the low market share of wire rod imports, and regulations on the exportation of wire rod". (Turkey's response to Panel question No. 36, para. 71 (quoting US Court of International Trade, Guangdong v. United States, (Exhibit TUR-165))).

[235] Turkey's response to Panel question No. 83, paras. 14 and 16-17; see also second written submission, fn 179.

factors does not detract from the existence of the alleged practice. To the extent that the USDOC considers additional evidence in assessing the degree of distortion present in the market, as reflected in several examples before us, the USDOC cannot be said to have rejected 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.

7.133. We recall that Turkey has referred to excerpts from three preliminary determinations involving Chinese products that pre-date the USDOC's CVD determinations challenged in this dispute: Certain Steel Wheels from China, Circular Welded Austenitic Stainless Pressure Pipe from China, and Circular Welded Carbon Quality Steel Line Pipe from China.[236] In each of these determinations, the USDOC determined that private prices in China are significantly distorted based on a finding of "overwhelming involvement" by the Chinese government in the market.[237] Turkey has also identified examples in response to questioning from the Panel in which the USDOC rejected 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, without considering other evidence.[238] We do not consider that three preliminary determinations involving Chinese products and certain examples identified in response to questioning are sufficient evidence to demonstrate a systematic practice, particularly in consideration of other evidence contradicting the existence of such a practice. In this respect, we recall the "high [evidentiary] threshold"[239] that applies in proving the existence of an unwritten rule or norm that is alleged to have general and prospective application.

7.134. Based on the foregoing, we thus find that Turkey has failed to establish that 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".[240] Accordingly, we find that Turkey has failed to demonstrate that the United States has acted inconsistently "as such" with Article 14(d) of the SCM Agreement.

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[236] Turkey's first written submission, fn 437. At the time of filing its first written submission, Turkey did not submit this evidence on the record as exhibits. Turkey subsequently provided the Panel with excerpts from the cited preliminary USDOC determinations. (Preliminary AD/CVD Determination on certain steel wheels from China, (Exhibit TUR-149); Preliminary AD/CVD Determination on circular welded austenitic stainless pressure pipe from China, (Exhibit TUR-138); and Preliminary CVD Determination on circular welded carbon quality steel line pipe from China, (Exhibit TUR-139)).

[237] Preliminary AD/CVD Determination on certain steel wheels from China, (Exhibit TUR-149), p. 55024 ("we derived the ratio of HRS produced by government entities (SOEs and collectives) during the POI (70.18 percent). Consequently, because of the government's overwhelming involvement in the HRS market, the use of private producer prices in the PRC would be akin to comparing the benchmark to itself (i.e., such a benchmark would reflect the distortions of the government presence)"); Preliminary AD/CVD Determination on circular welded austenitic stainless pressure pipe from China, (Exhibit TUR-138), p. 39664 ("we find that SOEs account for approximately 82 percent of the stainless steel coil production in the PRC during the POI (and approximately 71 percent of production if available data on import volume are included). Consequently, because of the government's overwhelming involvement in the PRC stainless steel coil market, the use of private producer prices in China would be akin to comparing the benchmark to itself. … Even if, arguendo, we were to rely on the [Government of China]'s 71 percent production figure, we would still find that government production accounts for a significant portion of the HRS industry, so that it is reasonable to conclude that private prices in China are significantly distorted and therefore unusable as benchmarks"); Preliminary CVD Determination on circular welded carbon quality steel line pipe from China, (Exhibit TUR-139), p. 52307 ("we find that SOEs and collectives account for approximately 60.77 percent of the HRS production in the PRC during the POI. Consequently, because of the government's overwhelming involvement in the HRS market, the use of private producer prices in the PRC would be akin to comparing the benchmark to itself (*i.e.*, such a benchmark would reflect the distortions of the government presence).")

[238] Turkey's response to Panel question No. 34, para. 69. For example, see Preliminary CVD Determination on OCTG from China, (Exhibit TUR-143), p. 47219; Preliminary AD/CVD Determination on certain steel wheels from China, (Exhibit TUR-149), p. 55024; Preliminary AD/CVD Determination on utility scale wind towers from China, (Exhibit TUR-152), p. 33434; and Preliminary AD/CVD Determination on drawn stainless steel sinks from China, (Exhibit TUR-154), p. 46725.

[239] Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.157; *US – Zeroing (EC)*, para. 198.

[240] Turkey's first written submission, para. 172.

7.3.4 Conclusions regarding Turkey's claims under Articles 1.1(b) and 14(d) of the SCM Agreement

7.135. For the reasons set out above, we reject the United States request for a ruling that Turkey's challenge to an alleged "practice" in relation to the benchmark determination and its "as such" claim with respect to this alleged practice are outside the Panel's terms of reference. We further exercise our discretion and decline to rule on the USDOC's initial OCTG final benefit determination in the context of addressing Turkey's "as applied" claims under Article 1.1(b) and Article 14(d) of the SCM Agreement. We found that the initial OCTG final benefit determination ceased to have legal effect under US law prior to the Panel's establishment following the publication of the amended OCTG Final Determination, and thus, we do not consider that findings would aid in providing a positive resolution to the dispute.

7.136. In addressing Turkey's "as such" claim Article 14(d), we find that Turkey has failed to establish that 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". On this basis, we reject Turkey's claim that the United States acted inconsistently "as such" with Article 14(d) of the SCM Agreement.

7.4 Turkey's claims under Articles 2.1(c) and 2.4 of the SCM Agreement in relation to the specificity determinations in the OCTG, WLP, HWRP, and CWP proceedings

7.4.1 Introduction

7.137. Turkey claims that the USDOC's *de facto* specificity determinations in the OCTG, WLP, and HWRP investigations and the CWP review are inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement. Turkey claims, first, that the USDOC acted inconsistently with Articles 2.1(c) and 2.4 by failing to sufficiently identify or substantiate the existence of a "subsidy programme" within the meaning of Article 2.1(c). Second, the USDOC acted inconsistently with Article 2.1(c) by failing to take into consideration the two mandatory factors in the last sentence of Article 2.1(c), i.e. the extent of diversification of economic activities, as well as the length of time during which the subsidy programme has been in operation.[241]

7.138. In each of the determinations at issue, the USDOC determined that the number of industries or enterprises using the so-called "Provision of HRS for LTAR" programme was limited and, thus, *de facto* specific under Article 2.1(c). The USDOC based its determination primarily on a questionnaire response from the GOT that 8 or 9 industries purchased HRS in Turkey during the POI. In the OCTG investigation, the USDOC stated that:

> Regarding the specificity of HRS for LTAR, the GOT provided a list of the industries that purchased HRS in Turkey during the POI. The GOT identified eight industries: Construction, Automotive, Machinery & Industrial, Electrical Equipment, Appliances, Agricultural, Oil & Gas, and Containers & Packaging. Consistent with past determinations, we find that the provision of HRS is specific pursuant to section 771(5A)(D)(iii)(I) of the Act because the number of industries or enterprises using the program is limited.[242]

7.139. The USDOC replicated its specificity determination for the WLP, HWRP, and CWP proceedings.[243]

7.140. We will first address the legal standard under Articles 2.1(c) and 2.4 of the SCM Agreement before addressing Turkey's claims.

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[241] Turkey's first written submission, paras. 215, 333, 446, and 547.

[242] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 22. (fn omitted)

[243] For the WLP investigation, see WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 15. For the HWRP investigation, see HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12. For the CWP review, see Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), pp. 9-10.

7.4.2 The Panel's evaluation of Turkey's Articles 2.1(c) and 2.4 claims

7.141. Article 2.1 of the SCM Agreement provides as follows:

Article 2
Specificity

> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") *within the jurisdiction of the granting authority*, the following principles shall apply:
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> …
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: *use of a subsidy programme by a limited number of certain enterprises*, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.[244]

7.142. Article 2.4 of the SCM Agreement provides:

> Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

7.143. Thus, a subsidy may be *de facto* specific notwithstanding the appearance of being *de jure* non-specific in certain cases. For instance, a finding of *de facto* specificity may arise when a subsidy is provided under a "subsidy programme" that is used "by a limited number of certain enterprises".

7.144. In order to establish *de facto* specificity on this basis, an investigating authority must first have established the existence of the relevant "subsidy programme". An investigating authority might do this when determining the existence of the relevant subsidy within the meaning of Article 1.1.[245] When this is not the case, the investigating authority must do so at the time of making its determination of specificity. In order to do so, an investigating authority needs to determine that subsidies have been provided to recipients pursuant to a plan or scheme of some kind.[246] Moreover, in determining whether a subsidy programme is used by a limited number of enterprises, the last sentence of Article 2.1(c) provides that an investigating authority shall take into account the extent of diversification of economic activities with the jurisdiction of the granting authority, as well as the length of time that the subsidy programme has operated. Thus, an investigating authority is obligated to take these two factors into consideration in its *de facto* specificity determination, regardless of whether an interested party raises this issue during the investigation.[247] Finally, an investigating authority's specificity determination is subject to the obligation under Article 2.4 that it be clearly substantiated on the basis of positive evidence.

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[244] Emphasis added; fn omitted.

[245] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144. In the present case, for example, the USDOC might have established that HRS was provided pursuant to the Provision of HRS for LTAR Programme when establishing the existence of a financial contribution. Indeed, evidence regarding the provision of HRS by the alleged public bodies under such programme may have indicated that such entities were pursuing a government policy under the meaningful control of the GOT, and may have been providing HRS in a systematic manner.

[246] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

[247] See, e.g. Panel Report, *US – Countervailing Measures (China)*, paras. 7.252 and 7.255.

7.4.2.1 Whether the United States established the existence of a "subsidy programme" for purposes of Article 2.1(c) of the SCM Agreement

7.145. We recall our findings at paragraphs 7.51 and 7.62 above that the USDOC's public body determinations regarding Erdemir and Isdemir in the challenged proceedings are inconsistent with Article 1.1(a)(1) of the SCM Agreement because the USDOC failed to establish that Erdemir and Isdemir possess, exercise, or are vested with governmental authority to perform a government function. Since the SCM Agreement is concerned only with subsidies provided by a government (in either the narrow or broad sense, either directly or through entrustment and direction of a private body), the term "subsidy programme" under Article 2.1 (c) necessarily refers to a governmental subsidy programme. Accordingly, a lack of governmental function of an entity for the purpose of public body analysis likely suggests a lack of a subsidy programme for the purpose of Article 2.1 (c). Nevertheless, we consider it useful to address the parties' arguments raised directly in relation to the issue of whether the USDOC established a "programme", to provide a more complete analysis to resolve the present dispute.

7.146. The parties agree that Article 2.1(c) requires the identification of a "subsidy programme". In this regard, both parties[248] referred to the Appellate Body's statement in *US – Countervailing Measures (China)* regarding the notion of "subsidy programme" in Article 2.1(c):

> The ordinary meaning of the word "programme" refers to "a plan or scheme of any intended proceedings (whether in writing or not); an outline or abstract of something to be done". The reference to "use of a subsidy programme" suggests that it is relevant to consider whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind. Evidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, for instance, in the form of a law, regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy. A subsidy scheme or plan may also be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises. This is so particularly in the context of Article 2.1(c), where the inquiry focuses on whether there are reasons to believe that a subsidy is, in fact, specific, even though there is no explicit limitation of access to the subsidy set out in, for example, a law, regulation, or other official document.
>
> …
>
> The mere fact that financial contributions have been provided to certain enterprises is not sufficient, however, to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement. In order to establish that the provision of financial contributions constitutes a plan or scheme under Article 2.1(c), 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.[249]

7.147. We agree with the above statement and are guided by these findings in addressing Turkey's claim. The issue before us is essentially a factual one: whether the USDOC identified and evidenced a "subsidy programme" in the form of the Provision of HRS for LTAR in each challenged proceeding.

7.148. Turkey contends that the USDOC simply based its *de facto* specificity determinations on the mere fact that the purchasers of HRS in Turkey are limited in number. In Turkey's view, the record contains neither evidence of a "plan" or "scheme", nor evidence demonstrating "a systematic series of actions" concerning the Provision of HRS for LTAR.[250]

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[248] See, e.g. United States' first written submission, para. 224; Turkey's first written submission, paras. 59-60; and Turkey's second written submission, para. 91.

[249] Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.141 and 4.143. (emphasis original; fn omitted)

[250] Turkey's first written submission, paras. 215-217, 334-335, 447-448, and 548-549; second written submission, paras. 91 and 106.

7.149. The United States argues that in each of the challenged proceedings the USDOC identified the subsidy programme at issue, i.e. the Provision of HRS for LTAR, in the form of "plan or scheme" through a systematic series of actions. The United States contends that the existence of the Provision of HRS for LTAR as a "subsidy programme" was first alleged by the petitioners in their petition, and was confirmed in the challenged proceedings through, *inter alia*, an examination of the GOT's 2012-2014 Medium Term Programme, Erdemir's Annual Reports, and a complete transaction-specific accounting of the provision of HRS, *in conjunction*.[251]

7.150. In response, Turkey argues that the United States took the statements in Erdemir's 2012 and 2013 Annual Reports out of context. Turkey also argues that the USDOC did not evaluate or explain its relevance of the list of HRS transactions in its *de facto* specificity determinations.[252] Turkey contends that a list of HRS transactions, some of which are above and some of which are below a benchmark price, cannot support the existence of a plan or scheme in the form of a systematic series of actions, let alone a plan or scheme for the Provision of HRS for LTAR. According to Turkey, the frequency or number of transactions that provide a subsidy may be relevant evidence of an underlying plan or scheme, but such evidence is not, in and of itself, sufficient evidence.[253]

7.151. We first observe that the USDOC determinations in the challenged proceedings do not include any explicit discussion or statement concerning the existence of a "subsidy programme" in the form of the Provision of HRS for LTAR. For example, in its *de facto* specificity determination section of the OCTG investigation, the USDOC stated that:

> Regarding the specificity of HRS for LTAR, the GOT provided a list of the industries that purchased HRS in Turkey during the POI. The GOT identified eight industries: Construction, Automotive, Machinery & Industrial, Electrical Equipment, Appliances, Agricultural, Oil & Gas, and Containers & Packaging. Consistent with past determinations, we find that the provision of HRS is specific pursuant to section 771(5A)(D)(iii)(I) of the Act because the number of industries or enterprises using the program is limited.[254]

7.152. Elsewhere in the determinations, the USDOC referred to all investigated subsidies in the challenged proceedings generally as "program" or "programs". For instance, the USDOC's determination in the WLP investigation contains the following:

> Further, we are applying the above-zero rates calculated for Toscelik in this investigation for the following identical *programs*: Provision of HRS for LTAR …[.][255]

7.153. Thus, the USDOC simply used the word "program" without any explanation of the reason why this term could properly be used to refer to the subsidy or subsidies in question. In our view, such a generic reference to all investigated subsidies as "programmes" alone is not sufficient to properly identify and substantiate a "subsidy programme" to determine *de facto* specificity under Article 2.1(c). We recall and agree with the panel's statement in *US – Countervailing Measures (China)* that "the use of the term 'subsidy programme', as opposed to 'subsidy', is not lacking in significance".[256] For its *de facto* specificity determination under Article 2.1(c), an objective and unbiased investigating authority is expected to provide a reasoned explanation whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind, before assessing whether access to that programme is specifically restricted.

7.154. In the present proceedings, the United States refers to the GOT's Medium Term Programme, Erdemir's policies of supporting export-oriented production, and a complete transaction-specific

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[251] United States' first written submission, paras. 225-230. See also responses to Panel question No. 42, paras. 130-133, and No. 88(a), para. 75; second written submission, para. 168; opening statement at the second meeting of the Panel, paras. 29 and 31; and comments on Turkey's responses to Panel question No. 88, para. 24, and No. 91, para. 29.

[252] Turkey's response to Panel question No. 91, para. 38

[253] Turkey's second written submission, para. 106 (referring to Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143).

[254] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 22 (fn omitted). We note that in the WLP and HWRP proceedings the USDOC found that nine industries in Turkey purchased HRS during the POI.

[255] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 5. (emphasis added)

[256] Panel Report, *US – Countervailing Measures (China)*, para. 7.238.

accounting of the provision of HRS as evidence of the existence of the "subsidy programme". The United States claims that, on the basis of all evidence in conjunction, the USDOC concluded that a subsidy programme in the form of the Provision of HRS for LTAR existed.[257] We have no doubt that government policies and the list of HRS transactions may serve as potential evidence demonstrating the existence of a plan or scheme in the form of a systematic series of actions. However, we must determine whether the USDOC *actually* considered the alleged evidence, and if so whether such evidence sufficiently supports the conclusion that there is a "subsidy programme" for the Provision of HRS for LTAR under Article 2.1(c). The parties do not dispute that the set of evidence referred to by the United States was in the record of the challenged proceedings. Nevertheless, the existence of the policy documents and the transaction data in the record does not necessarily mean that the USDOC actually considered them in determining the existence of a "subsidy programme" in the form of the Provision of HRS for LTAR. The burden is on the United States to demonstrate that the USDOC actually considered these policy statements and transaction data in determining the existence of a "subsidy programme". We shall now consider whether or not the United States has discharged that burden.

7.4.2.1.1 2012-2014 Medium Term Programme

7.155. In the OCTG, WLP, and CWP proceedings, the USDOC did indeed refer to the GOT's "stated policy in its 2012-2014 Medium Term Programme to improve Turkey's balance of payments".[258] The Medium Term Programme refers to the GOT's objectives such as "increasing employment, maintaining fiscal discipline, increasing domestic saving, [and] reducing the current account deficit, [in] this way strengthening macroeconomic stability in stable growth process".[259] The USDOC referred to the Medium Term Programme for the purpose of determining that Erdemir and Isdemir are public bodies. The USDOC did not refer to the Medium Term Programme as a basis for establishing the existence of any alleged Provision of HRS for LTAR Programme in the context of its *de facto* specificity determination. There may be many different ways of achieving the broad objectives of the Medium Term Programme of improving the balance of payments, increasing employment and strengthening macroeconomic stability in Turkey. The provision of subsidised HRS may well be one of them. However, this need not necessarily be the case. In the absence of any additional evidence suggesting that the Medium Term Programme somehow envisages the provision of subsidised HRS, or a reasoned explanation by the USDOC to this effect, any connection between these broad governmental policies in the Medium Term Programme and the alleged Provision of HRS for LTAR Programme is too remote to support the existence of the latter subsidy programme.

7.4.2.1.2 Erdemir's Annual Reports

7.156. Regarding Erdemir's alleged support to export-oriented production, we recall that, in the public body determination sections of the OCTG investigation, the USDOC refers to the statement in Erdemir's 2012 Annual Report that "the [Erdemir] Group also implemented policies which promoted the customers to engage in export-oriented production".[260] In the WLP, CWP and HWRP proceedings, the USDOC refers to the statements in Erdemir's 2013 Annual Report that Erdemir "made a major contribution to the 4.6% increase in Turkey's manufacturing exports in 2013"[261] and "continues to create value added for Turkish industry through initiatives to increase the use of domestic sources of raw materials".[262] According to the USDOC, these policies are "in line" with the GOT's policies in

[257] United States' first written submission, paras. 225-230; response to Panel question No. 42, paras. 130-133; and second written submission, para. 168.

[258] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9. The USDOC did not refer to the Medium Term Programme in context of the HWRP proceeding.

[259] Medium Term Programme, (Exhibit USA-6), p. 12. See also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21 and fn 160; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9.

[260] Erdemir 2012 Annual Report, (Exhibit USA-5), p. 29.

[261] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; and HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12. See also Erdemir 2013 Annual Report, (Exhibit USA-7), p. 34.

[262] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; and HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12. See also Erdemir 2013 Annual Report, (Exhibit USA-7), p. 34. The United States also refers to other statements in Erdemir 2013 Annual Report, such as the statements that Erdemir is "Turkey's iron and steel power", and that Erdemir "made 35% of its flat steel sales to the steel pipe

the 2012-2014 Medium Term Programme.[263] The United States submits that together with the Medium Term Programme and the list of HRS transactions, the alleged policies of Erdemir to support export-oriented production demonstrate that there is a plan or scheme in the form of the systematic provision of HRS for LTAR.[264] Turkey argues that these policy statements were taken out of context[265], and do not demonstrate the existence of a "subsidy programme" because the USDOC did not discuss any of them in any of its determinations in any context.[266]

7.157. As discussed at paragraph 7.44 above, we do not consider that the statements, when considered in their context, demonstrate that Erdemir pursued a governmental policy to support export-oriented production, let alone that there is a plan or scheme in the form of the Provision of HRS for LTAR in order to support export-oriented production in Turkey. In any event, considering that there could be many ways for a government or public body to support export-oriented production, an objective and unbiased investigating authority is expected to provide a reasoned explanation in its determinations of how Erdemir's alleged policies indicate the existence of the Provision of HRS for LTAR. In our view, the USDOC has failed to provide such a reasoned explanation in the present case. Without any additional evidence or a reasoned explanation by the USDOC, we consider that any connection between Erdemir's alleged policies and any alleged Provision of HRS for LTAR is too remote to support the existence of the latter subsidy programme.

7.4.2.1.3 List of HRS transactions

7.158. The list of HRS transactions may serve as potential evidence demonstrating that there is a *systematic* series of actions in the form of the Provision of HRS for LTAR by a public body. However, such a list alone is not sufficient evidence, particularly where the prices of the transactions vary with some prices higher than the benchmark prices and some lower than the benchmark prices.[267] As the Appellate Body stated in *US – Countervailing Measures (China)*, "the mere fact that financial contributions have been provided to certain enterprises is not sufficient, however, to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement".[268]

7.159. In our view, the number or frequency of the subsidies provided under an alleged subsidy programme must be analysed before the *systematic* nature of the subsidy provision can be determined.[269] We are not suggesting that a "subsidy programme" in the form of provision of inputs for LTAR must consist exclusively of transactions with prices lower than the benchmark prices. However, if the transactions providing a subsidy are disparate and infrequent in light of the total number of transactions, it may not be discernible that subsidies were provided pursuant to "a plan or scheme of some kind". We consider that an investigating authority must therefore provide a reasoned explanation as to how each of the pieces of evidence individually or jointly indicates the existence of the alleged subsidy programme. Where such a subsidy programme is evidenced by a systematic series of transactions, there must be a reasoned explanation as to whether and how the transactions providing a subsidy are "*systematic*" in the particular circumstances of a given case. In

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manufacturing sector, one of the largest exporting sectors in Turkey". However, the USDOC did not refer to these statements in its determinations.

[263] United States' first written submission, paras. 227-229; United States' second written submission, para. 168; and response to Panel question No. 42, para. 131 (referring to OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21 and fn 160; WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14; and Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9). The USDOC did not refer to the Medium Term Programme in context of the HWRP proceeding.

[264] United States' response to Panel question No. 42, paras. 130-133; second written submission, para. 168.

[265] Turkey' second written submission, paras. 95-99.

[266] Turkey' second written submission, paras. 93 and 104; statement at the first meeting of the Panel, paras. 79-80.

[267] See OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 26, where the USDOC stated that "*[f]or instances in which Borusan or Toscelik paid a lower unit price to Erdemir and Isdemir than the benchmark unit price*, we multiplied the difference by the quantity of HRS that the company purchased to calculate the benefit" (emphasis added). We understand from this statement that not all transactions of HRS purchases from Erdemir and Isdemir were made at prices lower than the benchmark price.

[268] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.

[269] In this regard, we agree with the European Union's third-party submission that the more transactions are above the benchmark, the less systematic the transactions below the benchmark become and the less probative their evidentiary value becomes for demonstrating a "subsidy programme". (European Union's third-party response to Panel question No. 5, para. 19).

the present case, the record does not indicate that the USDOC actually analysed the list of HRS transactions to determine whether the transactions providing subsidies in the form of the provision of HRS for LTAR are *systematic* by considering, e.g. the volume and frequency of transactions providing subsidies as compared with transactions for which the prices are above the benchmark.

7.4.2.1.4 Consideration of the evidence in its totality

7.160. We note that the United States argues that the USDOC considered the above-mentioned policy statements and the list of HRS transactions "in conjunction".[270] Having considered that each of the three pieces of evidence was not sufficient to support the USDOC's alleged conclusion concerning the existence of a subsidy programme in the form of the Provision of HRS for LTAR, we are not persuaded that the abovementioned evidence, when considered together, supports the USDOC's alleged conclusion that a subsidy programme existed in the form of systematic provision of HRS for LTAR by Erdemir and Isdemir.

7.161. Accordingly, given that the USDOC failed to make proper "public body" determinations in the challenged proceedings, we find that the USDOC could not have properly determined that Erdemir and Isdemir provided subsidies, much less that they did so pursuant to a "subsidy programme" within the meaning of Article 2.1(c). In any event, we find that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to properly identify and substantiate the existence of a subsidy programme in the form of the Provision of HRS for LTAR.

7.162. We recall that Turkey also brings a claim under Article 2.4 of the SCM Agreement concerning the USDOC's failure to substantiate the alleged "subsidy programme" of the Provision of HRS for LTAR.[271] We have found above that the USDOC failed to properly identify and substantiate the existence of a subsidy programme within the meaning of Article 2.1(c). Accordingly, the USDOC's *de facto* specificity determination was not clearly substantiated on the basis of positive evidence in accordance with Article 2.4. For this reason, we also find that the USDOC acted inconsistently with Article 2.4 of the SCM Agreement for failing to clearly substantiate its *de facto* specificity determination.

7.4.2.2 Whether the United States considered the two factors in the last sentence of Article 2.1(c) of the SCM Agreement

7.163. In determining whether a subsidy programme is used by a limited number of enterprises, the last sentence of Article 2.1(c) of the SCM Agreement provides that an investigating authority shall take into account the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time that the subsidy programme has operated. Article 2.1(c) however does not provide any specific guidance as to how an investigating authority should take into account these two factors. The panel in *US – Countervailing Measures (China)* addressed this issue in the following terms:

> With regard to the ordinary meaning of the final sentence of Article 2.1(c), we are of the view that the use of the term "shall" clearly connotes an obligation. Indeed, the term is defined as "has a duty to; more broadly, is required to". The decision by the drafters of the SCM Agreement to use the term "shall" instead of terms such as "should" or "may" is significant.
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> With regard to the context of Article 2.1(c) more broadly, as we have seen above, subparagraph (c) concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise. In this context, we consider the last sentence of Article 2.1(c) to function as a safeguard that keeps in check this flexibility. Indeed, where economic activities within the jurisdiction of the granting authority are less diversified, the use of a subsidy programme by a limited number of certain enterprises may nonetheless lead to a finding of non-specificity. Use by a limited

[270] United States' opening statement at the second meeting of the Panel, para. 31; response to Panel question No. 42, para. 130.

[271] Turkey's first written submission, para. 547.

> number of certain enterprises may similarly lead to a finding of non-specificity where the subsidy programme has been in operation for a limited period of time only.[272]

7.164. Moreover, that panel considered that an investigating authority's consideration of the factors in the final sentence of Article 2.1(c) need not be done explicitly. That is to say, an investigating authority need not in all circumstances include an *explicit* statement in its determination that these factors had been taken into account. However, there must be evidence that these two factors were taken into account, either explicitly or implicitly.[273] The panel in *US – Washing Machines* followed a similar approach.[274]

7.165. We agree with these panels. Thus, the two factors, i.e. the extent of economic diversification and the length of time during which the subsidy programme has operated, are mandatory, and must therefore be taken into account whenever an investigating authority makes a *de facto* specificity determination. This does not depend upon whether an interested party in the proceeding raised the relevance of the two factors. Having said that, an investigating authority does not need to consider these two factors explicitly.

7.166. In the present case, the United States does not dispute that the USDOC did not discuss these two factors, or make any explicit statement regarding these factors in its determination. The United States asserts that the USDOC took these factors into account implicitly. The question before us is whether the record evidence supports this assertion. We make this inquiry with respect to each of these two factors in turn.

7.4.2.2.1 Economic diversification

7.167. The United States argues that the USDOC concluded, *implicitly*, that the extent of economic diversification factor had no bearing on its specificity analysis. According to the United States, the USDOC's implicit consideration of this factor is reflected in the USDOC's consideration and discussion of the factual record such as the Medium Term Programme and Erdemir's 2012 and 2013 Annual Reports.[275] The United States also submits that it is a publicly known fact that Turkey has a highly diversified economy.[276]

7.168. In our view, the United States' reference to the Medium Term Programme in its public body determinations in each of the proceedings does not demonstrate that the USDOC actively and meaningfully considered the economic diversification of Turkey. According to the United States, the Medium Term Programme discusses the Turkish economy in relation to other world economies. The United States underlines the following statements in the Medium Term Programme:

> Turkey was among the countries that had highest growth rates around the world.[277]

> Turkey has been one of the most successful countries among the OECD in struggling with the unemployment thanks to rapid growth and measures taken timely during the crisis exit process.[278]

7.169. Although these statements concern Turkey's economy, they address only certain aspects of the Turkish economy, i.e. its growth and unemployment rates. These statements are not connected with the economic diversification of the Turkish economy. We note that the last sentence of Article 2.1(c) does not simply require consideration of factors related to the economy of the granting authority, but specifies that an investigating authority consider the extent of the economic

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[272] Panel Report, *US – Countervailing Measures (China)*, paras. 7.251-7.252. (fns omitted)
[273] Panel Report, *US – Countervailing Measures (China)*, paras. 7.250-7.256. (fns omitted)
[274] Panel Report, *US – Washing Machines*, para. 7.252.
[275] United States' second written submission, para. 175.
[276] United States' response to Panel question No. 41, para. 127.
[277] Medium Term Programme (Exhibit USA-6), p. 9; see also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14.
[278] Medium Term Programme, (Exhibit USA-6), p. 10; see also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14.

diversification. Therefore, even if we accept the United States' argument that the USDOC indeed *implicitly* considered these statements when making its *de facto* specificity determination, the United States has not demonstrated that the USDOC specifically took into account the economic diversification factor.

7.170. Likewise, Erdemir's 2012 and 2013 Annual Reports do not demonstrate that USDOC actively and meaningfully considered the economic diversification of Turkey. The United States referred to statements in Erdemir's 2012 and 2013 Annual Reports that Turkey is among the eight largest steel producers in the world, with a production capacity of 35.9 million tonnes in 2012 and 34.7 million tonnes in 2013.[279] The United States also points to the statements in Erdemir's 2013 Annual Report that the Turkish economy expanded more than 3% in 2013 despite the global crisis[280], and that Turkeys' manufacturing exports grew by 4.6% in 2013.[281] None of these references are linked to the diversification of the Turkish economy.

7.171. Finally, regarding whether the USDOC implicitly took into account the publicly known fact that the Turkish economy is highly diversified, we do not necessarily disagree that an investigating authority may take into account publicly known facts in its determinations. However, leaving aside whether the high level of diversification of the Turkish economy is a publicly known fact or not, the United States has not identified anything in the investigation record to indicate that the USDOC implicitly took into account the diversification of the Turkish economy. We recall and agree with the panel in *US – Washing Machines* that there must be *some means* of determining from the determination that the investigating authority did consider the factors in the last sentence of Article 2.1(c) in an "active and meaningful" way.[282]

7.172. In sum, we conclude that the identified statements contained in the evidence on the record do not indicate that the USDOC considered the economic diversification of Turkey in its determination of *de facto* specificity. Accordingly, we find that the USDOC acted inconsistently with the final sentence of Article 2.1(c) of the SCM Agreement by failing to take into account the extent of diversification of economic activities within Turkey.

7.4.2.2.2 Length of time that the "subsidy programme" has been in operation

7.173. Regarding the length of time that the subsidy programme has been in operation, the United States argues that in evaluating the Provision of HRS for LTAR, the USDOC examined Erdemir's 2012 and 2013 Annual Reports, which identify Erdemir as "Turkey's iron and steel power"[283], as well as evidence that Erdemir has existed since 1960 and Isdemir has existed since 1970.[284] The United States also contends that the GOT provided the USDOC with information regarding the production and provision of HRS not only for the period of investigation (POI), but also the preceding two years, which demonstrated that the programme usage data for the POI was not anomalous in comparison to data for past years.[285] According to the United States, the length of

[279] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 12; Erdemir 2012 Annual Report, (Exhibit USA-5), p. 16; see also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14.

[280] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 10; see also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46) p. 12; and WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14.

[281] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 10; see also OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 21; Excerpt from CWP CVD Final Determination Memorandum, (Exhibit TUR-22), p. 9; HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 12; and WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 14.

[282] Panel Report, *US – Washing Machines*, para. 7.253.

[283] Erdemir 2013 Annual Report, (Exhibit USA-7), p. 2.

[284] Erdemir 2013 Annual Report, (Exhibit USA-7), second cover page; Erdemir 2012 Annual Report, (Exhibit USA-5), p. 6.

[285] Excerpt from GOT's OCTG questionnaire response, (Exhibit TUR-60), pp. 4-6; Excerpt from GOT's WLP initial questionnaire response, (Exhibit USA-43), pp. 14-16; Excerpt from GOT's HWRP initial questionnaire response, (Exhibit USA-44), pp. 12-15; and Excerpt from GOT's CWP initial questionnaire response, (Exhibit USA-45), pp. 7-10.

time in which the subsidy programme had existed did not warrant explicit discussion in the USDOC's determination.[286]

7.174. Turkey argues that the USDOC's *de facto* specificity determination is not based on the evidence that the United States refers to in the present proceedings. Turkey contends that the duration of the existence of Erdemir and Isdemir does not establish of the duration of the subsidy programme.[287] Turkey also points out that, for the two preceding years before the POI, the data on the record are insufficient to allow the USDOC to meaningfully take into account the length of time in which the alleged subsidy programme has operated.[288]

7.175. We must decide whether the USDOC took into account the length of the subsidy programme's operation by virtue of the fact that there is evidence on the record that Erdemir and Isdemir have been in operation since 1960 and 1970, respectively, and the fact that the USDOC requested and obtained data from the GOT concerning the two years preceding the POI.

7.176. The kinds of evidence that the United States identified could be potentially relevant for an investigating authority to consider in its evaluation of the length of time in which the subsidy programme has been in operation. For instance, for a subsidy programme in the form of the provision of inputs for LTAR, an investigating authority may consider the duration of the subsidy programme by examining transactional data preceding the POI with regard to the provision of that relevant input.[289] The compliance panel in *US – Countervailing Measures (Article 21.5 – China)* did not understand this mandatory factor to require an investigating authority to establish in each case the total duration of the subsidy programme that has been in operation. That panel stated that:

> [W]e do not consider that Article 2.1(c) imposes in all cases a requirement to establish the total duration of the programme. Rather, to comply with the requirement of the last sentence of Article 2.1(c), it would be sufficient to show that the programme has been in operation for a duration that does not itself account for "use of a subsidy programme by a limited number of certain enterprises".[290]

7.177. We agree with this statement. In our view, an investigating authority does not need to establish the total duration of the subsidy programme, so long as it can be demonstrated that the limited number of users of the programme is not entirely explained by the short durations of the programme. In the present case, the parties do not dispute that the data for the two preceding years are incomplete, so far as the provision of HRS for LTAR by Erdemir and Isdemir is concerned. In particular, in the OCTG investigation, because the requested HRS consumption and production data was not available, the GOT provided Turkish production and consumption figures for all flat steel products, which includes hot rolled coils, cold rolled coils, stainless coils, and other products.[291] In subsequent proceedings, the GOT provided data for all Turkish HRS imports, exports, production, and consumption.[292] The GOT did not provide any company-specific data for Erdermir and Isdemir. Moreover, the GOT did not provide any HRS pricing information during the relevant period.[293]

7.178. Given that pricing information for the relevant period is missing from the record, and Erdemir and Isdemir were not the only HRS producers in Turkey during the relevant period, we do not see how assessing the data provided by the GOT would allow the USDOC to meaningfully consider the length of the time that the subsidy programme has been in operation.

7.179. We also do not consider that statements that Erdemir and Isdemir existed since 1960 and 1970, necessarily inform the length of time that the so-called Provision of HRS for LTAR Programme

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[286] United States' second written submission, para. 174.
[287] Turkey's second written submission, para. 114.
[288] Turkey's second written submission, paras. 114-117.
[289] Panel Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 7.270.
[290] Panel Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 7.273.
[291] Turkey's second written submission, para. 115 (referring to Excerpt from GOT's OCTG questionnaire response, (Exhibit TUR-60), pp. 4-5).
[292] Turkey's second written submission, paras. 115-117 (referring to Excerpt from GOT's WLP initial questionnaire response, (Exhibit USA-43), p. 14; Excerpt from GOT's HWRP initial questionnaire response, (Exhibit USA-44), p. 13; and Excerpt from GOT's CWP initial questionnaire response, (Exhibit USA-45), p. 8).
[293] Turkey's second written submission, paras. 115-117 (referring to Excerpt from GOT's WLP initial questionnaire response, (Exhibit USA-43), p. 14; Excerpt from GOT's HWRP initial questionnaire response, (Exhibit USA-44), p. 13; and Excerpt from GOT's CWP initial questionnaire response, (Exhibit USA-45), p. 8).

has been in operation. The fact that these two companies have existed since the 1960s and 1970s does not necessarily mean that these two companies have been providing HRS for LTAR as public bodies since then. In our view, the evidence cited by the United States is not sufficient on its own to demonstrate that the USDOC actively and meaningfully considered the length of operation of the alleged "subsidy programme".

7.180. Finally, we do not see any basis in Article 2.1(c) or elsewhere in the SCM Agreement for the United States' argument that a complainant must also show how the investigating authority's failure to consider the two factors in the final sentence of Article 2.1(c) affected the specificity determination.[294]

7.181. In sum, we find that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to properly evaluate the length of time in which the so-called Provision of HRS for LTAR Programme has been in operation.

7.4.3 Conclusions regarding Turkey's Article 2.1(c) and 2.4 claims

7.182. For the reasons stated above, we find that the USDOC acted inconsistently with Articles 2.1(c) and 2.4 of the SCM Agreement by failing to identify and clearly substantiate the existence of a Provision of HRS for LTAR Programme based on positive evidence. We also find that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take into account the extent of diversification of economic activities within Turkey, and by failing to properly evaluate the length of time in which the so-called Provision of HRS for LTAR Programme has been in operation.

7.5 Turkey's claims under Article 12.7 of the SCM Agreement in relation to the use of facts available in the OCTG, WLP, and HWRP proceedings

7.5.1 Introduction

7.183. Turkey claims that the USDOC's use of facts available in the OCTG, WLP, and HWRP investigations is inconsistent with Article 12.7 of the SCM Agreement.

7.184. In its first written submission, the United States requested the Panel to make a preliminary ruling excluding from its terms of reference claims under Article 12.7 of the SCM Agreement relating to the WLP investigation, concerning subsidy programmes other than the Provision of HRS for LTAR. In its panel request, the United States argues that Turkey expressly limited its Article 12.7 claim in the WLP investigation to a single programme, the Provision of HRS for LTAR, and thus any Article 12.7 claims in respect of any other investigated programmes in the WLP proceeding fall outside the Panel's terms of reference.

7.185. We address Turkey's claims concerning the OCTG, WLP, and HWRP proceedings in turn.

7.5.2 The use of facts available in the OCTG investigation

7.5.2.1 Factual background

7.186. In the OCTG investigation, the USDOC requested that Borusan report in its questionnaire response *all* of its HRS purchases during the POI, including purchases which were not used to produce OCTG.[295] Following a request by Borusan, the USDOC extended the deadline for response to the original questionnaire.[296]

7.187. In response to the original questionnaire, Borusan stated that it had production facilities at three locations during the POI: Gemlik, Halkali, and Izmit. Borusan only reported HRS purchases for the Gemlik facility. Borusan explained that it only produces OCTG at Gemlik, and did not transfer any HRS purchased at the other two facilities to Gemlik. Borusan also explained that the process of

[294] C.f. United States' first written submission, para. 231 (where the United States argues that Turkey does not explain how the USDOC's alleged lack of consideration of these factors affected the overall specificity determination and thereby resulted in a breach of Article 2.1(c)).

[295] Turkey's first written submission, para. 198.

[296] USDOC's letter on extension request, (Exhibit USA-12) (granting Borusan an extension of 12 days to respond to the questionnaire).

gathering HRS purchase data on a coil-by-coil basis is extremely time-consuming and burdensome, and failed to see the purpose of gathering information for the facilities that do not produce OCTG. The USDOC subsequently issued a supplemental questionnaire requesting that Borusan either report all its HRS purchases, including for the other two facilities, or otherwise justify why it could not report the purchases.[297] In its response to the supplemental questionnaire, Borusan stated that Gemlik HRS purchase data was collected from two different data systems, and transportation costs had to be separated out manually. For these reasons, Borusan requested the USDOC's permission to report HRS purchases only for Gemlik.[298] Borusan further indicated to the USDOC that it would be willing to cooperate if a full reporting was insisted upon for all facilities, but stressed that Borusan would require several weeks to provide such complete information.[299]

7.188. The USDOC determined that Borusan failed to follow the questionnaire instructions and failed to properly request an extension when asked for the second time to provide all HRS purchases data, thus failing to act to the best of its ability. As a result, the USDOC applied an adverse inference. Specifically, for both the Halkali and Izmit facilities, the USDOC found that Borusan purchased HRS at the lowest price on the record for the Gemlik facility's purchases. The USDOC also adversely inferred that the Halkali and Izmit facilities purchased quantities of HRS during the POI equal to their annual production capacity[300], and that these facilities purchased HRS from Erdemir and Isdemir in the same ratio as the Gemlik facility purchased from Erdemir and Isdemir (expressed as a share of Gemlik's total purchases from all suppliers).

7.5.2.2 The Panel's evaluation of Turkey's claim regarding the use of facts available in the OCTG investigation

7.189. Article 12.7 of the SCM Agreement provides that:

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

7.190. Article 12.7 of the SCM Agreement thus allows an investigating authority to make determinations using facts available in cases when a Member or interested party refuses access to necessary information within a reasonable time period, otherwise fails to provide such information within a reasonable period, or significantly impedes the investigation. This provision is intended to ensure that an interested party's failure to provide necessary information does not impede the investigation. Article 12.7 permits the use of facts that are otherwise available on the record solely for the purpose of replacing necessary information that may be missing, to allow the investigating authority to make an accurate subsidization determination. Recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses. Rather, an investigating authority must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party. An investigating authority may draw inferences when selecting from among the facts otherwise available, but should not use Article 12.7 to punish non-cooperating parties by intentionally drawing an adverse inference. The use of inferences to select adverse facts to punish non-cooperating parties would result in an inaccurate subsidization determination.

7.191. Paragraph 7 of Annex II of the Anti-Dumping Agreement, which is relevant to the interpretation and application of Article 12.7, provides that "if an interested party does not cooperate and thus relevant information is being withheld from the investigating authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate".[301]

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[297] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), pp. 9-13.
[298] Turkey's first written submission, para. 203.
[299] Turkey's first written submission, para. 204.
[300] Initially, the USDOC used the quantities of HRS which Gemlik facility purchased as the quantities for the two non-responding facilities. Following the submission from the respondents, USDOC reduced its initial calculation of these HRS quantities in order to arrive at a more accurate determination of the relevant subsidy rates. (United States' first written submission, paras. 156-157).
[301] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426.

7.192. Turkey argues that the USDOC's reliance on facts available and its decision to draw an adverse inference is inconsistent with Article 12.7 of the SCM Agreement: first, because the USDOC failed to take "due account" of the difficulties Borusan experienced in gathering the requested information; and second, because the USDOC's application of facts available is punitive.[302] We address these two aspects of Turkey's claim in turn.

7.5.2.2.1 Failure to take into account the difficulties

7.193. Turkey argues Borusan experienced considerable difficulties in collecting the requested information. According to Turkey, once Borusan informed the USDOC of its difficulties in obtaining the requested information, the USDOC should have taken "due account" of those difficulties in having recourse to Article 12.7.[303] In particular, Turkey argues that the USDOC should have considered "whether it would have been reasonable to use the data which Borusan provided on its hot rolled steel purchases for the Gemlik facility to approximate the missing information or to ask Borusan to provide the missing information in a different form".[304] In this regard, Turkey relies on the Appellate Body's statement in *US – Carbon Steel (India)* that:

> In our view, the context provided by these provisions suggests that the manner or procedural circumstances in which information is missing can be relevant to an investigating authority's use of "facts available" under Article 12.7. In particular, Article 12.11 requires an investigating authority to take "due account of any difficulties experienced by interested parties", which includes interested parties that have not provided the "necessary information" referred to in Article 12.7. The kinds of "difficulties", or lack thereof, experienced by interested parties to be taken into account by an investigating authority in having recourse to Article 12.7 could relate, *inter alia*, to the nature and availability of the evidence being sought … the time period provided in which to respond, and the extent or number of opportunities to respond[.][305]

7.194. According to Turkey, the Appellate Body's statement above means that the USDOC was obligated to take "due account" of the difficulties Borusan experienced in responding to the USDOC's requests for information both when determining that necessary information was not provided (such that recourse to Article 12.7 is justified), and when selecting facts available under Article 12.7.[306] Turkey's claim only concerns the latter situation, regarding the USDOC's *selection* of facts available.[307]

7.195. The United States argues that Turkey is trying to collapse the obligation to take due account of the difficulties under Article 12.11 into the obligation under Article 12.7.[308] The United States contends that, in any event, the USDOC took due account of Borusan's difficulties, including by granting an extension, and by issuing a supplemental questionnaire to allow Borusan significant additional time to gather the requested data.[309] The United States contends that Borusan had two opportunities to provide the information, 65 days to prepare for the initial questionnaire response, and an opportunity to request a further extension for the supplemental questionnaire response.[310] According to the United States, the USDOC appropriately relied on facts available to "fill in gaps" due to the continued failure of Borusan to provide data regarding its HRS purchases for the Halkali and Izmit facilities.[311]

7.196. In our view, Turkey's complaint about the difficulties fits more appropriately into the obligation under Article 12.11 to take "due account of any difficulties experienced by interested

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[302] Turkey's first written submission, para. 196; second written submission, para. 121.
[303] Turkey's response to Panel question No. 45, para. 86.
[304] Turkey's response to Panel question No. 45, para. 91.
[305] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.422.
[306] Turkey's response to Panel question No. 45, paras. 86 and 91.
[307] Turkey does not pursue any claims concerning the USDOC's determination that Borusan failed to provide necessary information or whether the resort to facts available under Article 12.7 was justified. (Turkey's response to Panel question No. 43, para. 83).
[308] United States' opening statement at the first meeting of the Panel, para. 51.
[309] United States' first written submission, para. 148; second written submission, para. 122.
[310] United States' first written submission, paras. 151-153.
[311] United States' first written submission, para. 153 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291); second written submission, para. 123.

parties". We do not see any basis to read the obligation under Article 12.11[312] into Article 12.7. In *US – Carbon Steel (India)*, the Appellate Body referred to Articles 12.4 and 12.11 for context in its interpretation of the text of Article 12.7, because "these provisions recognize some potential reasons why the 'necessary information' referred to in Article 12.7 may not be provided, namely, confidentiality and resource constraints".[313] The Appellate Body's reference to these provisions as context for understanding the potential reasons why "necessary information" may not be provided in the sense of justifying recourse to facts available under Article 12.7 cannot have the effect of reading an obligation into Article 12.7 that is not reflected in its text. Nor do we understand the Appellate Body to have suggested otherwise. The Appellate Body stated clearly after its contextual consideration of Article 12.7 that "*[w]hether and how* such procedural circumstances should be taken into account by an investigating authority, and any appropriate inferences that may be drawn, will necessarily depend on the particularities of a given investigation."[314] Thus, the Appellate Body has not suggested that Article 12.7 *requires* an investigating authority to properly take into account the difficulties experienced by the interested parties.

7.197. Turkey's claim concerning the alleged difficulties is made under Article 12.7 only. Turkey has not brought any claim under Article 12.11. Thus, to the extent that Turkey relies on an alleged breach of the obligation to take due account of difficulties under Article 12.11 to demonstrate a breach of Article 12.7, we reject Turkey's claim as a matter of law.

7.198. In any event, we are not persuaded by Turkey's proposition that had the USDOC taken due account of the difficulties, it would not have insisted on Borusan submitting the relevant information, and thereby would not have resorted to facts available. We do not see how the difficulties experienced by Borusan could have affected the USDOC's resort to facts available, if the information that the USDOC requested is indeed "necessary information" for the purpose of Article 12.7.[315] The absence of a piece of "necessary information" in the record leaves a hole in the factual basis of an investigating authority's determination, which necessarily requires the investigating authority to resort to facts available to fill in the gaps. The mere failure of an interested Member or interested party to provide information *necessary* for the determination, regardless of the reasons or procedural circumstances, requires an investigating authority to resort to other sources of information to complete the factual record on which it makes its determination.

7.199. We are also not persuaded by Turkey's argument that the USDOC should have considered whether "to ask Borusan to provide the missing information in a different form".[316] That, in our view, is not a relevant consideration under Article 12.7 of the SCM Agreement, which strictly addresses situations in which information is not provided.

7.5.2.2.2 Punitive application of facts available

7.200. Turkey argues that the USDOC used an adverse inference to purposefully punish Borusan, contrary to the Appellate Body's interpretation of Article 12.7 in *US – Carbon Steel (India)*. Turkey contends that the USDOC should have used *all* of the data provided by Borusan regarding its purchases of HRS for the Gemlik mill to reasonably approximate the benefit received by Borusan with respect to Borusan's purchases of HRS for its Halkali and Izmit facilities.[317] Turkey submits that the USDOC chose the lowest price of any of Borusan's purchases of HRS from Erdemir and Isdemir and applied that price for all purchases of HRS for the Halkali and Izmit facilities equal to the facilities' entire annual production capacity. In doing so, the USDOC only relied on a part of the evidence provided by Borusan – i.e. only the lowest price on the record.[318] Turkey considers that "even a weighted average" of the prices paid for HRS at the Gemlik facility "might have been a more reasonable replacement for the price of hot rolled steel purchased for the Halkali and Izmit mills"

[312] Article 12.11 of the SCM Agreement states that:
The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.
[313] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.422.
[314] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.422. (emphasis added)
[315] We recall that Turkey has not challenged the USDOC's determination that the missing information was necessary for the purpose of Article 12.7. (Turkey's response to Panel question No. 43, para. 83).
[316] Turkey's response to Panel question No. 45, para. 91.
[317] Turkey's response to Panel question No. 46, para. 92.
[318] Turkey's response to Panel question No. 46, para. 94; second written submission, para. 126.

because it would reflect all of the relevant substantiated facts on the record.[319] According to Turkey, the USDOC's application of facts available is a clear attempt to use the worst facts to punish Borusan for non-cooperation[320], as the USDOC itself acknowledged.[321] In this regard, Turkey points to the USDOC's own statement that "the inference is *adverse*, not neutral".[322]

7.201. The United States submits that the USDOC's application of facts available was not punitive and fully complied with Article 12.7.[323] The United States argues that the Appellate Body has recognized that non-cooperation implies that a less favourable result becomes possible due to the selection of a replacement of an unknown fact. That the outcome is less favourable than Borusan would have liked does not mean that the application of facts available was punitive or otherwise inconsistent with Article 12.7.[324] According to the United States, the USDOC selected a reasonable replacement for the missing price and quantity information by relying on actual data that Borusan had provided for another of its facilities.[325] Turkey has not explained why its suggested approach would lead to a more accurate determination of the missing price and quantity data. With regard to price, the United States argues that the actual prices paid by Borusan for HRS for the non-responding facilities may have been less than the lowest price it paid for Gemlik. In that situation, the use of the lowest price may in fact reflect a better outcome than had Borusan fully cooperated with the investigation.[326] With regard to quantity, the United States points out that the selected quantities did not exceed the annual production capacity of the non-reporting facilities and reflected a reasonable replacement of the missing information.[327]

7.202. The United States rejects that the USDOC should have relied on a weighted average transaction price, as Turkey argued. The United States argues that such an approach would ignore the procedural circumstances of the investigation, including Borusan's failure to cooperate, and would in general lead to findings that are necessarily better than some of the outcomes for cooperating entities. According to the United States, such an interpretation would be inconsistent with Article 12.7 because it provides an incentive for interested parties not to cooperate.[328]

7.203. We note that Turkey's arguments concerning the alleged punitive application of facts available evolved during the dispute. At the outset, Turkey seemed to argue that, in light of the difficulties experienced by Borusan in providing the requested information, the USDOC is not entitled to resort to the use of adverse inferences with a view to punish Borusan.[329] If this is the case, Turkey's argument concerning "punitive application of facts available" hinges upon its view that the USDOC should have taken into account the difficulties experienced by Borusan when selecting facts available. In this regard, we refer to our findings above at paragraph 7.198 that the USDOC was not obliged to take into account the difficulties experienced by Borusan in responding to the USDOC's requests for information when *selecting* facts available under Article 12.7. Subsequently, Turkey clarified that its argument concerning the punitive application of facts available does not hinge upon the USDOC having to take into account the alleged difficulties.[330] Therefore, we proceed on the basis that Turkey is pursuing an argument that the facts that the USDOC selected in the OCTG investigation were punitive, irrespective of whether Borusan experienced any difficulties.

[319] Turkey's response to Panel question No. 46, para. 94; second written submission, paras. 126 and 129.
[320] Turkey's first written submission, para. 209; statement at the second meeting of the Panel, para. 84.
[321] Turkey's first written submission, para. 210.
[322] Turkey's first written submission, para. 210 (quoting OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 52). (emphasis added by Turkey)
[323] United States' second written submission, para. 125.
[324] United States' first written submission, paras. 131-132, and 154; response to Panel question No. 51, para. 152; and second written submission, para. 133.
[325] United States' second written submission, paras. 125, 128, and 134.
[326] United States' second written submission, para. 131.
[327] United States' first written submission, para. 155; second written submission, paras. 125, 128, and 132.
[328] United States' response to Panel question No. 47, para. 146.
[329] Turkey's response to panel question No. 45, para. 84 (where Turkey argues that "USDOC's selection of facts available based on adverse inferences in the OCTG investigation is inconsistent with Article 12.7 of the SCM Agreement, in part, *because the USDOC failed to take 'due account' of the difficulties Borusan experienced in providing the requested information* in drawing adverse inferences" (emphasis added)). See also United States' response to Panel question No. 44, para. 135.
[330] Turkey's response to Panel question No. 96, para. 49.

7.204. The words "punish" or "punitive" do not appear in the SCM Agreement. In alleging "punitive" application of facts available, we understand Turkey to argue that the use of adverse inferences—such as the selection of the lowest price on the record and the non-reporting facilities' entire annual production capacity was meant to punish Borusan and resulted in an inaccurate subsidization determination that does not accord with Article 12.7.[331] Turkey's argument concerning the "punitive" application of facts available thus rests on the premise that the way in which the USDOC selected "facts available" resulted in inaccurate determinations that are not "reasonable replacements" of the necessary missing information.[332] We note that in *US – Carbon Steel (India)*, the Appellate Body warned against the so-called "punitive" application of facts available for exactly that reason:

> [T]he 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.[333]

7.205. Thus, the issue before us is whether an objective and unbiased investigating authority would have considered the facts that the USDOC selected in the OCTG investigation to be reasonable replacements of the missing information, with a view to achieving an accurate determination. In this regard, the Appellate Body in *US – Carbon Steel (India)* stated that:

> [T]he task of ascertaining which "facts available" reasonably replace the missing "necessary information" under Article 12.7 calls for a process of reasoning and evaluation. … [I]t would not be possible to identify whether replacements for the missing "necessary information" are "reasonable", and thus constitute the "evidence" on which to ground a determination, without engaging in such a process.[334]

7.206. This process in turn calls for a consideration of all pertinent and substantiated facts on the record:

> [A]s part of the process of reasoning and evaluating which "facts available" reasonably replace the missing information, all substantiated facts on the record must be taken into account. It would frustrate the function of Article 12.7, namely, to "replac[e] information that may be missing, in order to arrive at an accurate subsidization or injury determination", if certain substantiated facts were arbitrarily excluded from consideration. In addition, we note that the participants agree that Article 12.7 should not be used to punish non-cooperating parties by choosing adverse facts for that purpose. Rather, the participants agreed at the oral hearing that the function of Article 12.7 is to replace the missing "necessary information" with a view to arriving at an accurate determination.[335]

7.207. Where there are multiple facts available on the record, an investigating authority may be required to make a comparative evaluation:

> [W]here there are several "facts available" from which to choose, an investigating authority must nevertheless evaluate and reason which of the "facts available" reasonably replace the missing "necessary information", with a view to arriving at an accurate determination.[336]

7.208. Finally, the investigating authority must sufficiently explain in its determination its selection of "facts available":

> [T]he explanation provided by the investigating authority in its published report must be sufficient to allow a panel to assess whether the "facts available" employed by the investigating authority resulted from a process of reasoning and analysis, including an

[331] Turkey's first written submission, para. 209.
[332] Turkey's responses to Panel question No. 46, para. 94, and No. 48, para. 96.
[333] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468.
[334] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.418. (emphasis added)
[335] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419. (fns omitted; emphasis added)
[336] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426.

> assessment of whether the use of an inference comports with the legal standard of Article 12.7 we have set out above.[337]

7.209. We are guided by these principles when assessing whether the USDOC as an objective and unbiased investigating authority could have found the selected facts to be reasonable replacements for the missing necessary information.

7.210. In the OCTG investigation, the USDOC selected facts available for the purpose of determining two elements regarding Borusan's purchases of HRS from Erdemir and Isdemir at the two non-responding facilities, i.e. the price and quantity of such purchases. We examine each of these selected facts in turn.

7.5.2.2.2.1 The selection of the lowest price on the record

7.211. We recall that, for the purpose of establishing the price paid for HRS at the two non-responding facilities, the USDOC's Post-Preliminary Analysis Memorandum for Borusan stated that:

> With respect to Borusan's HRS purchases for the Halkali and Ismit mills … we are also inferring adversely that for both the Halkali and Ismit mills, Borusan purchased HRS at the lowest price on the record for the Gemlik mill's HRS purchases.[338]

7.212. The USDOC's Final Determination stated in this regard that:

> Consistent with the Borusan Post-Preliminary Analysis, we are inferring adversely that Borusan purchased all HRS for the Halkali and Izmit mills at the lowest price on the record for the Gemlik mill's HRS purchases from Erdemir and Isdemir.[339]

7.213. The parties do not dispute that verified information concerning HRS transactions for the Gemlik facility was on the record. Accordingly, there was a series of verified prices on the record concerning Borusan's HRS purchases at the Gemlik facility. Before an investigating authority selects a price amongst the facts available, i.e. all verified prices, we expect an objective and unbiased investigating authority to engage in a process of reasoning and evaluation regarding the whole range of transactional prices on the record, including in particular the date, seller, purchase quantity associated with these transactions, as well as any reasons for fluctuations in prices. Moreover, as the Appellate Body observed on several occasions, when an investigating authority must choose among several facts available, like in the present case, the process of reasoning and evaluation must involve a degree of comparison in order to arrive at an accurate determination.[340] In our view, only through such a process could an investigating authority properly select among all verified prices to find a "reasonable replacement" for the missing price information consistently with Article 12.7.

7.214. We do not suggest that the price that an investigating authority eventually selects as the "fact available" must reflect all of the verified prices on the record, which Turkey seems to suggest.[341] What is important in our view is that an investigating authority cannot exclude other substantiated facts from the pool from which it will select a reasonable replacement. If an investigating authority simply chooses the lowest price without a process of reasoning and evaluation of all the prices, it risks excluding *a priori* the rest of the prices arbitrarily.

7.215. We do not understand that the USDOC engaged in any comparative process of reasoning and evaluation in selecting the lowest price on the record. Instead, the USDOC clearly stated that it was "inferring adversely" in selecting the lowest price on the record because of Borusan's non-cooperation. In other words, the sole basis for selecting the relevant price data was

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[337] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.469.
[338] Post-Preliminary Analysis Memorandum for Borusan, (Exhibit TUR-75), p. 14.
[339] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 12.
[340] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.431 and 4.435. See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.179.
[341] Turkey's second written submission, para. 129; United States' opening statement at the second meeting of the Panel, para. 41.

the adverse inference. Therefore, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement.

7.216. The United States argues that the USDOC considered the lowest price to be a "reasonable replacement" because it was a price that Borusan had actually paid for HRS for the Gemlik facility. For the United States, it is entirely possible that the actual prices paid by Borusan for HRS for the Halkali and Izmit facilities were less than the lowest price it paid for the Gemlik facility.[342]

7.217. The United States' argument is not reflected in the USDOC determination and amounts to *post hoc* rationalization. In any event, the United States' argument is unpersuasive. The fact that the selected price is an actual price does not necessarily mean that it is a "reasonable replacement" of the missing necessary information under Article 12.7. We agree that actual prices that the same respondent paid at a different facility may serve as a useful starting point for selecting the "reasonable replacement" for prices paid by that respondent at its other facilities. However, given that there is a range of actual prices available on the record, one cannot ascertain which of the actual prices reasonably replaces the missing "necessary information" under Article 12.7 without also looking into the particular circumstances of the transactions. While the United States may be right in pointing out that the unknown actual price at the non-responding facilities could be lower than the lowest price at the Gemlik facility, it is equally possible that the unknown price at the non-responding facilities could be higher than the highest price at the Gemlik facility. Such speculation cannot form the basis of *facts* available under Article 12.7. We recall and agree with the panel's views in *EC – Countervailing Measures on DRAM Chips* that an objective and unbiased investigating authority would not base its determination on "speculative assumptions or on the worst information available", even when interested parties have failed to cooperate.[343]

7.218. In light of our finding that the USDOC failed to engage in a process of reasoning and evaluation in selecting the facts available for the missing price information in the OCTG investigation, we do not address the arguments of Brazil[344] and Turkey[345] that a weighted average price serves better as a "reasonable replacement" of the missing price information at the two non-responding facilities. We also do not need to address Turkey's argument that the USDOC selected the lowest price on the record as the *worst possible fact* to punish Borusan.[346]

7.5.2.2.2.2 The selection of quantities of HRS purchases on the basis of the full capacity of the non-responding facilities and Gemlik's ratio of HRS purchases from Erdemir and Isdemir

7.219. In the OCTG investigation, the USDOC determined the quantities of HRS purchases by non-responding facilities, Halkali and Izmit, from Erdemir and Isdemir based on facts available. The USDOC initially used the quantity of HRS purchased by Gemlik from Erdemir and Isdemir as the quantity of HRS purchases for each of the non-responding facilities. The USDOC subsequently revised the quantities of HRS purchases for the non-responding facilities. The USDOC based the final quantities of HRS purchases at the Halkali and Izmit facilities on the full production capacity[347] of

[342] United States' second written submission, para. 131; comments on Turkey's response to Panel question No. 96, para. 43.

[343] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.61. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.417.

[344] In its oral statement, Brazil argues that a weighted average of the prices paid by the Gemlik facility for HRS "in all likelihood, would serve as a better approximation of the missing information" than USDOC's use of the lowest price on the record for purchases of HRS for the Gemlik facility. (Brazil's third-party statement, paras. 7-8). The United States argues that Brazil has not provided any explanation based on the text of Article 12.7 that would support such an assertion. According to the United States, such an interpretation would serve only to incentivize non-cooperation. (United States' response to Panel question No. 47, para. 146; see also opening statement at the second meeting of the Panel, para. 41).

[345] Turkey's response to Panel question No. 47, para. 95; second written submission, para. 126; and statement at the second meeting of the Panel, para. 85.

[346] Turkey's second written submission, para. 130; responses to Panel question No. 51(b), para. 109, and No. 49, para. 100.

[347] The capacity figures which the USDOC used to calculate the benefit to Borusan of the Halkali and Izmit facilities' HRS purchases were nominal rates, i.e. "their entire annual production capacity" of 100 ktonnes and 250 ktonnes, respectively. (Turkey's response to Panel question No. 98, para. 51 (referring to OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), pp. 51-52)). See also United States' response to Panel question No. 98, para. 105.

each facility, multiplied by the percentage of Gemlik's HRS purchases from Erdemir and Isdemir out of total HRS purchases. In its Final Determination, the USDOC stated the following:

> In the Borusan Post-Preliminary Analysis, we also inferred adversely that Borusan purchased the same quantity of HRS produced by Erdemir and Isdemir for each of these mills as it did for the Gemlik mill. Based on comments from interested parties and record information, however, we adjusted that inference for this final determination. Accordingly, we now are inferring as adverse facts available that the Halkali and Izmit mills each purchased the same quantity of HRS during the POI as its annual production capacity. In accordance with that inference, we are presuming in our calculations that the Halkali and Izmit mills each purchased HRS from Erdemir and Isdemir in the same ratio as the Gemlik mill's purchases from Erdemir and Isdemir as a share of its total purchases.[348]

7.220. In our view, an objective and unbiased investigating authority would not have simply used the full production capacity as a basis to calculate the quantities of HRS purchases from Erdemir and Isdemir at the two non-responding facilities, without first considering any substantiated information on the record that may shed light on the capacity utilization of the two non-responding facilities. The United States confirms that Borusan's verified capacity utilization rate at the Gemlik facility was on the record.[349] This information might have served as a reasonable approximation of the capacity utilization rate at the two non-responding facilities. This is clear given that the USDOC also used Gemlik's HRS purchase ratio for the purpose of establishing the two non-responding facilities' HRS purchase ratio from Erdemir and Isdemir. Even absent such verified capacity utilization data, an investigating authority may choose to use information from secondary sources, such as the industry average capacity utilization rate, in order to select a *commercially realistic capacity utilization rate* as a basis for a "reasonable replacement" of the quantities of HRS purchases with a view to arrive at an accurate subsidization determination. We have no evidence before us that the USDOC engaged in such a process of reasoning and evaluation to ascertain whether the full capacity utilization serves as the basis of a *reasonable replacement* of the missing quantity information.

7.221. We therefore find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement in using the full production capacity of the two non-responding facilities as the basis for calculating the quantity of the HRS purchases at these two facilities.

7.222. We now turn to examine whether an objective and unbiased investigating authority could have selected Gemlik's ratio of HRS purchases from Erdemir and Isdemir as the ratio for the non-responding facilities' HRS purchases from Erdemir and Isdemir. We recall that in determining the quantity of HRS provided by Erdemir and Isdemir, the USDOC multiplied the full production capacity of the two non-reporting facilities by the percentage of Gemlik's HRS purchases from Erdemir and Isdemir out of Gemlik's total HRS purchases. In our view, it was reasonable that the USDOC relied on Gemlik's ratio of HRS purchases from Erdemir and Isdemir out of Gemlik's total HRS purchases. First, the USDOC engaged in a process of reasoning and evaluation with a degree of comparison when it rejected the alternative facts proposed by the petitioner that "Borusan's Izmit and Halkali mills purchased the same quantity of HRS as the Gemlik facility, but that *100 percent of these purchases was from Erdemir and Isdemir*."[350] Second, we consider that there is a sufficiently close connection between the missing information, i.e. the quantity of Borusan's HRS purchases from Erdemir and Isdemir at non-responding facilities Halkali and Izmit, and the percentage of Gemlik's HRS purchases from Erdemir and Isdemir.

7.223. For the above reasons, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing to engage in a process of reasoning and evaluation in selecting the facts available for the missing price information in the OCTG investigation. We also find that the USDOC acted inconsistently with Article 12.7 by using the full production capacity of the two non-responding facilities as the basis for calculating the quantity of the HRS purchases at these two facilities, without engaging in a process of reasoning and evaluation. However, we consider that it was reasonable for the USDOC to use Gemlik's ratio of HRS purchases from Erdemir and Isdemir out of the total HRS

[348] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 12. (fn omitted)
[349] United States' response to Panel question No. 98, para. 104.
[350] OCTG CVD Final Determination Memorandum, (Exhibit TUR-85), p. 52 (emphasis added). See also United States' comments on Turkey's response to Panel question No. 96, para. 44; and response to Panel question No. 98, para. 105.

purchases at the Gemlik facility as the basis for calculating the quantity of the HRS purchases at the two non-responding facilities.

7.5.3 The use of facts available in the WLP investigation

7.5.3.1 Factual background

7.224. In the WLP investigation, Borusan decided not to participate in the verification. Instead, Borusan requested the USDOC to use the verification report and exhibits from the CWP review proceeding, which allegedly covered the same programmes[351] and the same time period as the WLP investigation.[352] The USDOC rejected this request because "[v]erification of data submitted in a separate proceeding related to a different industry does not satisfy the requirement in section 782(i) of the Act that the Department verify the information relied upon in making its final determination".[353] The USDOC found that Borusan significantly impeded the investigation and provided information that could not be verified, and therefore its CVD rate has to be based on facts available. The USDOC concluded that Borusan did not cooperate to the best of its ability in this investigation. The USDOC stated that adverse inference is warranted "to ensure that Borusan did not obtain a more favorable result by failing to cooperate in the investigation".[354]

7.225. The USDOC inferred that Borusan benefitted from each of the programmes raised in the petition, with the exception of any programmes that were previously proven not to exist. The USDOC applied subsidy rates for all of the subsidy programmes in the following manner[355]:

a. for the 7 income tax programmes alleged in the petition which pertain to either the reduction of income tax paid or the payment of no income tax, the USDOC applied an adverse inference that Borusan paid no income tax during the POI, i.e. a subsidy rate of 20% was applied;

b. for 7 subsidy programmes, including the Provision of HRS for LTAR, the USDOC applied the highest-calculated programme-specific subsidy rates (above zero) for a cooperating respondent in the WLP investigation, Toscelik;

c. for programmes for which the USDOC did not calculate an above-zero rate for Toscelik in the WLP investigation, the USDOC applied the highest subsidy rate calculated for the same or, if lacking such rate, for a similar programme in a CVD investigation or administrative review involving Turkey; and

d. for programmes for which the USDOC were unable to find above-*de minimis* rates calculated for the same or similar programmes, the USDOC applied the highest calculated subsidy rate for any programme identified in a Turkish CVD proceeding that could conceivably be used by Borusan.

7.226. We first address the United States' request that we exclude from our terms of reference certain claims under Articles 12.7 of the SCM Agreement concerning the WLP investigations. We then address the claims that are within our terms of reference.

7.5.3.2 Whether Turkey's claims under Article 12.7 of the SCM Agreement in respect of "all investigated programs" in the WLP investigation are within the Panel's terms of reference

7.227. The United States requests the Panel to rule that Turkey's claims under Article 12.7 of the SCM Agreement with respect to 29 non-HRS for LTAR subsidies addressed in the WLP investigation are outside the Panel's terms of reference.

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[351] The United States disagrees that it covers the same subsidy programmes. (United States' first written submission, para. 169; response to Panel question No. 94, para. 99).

[352] United States' first written submission, para. 165. See also Borusan's decision not to participate in verification, (Exhibit TUR-101), pp. 1-2.

[353] USDOC's letter on WLP verification, (Exhibit USA-20).

[354] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 4.

[355] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), p. 7.

7.228. Turkey's panel request includes a number of claims regarding the WLP investigation. Three of these claims are grouped under the subheading "In connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration", including one claim under Article 12.7 of the SCM Agreement, as follows[356]:

> **(B) WLP from Turkey (C-489-823)**
>
> **In connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration:**
>
> 1. Article 1.1(a)(1) of the SCM Agreement
>
> a. In determining that OYAK is a "public body," the USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) and follow the Appellate Body's guidance regarding the interpretation of that standard. Instead, the USDOC determined that OYAK is a public body based on formal indicia of government ownership or control, with no consideration of whether OYAK in fact exercises or is vested with governmental authority. 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.
>
> b. In determining that Erdemir and its subsidiary Isdemir are "public bodies," the USDOC failed to adhere to the appropriate legal standard under Article 1.1(a)(1) and follow the Appellate Body's guidance regarding the interpretation of that standard. The USDOC's determination was improperly confined to formal indicia of government ownership or control, with no consideration of whether Erdemir and its subsidiary Isdemir in fact exercise or are vested with governmental authority. The USDOC also failed to provide a reasoned and adequate explanation, based on the evidence on the record, for its finding that Erdemir and its subsidiary Isdemir are public bodies.
>
> 2. Article 12.7 of the SCM Agreement
>
> a. The USDOC drew adverse inferences in selecting among the facts available for the purpose of punishing Borusan for its alleged failure to cooperate.
>
> 3. Articles 2.1(c) and 2.4 of the SCM Agreement
>
> a. In finding specificity in terms of use by a limited number of industries or enterprises, the USDOC failed to identify, or substantiate based on positive evidence on the record, a "subsidy programme" related to the provision of hot rolled steel for less than adequate remuneration.
>
> …
>
> **In connection with the injury determination:**
>
> 4. Article 15.3 of the SCM Agreement
>
> a. The U.S. International Trade Commission ("[US]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, from all countries with respect to which antidumping or countervailing duty petitions are filed on the same day. In investigations, the [US]ITC considers this practice to be required under section 771(7)(G)(i) of the

[356] Turkey's panel request, p. 4, section (B).

> Tariff Act of 1930, if the subsidized and non-subsidized imports compete with each other and with the domestic like product in the U.S. market.
>
> b. Turkey considers that the [US]ITC's 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", as a practice, and as applied in this proceeding.

7.229. The United States argues that, by grouping its claims in this manner, Turkey expressly limited its Article 12.7 claim in the WLP investigation to the USDOC's application of facts available "[i]n connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration".[357] The United States submits that the other 29 programmes were not included in the claim in Turkey's panel request.[358]

7.230. Turkey argues that it advanced its Article 12.7 claim that the United States' determination to apply facts available and draw adverse inferences with regard to Borusan in the WLP proceeding generally and not just in respect of the so-called Provision of HRS for LTAR Programme.

7.231. Therefore, we must address whether Turkey's panel request limits the scope of its Article 12.7 challenge in the WLP proceeding to the use of facts available in connection with the so-called Provision of HRS for LTAR Programme, based on how Turkey chose to group its claims in its panel request.

7.232. Article 6.2 of the DSU provides in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.233. The two requirements to identify the measures at issue and provide a brief summary of the legal basis of the complaint constitute the "matter referred to the DSB" and form the basis of a panel's terms of reference. These requirements are therefore central to the establishment of a panel's jurisdiction.[359] The panel request also serves a due process function, providing the respondent and third parties notice as to the nature of the complainant's case[360], enabling them to respond accordingly.[361] A panel must therefore determine whether the panel request, read as a whole and as it existed at the time of filing[362], is "sufficiently clear" or "sufficiently precise" on the basis of an "objective examination".[363]

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[357] United States' first written submission, para. 30. In its discussion of the use of facts available in the WLP investigation, Turkey refers to "examples of inaccurate determinations made by the USDOC" in determining the overall 152.2% subsidy rate for Borusan. As examples, Turkey refers to income tax-related subsidy programmes, as well as Customs Duty Exemptions and VAT Exemptions under each of the Investment Encouragement programme, the Large Scale Investment Incentives programme, and the Strategic Investment Incentives programme. Turkey does not refer to facts available determinations made in respect of the Provision of HRS for LTAR Programme. (Turkey's first written submission, para. 327).

[358] United States' first written submission, para. 32.

[359] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 639-640 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; and *US – Carbon Steel*, para. 125); *US – Continued Zeroing*, paras. 160-161; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; *Australia – Apples*, para. 416; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186.

[360] Appellate Body Reports, *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186; *US – Carbon Steel*, para. 126; and *EC and certain member States – Large Civil Aircraft*, para. 640.

[361] Appellate Body Reports, *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186; *Chile – Price Band System*, para. 164; *US – Continued Zeroing*, para. 161; and *Thailand – H-Beams*, para. 88.

[362] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

[363] Appellate Body Reports, *EC – Bananas III*, para. 142; *EC and certain member States – Large Civil Aircraft*, para. 641; *US – Carbon Steel*, para. 127; *US – Continued Zeroing*, para. 161; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108. Parties' subsequent submissions and

7.234. In order to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", the panel request must set out the claims so as to "present the problem clearly".[364] A "claim" in this context is an allegation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular Agreement".[365] "Arguments", by contrast, are statements put forth by a complaining party "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".[366] Further, "the narrative" of panel requests should "explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[367] Moreover, a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered Agreements claimed to have been infringed".[368] "Whether such a brief summary is 'sufficient to present the problem clearly' is to be assessed on a case-by-case basis, keeping in mind the nature of the measure(s) at issue, and the manner in which it is (or they are) described in the panel request, as well as the nature and scope of the provision(s) of the covered Agreements alleged to have been violated."[369]

7.235. We consider that, by grouping its claims in its panel request in the manner it did, Turkey expressly limited its Article 12.7 claim in the WLP investigation to the USDOC's application of facts available "[i]n connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration". Therefore, any claim that Turkey raises in respect of other subsidy programmes at issue in the WLP investigation are outside of our terms of reference.

7.236. Fundamentally, Turkey's panel request identifies a single subsidy programme in respect of the WLP investigation, namely the alleged "Provision of Hot Rolled Steel for Less Than Adequate Remuneration". Turkey's panel request does not refer to any of the other subsidy programmes at issue in the WLP investigation. In order to "present the problem clearly", a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered Agreements claimed to have been infringed".[370] Turkey's panel request plainly connects its Article 12.7 claim with the alleged Provision of HRS for LTAR Programme. It does not plainly connect its Article 12.7 claim with any other programmes or measures at issue in the WLP investigation.

7.237. We recall that a panel request forms the basis of a panel's terms of reference and establishes a panel's jurisdiction[371], as well as serves a due process function by providing the respondent notice as to the nature of the complainant's case. Based on the manner in which Turkey formulated its panel request, we conclude that a respondent would thus reasonably understand that Turkey as complainant was raising its Article 12.7 claim in the WLP investigation solely in connection with the Provision of HRS for LTAR.

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statements, therefore, cannot "cure" defects in panel requests. (Appellate Body Reports, *China – Raw Materials*, para. 220; *EC – Bananas III*, para. 143; *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Carbon Steel*, para. 127; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9).

[364] Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

[365] Appellate Body Report, *Korea – Dairy*, para. 139.

[366] Appellate Body Report, *Korea – Dairy*, para. 139. A panel request need not, however, include arguments seeking "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision". A party's arguments may be presented and clarified over the course of the proceeding. (Appellate Body Report, *Korea – Dairy*, para. 139 (referring to Appellate Body Reports, *EC – Bananas III*, para. 141; *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156)).

[367] Appellate Body Reports, *China – Raw Materials*, para. 226 (emphasis original); *EC – Selected Customs Matters*, para. 130.

[368] Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

[369] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.

[370] Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

[371] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 639-640 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; and *US – Carbon Steel*, para. 125); *US – Continued Zeroing*, paras. 160-161; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; *Australia – Apples*, para. 416; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186.

7.238. This conclusion is consistent with the logic with which claims are identified throughout Turkey's panel request.[372] For instance, we note that the other claims grouped with Turkey's Article 12.7 claim under the subheading "[i]n connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration" concerning the WLP investigation are raised exclusively in respect of the Provision of HRS for LTAR. Turkey's claims under Article 1.1(a)(1) in respect of the public body determination in the WLP investigation only concern the provision of HRS by Erdemir and Isdemir. Turkey's Articles 2.1(c) and 2.4 claims also concern the provision of HRS programme exclusively.[373] The same logic exists in respect of Turkey's claims concerning the HWRP investigation. In the subsection pertaining to that investigation, Turkey's panel request groups Turkey's Articles 1.1(a)(1), 2.1(c) and 2.4 claims under the subheading "In connection with the alleged Provision of Hot Rolled Steel for Less Than Adequate Remuneration".[374] Turkey's Article 12.7 claim regarding the HWRP investigation, however, is listed under the separate subheading "In connection with 'other subsidies' not previously reported to the USDOC".[375] Consistent with the inclusion of its Article 12.7 claim concerning the HWRP investigation under that subheading, Turkey has only raised arguments in connection with so-called "other subsidies" not reported to the USDOC prior to verification.[376]

7.239. Turkey argues that the United States conflates Turkey's "arguments" with its "claims" under Article 12.7 and mischaracterizes the nature of the claim at issue. Turkey considers that it was not required to include all potential arguments in support of its claim under Article 12.7 of the SCM Agreement in its panel request, and thus it was not required to identify all 30 programmes investigated in the WLP proceeding in its request. Turkey also argues that its panel request clearly connects the challenged measure with the provision that is alleged to have been infringed, and thus, Turkey considers that the United States was sufficiently informed of Turkey's claim.[377] We disagree. As we explain above, a panel request must plainly connect the challenged measures with the provisions of the covered Agreements claimed to have been infringed in order to "present the problem clearly". Turkey's panel request does not connect its Article 12.7 claim with any other subsidy programme, strictly identifying its Article 12.7 claim directly in connection with the Provision of HRS for LTAR Programme.

7.240. Turkey also raises several additional arguments. For instance, Turkey argues that the United States' determination to apply facts available with regard to Borusan was not a "program-specific determination", but was based on Borusan's decision not to participate in verification, which is a circumstance outside the context of the USDOC's investigation of any particular subsidy programme. Thus, Turkey submits that "the USDOC did not make an adverse facts available determination specifically with regard to its investigation of the provision of hot rolled steel for less than adequate remuneration".[378] In addition, Turkey argues that, even if the United States understood Turkey's claim to be limited to the Provision of HRS for LTAR, the United States is not prejudiced because the "USDOC made the same factual findings and applied the same legal reasoning in drawing adverse inferences to select subsidy rates for all investigated programs in the WLP proceeding".[379]

7.241. Turkey's arguments are not relevant to our assessment of whether any of Turkey's Article 12.7 claims fall outside our terms of reference. Regardless of whether the USDOC made the same factual findings and applied the same legal reasoning when drawing adverse inferences in respect of all subsidy programmes, whether the decision to resort to facts available is programme-specific or not cannot cure deficiencies in a panel request.[380] We further find irrelevant

[372] We note that Turkey's claims concerning the injury determination in the four challenged proceedings are placed under subheadings "In connection with the injury determination" as the injury determination is made in the context of all subsidy programmes under investigation.

[373] In this respect, Turkey's Article 2.1(c) and 2.4 claims are directed at the specificity findings "related to the provision of hot rolled steel for less than adequate remuneration". (Turkey's panel request, para. 8.(B).3.a).

[374] Turkey's Panel request, paras. 8.(C).1. and 8.(C).2.

[375] Turkey's Panel request, para. 8.(C).3.

[376] With the exception of its Article 12.7 claim concerning the WLP investigation, we note that Turkey has not introduced arguments over the course of the proceedings with a view to enlarging any of its other claims to encompass other programmes beyond those identified in its panel request.

[377] Turkey's response to the United States' preliminary ruling request, paras. 27-28.

[378] Turkey's response to the United States' preliminary ruling request, para. 29.

[379] Turkey's response to the United States' preliminary ruling request, para. 30.

[380] The United States argues that the USDOC engaged in separate fact-finding and legal determinations with respect to each of the subsidy programmes at issue. (United States' second written submission, para. 26).

whether the United States was prejudiced or not by a lack of precision in Turkey's panel request. As we explain above, Article 6.2 of the DSU requires a complainant to "identify the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". A panel's examination of whether a panel request complies with these requirements "must be objectively determined on the basis of the panel request as it existed at the time of the filing" and be "demonstrated on the face" of the request.[381] Article 6.2 of the DSU does not separately require a finding of prejudice to a responding party in order to determine whether or not a given claim falls within a panel's terms of reference. Rather, as we explain above, a panel request forms the basis of a panel's terms of reference and establishes a panel's jurisdiction.[382] Importantly, the panel request also serves a due process function by providing the respondent notice as to the nature of the complainant's case.[383] We therefore reject Turkey's arguments.[384]

7.242. Accordingly, in respect of the WLP investigation, we find that Turkey's claims under Article 12.7 of the SCM Agreement concerning subsidy programmes other than the Provision of HRS for LTAR are outside the Panel's terms of reference. We now consider Turkey's Article 12.7 claims in respect of the provision of HRS for LTAR in the WLP investigation.

7.5.3.3 The Panel's evaluation of Turkey's claim regarding the use of facts available in the WLP investigation

7.243. Turkey argues that the USDOC's reliance on facts available and its decision to draw an adverse inference in the WLP investigation are inconsistent with Article 12.7 of the SCM Agreement because the USDOC drew an adverse inference to punish Borusan for its decision not to participate in the verification, and made various inaccurate determinations which led to an inaccurate subsidy calculation.[385] Turkey refers to two examples of alleged inaccurate determinations that the USDOC made.[386] Turkey argues that the USDOC made no effort to evaluate the facts available to determine which facts could reasonably replace "necessary information" that was missing from the record.[387] Turkey notes that there were substantiated facts on the record of the WLP investigation regarding Borusan's non-use of, and ineligibility for, many subsidy programmes, but the USDOC ignored these facts and instead selected the worst possible rates in order to punish Borusan for its alleged failure to cooperate.[388]

7.244. The United States argues that the USDOC properly applied facts available as a reasonable replacement for the missing information. The United States argues that Turkey has dramatically expanded the scope of its arguments under Article 12.7 with respect to the WLP investigation to include 14 additional subsidy programmes in its response to the Panel's questions. The United States requests that the Panel reject Turkey's challenge with respect to these 14 subsidy programmes because such a belated introduction of new evidence and arguments is contrary to the Panel's working procedures and basic procedural fairness.[389] With regard to the Provision of HRS for LTAR, the United States argues that Turkey has provided *no* substantive argumentation or

[381] Appellate Body Reports, *US – Carbon Steel*, para. 127; *EC and certain member States – Large Civil Aircraft*, para. 641. See also Appellate Body Reports, *EC – Bananas III*, para. 142; *US – Continued Zeroing*, para. 161; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

[382] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 639-640 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; and *US – Carbon Steel*, para. 125); *US – Continued Zeroing*, paras. 160-161; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; *Australia – Apples*, para. 416; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186.

[383] Appellate Body Reports, *Brazil – Desiccated Coconut*, DSR 1997:1, p. 186; *US – Carbon Steel*, para. 126; and *EC and certain member States – Large Civil Aircraft*, para. 640.

[384] We note that Turkey has also argued that the United States could have asked for clarifications prior to filing its preliminary ruling request and asked for an extension of time to prepare its response, as doing so would avoid the need for Turkey to reinitiate consultations and file another dispute to address other subsidy programmes at issue in the WLP proceeding. (Turkey's response to the United States' preliminary ruling request, para. 31; response to Panel question No. 2, paras. 14-15). We also consider that these arguments are not relevant to our assessment.

[385] Turkey's response to Panel question No. 48, para. 96.

[386] Turkey's first written submission, para. 327. These two examples relate to the income tax related "subsidy programmes", and the Customs Duty Exceptions and VAT Exemptions "subsidy programmes".

[387] Turkey's responses to Panel question No. 48, para. 96, and No. 49, para. 100.

[388] Turkey's response to Panel question No. 49, paras. 97-101; second written submission, para. 125.

[389] United States' second written submission, paras. 137-141.

analysis.[390] According to the United States, as Turkey has not properly raised any claims under Article 12.7, the Panel's analysis may therefore end here.[391]

7.245. As discussed above in Section 7.5.3.2, we find that Turkey's Article 12.7 claims concerning subsidy programmes[392] other than the Provision of HRS for LTAR are not properly within our term of reference.

7.246. We reject the United States' argument that Turkey has provided no substantive argumentation concerning the Provision of HRS for LTAR. The principal arguments of Turkey are twofold: first, the subsidy rate calculations for all of the subsidy programmes in the WLP investigation, including the Provision of HRS for LTAR, are not reasonable replacements of the missing information[393]; and second, the USDOC purposefully selected the worst possible facts available in order to punish Borusan for its alleged failure to cooperate.[394] In its first written submission, Turkey also disputes the total subsidy rate that the USDOC calculated for Borusan.[395] Thus in our view, Turkey's arguments above were made with reference to all subsidy programmes it sought to challenge, including the Provision of HRS for LTAR.[396] We do not agree with the United States that Turkey must repeat its arguments with respect to each and every alleged subsidy programme.[397]

7.247. Given that we have concluded above that Turkey's Article 12.7 claim concerning the WLP investigation is limited to the Provision of HRS for LTAR only, the only issue before us is whether the USDOC acted inconsistently with Article 12.7 in selecting the subsidy rate for the Provision of HRS for LTAR.[398]

7.248. We recall that the USDOC selected the highest-calculated programme-specific subsidy rate for Toscelik, a cooperating respondent in the WLP investigation, for Borusan's Provision of HRS for LTAR. The USDOC's determination stated the following:

> It is the Department's practice in CVD proceedings to compute a total AFA rate for non-cooperating companies using the highest calculated program-specific rates determined for a cooperating respondent in the same investigation, or, if not available, rates calculated in prior CVD cases involving the same country.
>
> …

[390] United States' second written submission, para. 142.

[391] United States' first written submission, para. 161; second written submission, para. 142; and response to Panel question No. 94, para. 91.

[392] We note that the USDOC referred to all investigated subsidies in the challenged proceedings generally as "program" or "programs". Our reference to the United States' use of the term "program(s)" or "subsidy program(s)" does not prejudge the issue whether the USDOC properly identified a "subsidy programme" for the purpose of determining *de facto* specificity under Article 2.1(c). As discussed at paragraph 7.153 above, such a generic reference to all investigated subsidies as "programs" is not sufficient to properly identify a "subsidy programme" for the purpose of determining *de facto* specificity under Article 2.1(c).

[393] Turkey's first written submission, paras. 323-326; response to Panel question No. 48, para. 96.

[394] Turkey's response to Panel question No. 49, para. 99; second written submission, para. 121.

[395] Turkey's first written submission, paras. 325-326 and 328.

[396] In this regard, we note that Turkey's more detailed analysis concerning the Income Tax and Customs Duty and VAT exemption programmes were provided by way of "examples". (Turkey's first written submission, para. 327 (where Turkey states that "[t]he following are *examples* of inaccurate determinations made by the USDOC in selecting the 152.2% rate for Borusan …" (emphasis added))). We understand from this statement that these two examples are not intended to be exhaustive.

[397] United States' second written submission, para. 142.

[398] In response to the Panel's written questions after the first Panel meeting, the United States argues that Turkey has dramatically expanded the scope of its arguments under Article 12.7 with respect to the WLP investigation to include 14 additional subsidy programmes. The United States requests the Panel to reject Turkey's challenge with respect to these 14 subsidy programmes because Turkey's belated introduction of new evidence and arguments is contrary to the Panel's Working Procedures and basic procedural fairness. (United States' second written submission, paras. 137-141). Given that we will limit our consideration of Turkey's Article 12.7 claim to the Provision of HRS for LTAR only, there is no need for us to consider whether Turkey failed to timely submit any argument or evidence with respect to these 14 subsidy programmes.

> In applying AFA to Borusan, we are guided by the Department's methodology detailed above.
>
> …
>
> [W]e are applying the above-zero rates calculated for Toscelik in this investigation for the following identical programs:
>
> - Provision of HRS for LTAR …[.][399]

7.249. In response to questioning, Turkey clarified that its Article 12.7 claim regarding the WLP investigation concerns the *selection* of the facts available only, and does not concern whether the USDOC was entitled to resort to facts available under Article 12.7.[400] Accordingly, we consider whether an objective and unbiased investigating authority could have selected the highest-calculated programme-specific subsidy rates (above zero) for a cooperating respondent in the WLP investigation, Toscelik, for the Provision of HRS for LTAR as a reasonable replacement for the subsidy rate for Borusan in accordance with Article 12.7.

7.250. We recall that the USDOC had before it a verification report and exhibits from the CWP review proceeding, which covered some of the same subsidy programmes and the same time period as the WLP investigation. Borusan requested the USDOC to rely on information in the CWP verification report and exhibits for its determination in the WLP investigation.[401] The USDOC rejected Borusan's request, stating that the "[v]erification of data submitted in a separate proceeding related to a different industry does not satisfy the requirement in section 782(i) of the Act that the Department verify the information relied upon in making its final determination."[402]

7.251. We express no view as to whether the USDOC properly rejected the CWP verification report and exhibits in concluding that Borusan provided information that could not be verified in the WLP investigation, thus impeding the investigation and triggering the application of facts available under Article 12.7. We also express no view as to whether the verification report and exhibits for the CWP proceeding, which were brought to the attention of the USDOC by Borusan, were part of the pool of substantiated facts on the record of the WLP investigation, *as a secondary source*, and whether the USDOC may have selected a fact from this source.[403] We note however that the investigation record does not indicate that the USDOC engaged in a process of reasoning and evaluation of which facts available reasonably replaces the missing necessary information. Instead, the WLP Final Determination shows that the USDOC simply selected the highest possible rate for the same programme in the same proceeding.

7.252. For this reason, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing to engage in a process of reasoning and evaluation of which facts available reasonably replaces the missing necessary information in the WLP investigation for the Provision of HRS for LTAR.

7.5.4 The use of facts available in the HWRP investigation

7.5.4.1 Factual background

7.253. During on-site verification in the HWRP investigation, the USDOC found that MMZ and Ozdemir used certain subsidy programmes which were not previously reported. Specifically, the USDOC found that MMZ did not report its use of the Deduction from Taxable Income for Export Revenue and Provision of Electricity for LTAR Programmes, while Ozdemir did not report its use of the Exemption from Property Tax programme. The USDOC rejected MMZ's request for revision to its questionnaire response at the commencement of the verification due to the fact that it was not a minor correction to information already on the record. The USDOC found that MMZ and Ozdemir

[399] WLP CVD Final Determination Memorandum, (Exhibit TUR-122), pp. 4-5. (fn omitted)
[400] Turkey's response to Panel question No. 48, para. 96.
[401] Borusan's decision not to participate in verification, (Exhibit TUR-101), pp. 1-2.
[402] USDOC's letter on WLP verification, (Exhibit USA-20).
[403] In its response to panel question No. 94, the United States argues that the CWP verification report and exhibits were not on the written record of the WLP investigation. (United States' Response to Panel question No 94, para. 97; see also Turkey's response to Panel question No. 94(a), para. 46).

failed to accurately answer questions regarding the subsidy programmes in their questionnaire responses and failed to provide necessary information that was in their possession. Therefore, the USDOC determined that adverse inferences were warranted. The USDOC applied subsidy rates for these programmes in the following manner[404]:

a. For MMZ:

   i. 0.06% for the Deduction from Taxable Income from Export Revenue, the subsidy rate calculated for another interested party Ozdemir in the same investigation; and

   ii. 2.08%[405] for the Provision of Electricity for LTAR, the subsidy rate calculated for the Provision of HRS for LTAR in its investigation of *OCTG from Turkey*, a rate that was in turn based on facts available and an adverse inference.

b. For Ozdemir:

   i. 14.01% for the Exemption from Property Tax, the subsidy rate calculated in the investigation of *CWP from Turkey* for an export tax rebate programme in effect in 1986.

7.5.4.2 The Panel's evaluation of Turkey's claim regarding the use of facts available in the HWRP investigation

7.254. Turkey argues that the USDOC acted inconsistently with Article 12.7 by selecting the highest subsidy rates for another interested party or for similar programmes from other countervailing duty proceedings related to Turkish imports for the purpose of punishing MMZ and Ozdemir. Turkey contends that these rates were selected for the purpose of "effectuat[ing] the statutory purposes of the [adverse facts available] rule to induce respondents to provide the Department with complete and accurate information".[406] Turkey also argues that the USDOC failed to ensure that the facts selected were reasonable replacements for the missing information.[407] Turkey contends that there is no evidence that these subsidy rates bear any relation to the subsidy programmes that MMZ and Ozdemir failed to identify in their initial questionnaire responses.[408]

7.255. The United States argues that the resort to facts available was warranted because MMZ and Ozdemir failed to accurately answer the USDOC's questions regarding the subsidy programmes, including reporting benefits which should have been discovered in the respondents' accounting system. The United States contends that the USDOC was under no obligation to accept new information at the stage of verification. The United States argues that the USDOC appropriately relied on facts available by applying subsidy rates calculated for the same or similar programmes. With respect to the Deduction from Taxable Income from Export Revenue, for which the USDOC selected a reasonable replacement based on the same programme in the same proceeding for another interested party, the United States notes that Turkey has not argued or provided evidence that the rate the USDOC selected is inconsistent with Article 12.7. With respect to the other programmes, the United States argues that the USDOC was not able to find a subsidy rate for the same programmes in the same proceeding. Therefore, the USDOC turned to a subsidy rate for each programme that was on a par with identical or similar subsidy programmes. According to the United States, these rates are not punitive, but instead reasonably estimate the level of subsidization, which is consistent with Article 12.7.[409]

[404] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), pp. 6-7.
[405] The USDOC applied a 15.58% rate for the Provision of Electricity for LTAR in its Final Determination. USDOC received comments from the GOT and MMZ to change the rate for the Provision of Electricity for LTAR based on the fact that the subsidy rate for HRS for LTAR in the OCTG investigation had been reduced from 15.58% to 2.08% following litigation.
[406] Turkey's first written submission, para. 439 (referring to HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 6).
[407] Turkey's response to Panel question No. 52, para. 111.
[408] Turkey's first written submission, para. 440.
[409] United States' first written submission, paras. 200-202; second written submission, paras. 157-159.

7.256. In response to a question from the Panel, Turkey clarified that its Article 12.7 claim regarding the HWRP proceeding concerns the *selection* of the facts available only, and does not concern whether the USDOC was entitled to resort to facts available under Article 12.7.[410]

7.257. With respect to the USDOC's selection of facts available for the Deduction from Taxable Income for Export Revenue programme, the USDOC selected the *same* rate (0.06%) for MMZ that it calculated (without resorting to facts available) for Ozdemir pertaining to the *same* programme in the *same* proceeding.[411] With respect to the Provision of Electricity for LTAR Programme and the Exemption from Property Tax Programme the USDOC selected subsidy rates for similar subsidy programmes in other proceedings. In particular, for the Provision of Electricity for LTAR, the USDOC selected a subsidy rate calculated for the Provision of HRS for LTAR in the *OCTG from Turkey* investigation, a rate that was in turn based on facts available and an adverse inference.[412] For the Exemption from Property Tax Programme, the USDOC selected a subsidy rate from the investigation of *CWP from Turkey* that was calculated for an export tax rebate programme in effect in 1986.[413] According to the United States, the USDOC matched the Provision of Electricity for LTAR and Exemption from Property Tax Programmes to similar programmes "based on program type and treatment of the benefit" from other Turkish countervailing duty proceedings.[414]

7.258. The USDOC Final Determination stated the following:

> The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the result is sufficiently adverse "as to effectuate the statutory purposes of the AFA rule to induce respondents to provide the Department with complete and accurate information in a timely manner." The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." In selecting AFA rates for programs on which a company has failed to fully cooperate, it is the Department's practice to use the highest calculated program-specific rates determined for a cooperating respondent in the same investigation, or, if not available, rates calculated in prior CVD cases involving the same country. Specifically, the Department applies the highest calculated rate for the identical program in the investigation if a responding company used the identical program, and the rate is not zero. If there is no identical program match within the investigation, or if the rate is zero, the Department uses the highest non-de minimis rate calculated for the identical program in another CVD proceeding involving the same country. If no such rate is available, the Department will use the highest non-*de minimis* rate for a similar program (based on treatment of the benefit) in another CVD proceeding involving the same country. Absent an above-de minimis subsidy rate calculated for a similar program, the Department applies the highest calculated subsidy rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies.
>
> In applying AFA to MMZ and Ozdemir, we are guided by the Department's methodology detailed above.[415]

7.259. Thus, the USDOC selected the *highest* calculated programme-specific rates determined for a cooperating respondent in the same investigation for the Deduction from Taxable Income for Export Revenue, and the *highest* subsidy rates calculated in prior CVD cases involving Turkey for the Provision of Electricity for LTAR and Exemption from Property Tax. In response to the Panel's question regarding the Provision of Electricity for LTAR, the United States confirmed that, for each category of subsidy programmes, the "USDOC noted the highest rate actually calculated".[416] In particular, the United States confirmed that the USDOC selected the 15.58% subsidy rate for the Provision of HRS for LTAR in the OCTG investigation instead of the 7.61% rate calculated for the

[410] Turkey's response to Panel question No. 52, para. 111.
[411] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 7.
[412] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 7.
[413] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 7.
[414] United States' first written submission, para. 202.
[415] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 6. (emphasis original; fns omitted)
[416] United States' response to Panel question No. 53, para. 153.

Provision of HRS for LTAR for MMZ in the HWRP investigation. The USDOC selected this rate because the latter was not the highest rate for a similar subsidy programme.[417]

7.260. We consider that the manner in which the USDOC selected the subsidy rates for the missing information in the HWRP proceeding does not comport with the legal standard as articulated by the Appellate Body in *US – Carbon Steel (India)* that "facts available" selected by the investigating authority must result from a process of reasoning and analysis. We note that this is not a situation when there were no other facts on the record for the USDOC to consider.[418] By selecting the highest subsidy rates to ensure that the result is sufficiently adverse "as to effectuate the statutory purposes of the AFA rule to induce respondents to provide the Department with complete and accurate information in a timely manner"[419], the USDOC failed to engage in an adequate and meaningful qualitative assessment as to which facts available might reasonably replace the missing necessary information. For this reason, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement.

7.261. In light of our finding that the USDOC failed to engage in a process of reasoning and evaluation in selecting the subsidy rates as "reasonable replacement" for the missing information in the HWRP investigation, we do not address Turkey's argument that the rates that the USDOC selected in the HWRP investigation have no connection with the "necessary information" missing from the record of that case.[420]

7.262. We therefore find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing to engage in an adequate and meaningful qualitative assessment, as to which facts available might reasonably replace the missing necessary information in the HWRP investigation.

7.5.5 Conclusions regarding Turkey's Article 12.7 claims

7.263. Turkey raised claims under Article 12.7 of the SCM Agreement regarding the USDOC's resort to facts available in connection with the OCTG, WLP and HWRP countervailing duty proceedings.

7.264. Turkey's claims in relation to the OCTG investigation concern the USDOC's selection of facts available regarding purchases of HRS by Borusan at two of its facilities. We find that Turkey has failed to establish that the USDOC acted inconsistently with Article 12.7 by failing to consider the difficulties experienced by Borusan in providing requested information in its questionnaire responses. However, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing to engage in a process of reasoning and evaluation in selecting facts available for missing price information for Borusan's Halkali and Izmit facilities, and in calculating the quantity of the HRS purchases at Halkali and Izmit facilities.

7.265. Regarding Turkey's claims in relation to the WLP investigation, we find that Turkey's panel request refers only to claims under Article 12.7 of the SCM Agreement in connection with the Provision of HRS for LTAR, and thus claims under Article 12.7 concerning other subsidy programmes are outside the Panel's terms of reference. We find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing to engage in a process of reasoning and evaluation of which facts available reasonably replace the missing necessary information in the WLP investigation for the Provision of HRS for LTAR.

7.266. Regarding Turkey's claims in relation to the HWRP investigation, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by failing to engage in a process of reasoning and evaluation in selecting the subsidy rates as reasonable replacements for the missing information, in connection with MMZ's and Ozdemir's use of certain subsidies.

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[417] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), pp. 6-7.

[418] For instance, we understand that there were subsidy rates for various programmes on the record, including the rate for the Provision of HRS for LTAR for MMZ in the HWRP investigation.

[419] HWRP CVD Final Determination Memorandum, (Exhibit TUR-46), p. 6.

[420] Turkey's statement at the first meeting of the Panel, paras. 68-70; second written submission, paras. 133-138.

7.6 Turkey's claims under Article 15.3 of the SCM Agreement in relation to the cumulative assessment of the effects of imports in the OCTG, WLP, HWRP, and CWP proceedings

7.6.1 Introduction

7.267. Turkey claims that the USITC has a practice of cumulating the effects of dumped and subsidized imports in assessing injury when anti-dumping and countervailing proceedings are brought against imports of the same product from the same country or countries (i.e. "cross-cumulation"). Turkey makes the following claims:

a. the practice of "cross-cumulating" the effects of imports in original investigations is inconsistent "as such" with Article 15.3 of the SCM Agreement;

b. the cross-cumulation of the effects of imports in the OCTG, WLP, and HWRP original investigations is inconsistent with Article 15.3 of the SCM Agreement;

c. the practice of "cross-cumulating" the effects of imports in sunset reviews is inconsistent "as such" with Article 15.3 of the SCM Agreement; and

d. the cross-cumulation of the effects of imports in the 2011 CWP sunset review is inconsistent with Article 15.3 of the SCM Agreement.

7.268. In its first written submission, the United States requested the Panel to make a preliminary ruling, excluding Turkey's challenge to the alleged practices of "cross-cumulation" in both original investigations and sunset reviews from the Panel's terms of reference.

7.269. In addressing Turkey's claims, we first address the United States' request for a preliminary ruling before turning to the parties' arguments regarding the merits of Turkey's claims.

7.6.2 Whether Turkey's panel request adds a challenge regarding alleged injury determination "practices" that were not the subject of Turkey's request for consultations

7.270. The United States has requested the Panel to rule that Turkey's panel request improperly includes measures and claims regarding alleged injury determination "practices" that were not the subject of consultations.

7.271. We addressed a parallel request that the United States made in Section 7.3.2.1 above, regarding whether Turkey's panel request includes an alleged benefit "practice" and related "as such" claim that was not the subject of Turkey's request for consultations. In addressing that request, we recalled that a "precise and exact identity"[421] is not required between the measures identified in the request for consultations and the measures identified in the panel request so long as a complainant does not "expand the scope"[422] or change the "essence" of the dispute.[423] We also recalled that the "legal basis" for a complaint in a panel request may reasonably evolve from the consultations request, so long as the addition of provisions does not have the effect of changing the essence of the complaint.[424] Based on the content of Turkey's request for consultations and panel request, we found that Turkey's panel request did not improperly expand the scope or essence of the dispute by including a new measure and claim in connection with the alleged benefit "practice".[425]

7.272. We consider that our reasoning applies *mutatis mutandis* in the present instance.

7.273. Among the measures at issue, Turkey's panel request refers to "certain practices followed by the United States in the identified countervailing duty proceedings related to the cumulation of subsidized and non-subsidized imports in the assessment of injury".[426] Regarding the OCTG, WLP, and HWRP original investigations at issue, Turkey's panel request states that "the [US]ITC's practice

[421] Appellate Body Report, *Brazil – Aircraft*, para. 132.
[422] Appellate Body Report, *US – Upland Cotton*, para. 293.
[423] Appellate Body Reports, *Argentina – Import Measures*, para. 5.9; *Mexico – Anti-Dumping Measures on Rice*, para. 138; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.
[424] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[425] See paras. 7.84-7.98 above.
[426] Turkey's panel request, para. 7.

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', as a practice, and as applied in this proceeding".[427] Regarding the CWP sunset review at issue, Turkey's panel request states that "the [US]ITC's 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', as a practice, and as applied in this proceeding".[428]

7.274. We recall that section (A) of Turkey's request for consultations, entitled "Specific Measures at Issue", provides as follows:

> This request for consultations concerns 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; Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes; and Circular Welded Carbon Steel Pipes and Tubes, as identified in Annex 1.
>
> These measures include the determination by the United States to initiate the identified countervailing duty proceedings, the conduct of those proceedings, any preliminary or final countervailing duty or injury determinations issued in those proceedings, any definitive countervailing duties imposed as a result of those proceedings, as well as any notices, annexes, memoranda, orders, amendments, or other instruments issued by the United States, and related practices, in connection with the measures identified in Annex 1.[429]

7.275. As explained in Section 7.3.2.1 above, we found that the language in the first paragraph only identifies the preliminary and final countervailing duty measures that the United States imposed on imports of OCTG, WLP, HWRP, and CWP, as identified in Annex 1.[430] We observed that the second paragraph also refers to the preliminary and final countervailing duty measures imposed in the four challenged proceedings, but also refers to "related practices" in connection with the measures identified in Annex 1. While we did not find the term "related practices" to be particularly clear within this paragraph, we analysed whether the language elsewhere in Turkey's consultations request provides a sufficient basis for considering particular measures to be covered by our terms of reference.[431]

7.276. Concerning the injury determinations at issue, we note that section (B) of Turkey's request for consultations, entitled "Legal Basis of the Complaint" provides as follows in part:

> Turkey considers that the measures identified above, and in Annex 1, are inconsistent with the United States' obligations under the WTO Agreements. Turkey's concerns are particularly focused on, though not necessarily limited to, the following aspects of the measures and underlying administrative proceedings:
>
> …
>
> 5. Injury Determination: The United States' determination of injury based on cumulated imports, including imports from countries not subject to countervailing duty investigations or reviews, which is inconsistent with Article 15.3 of the SCM Agreement.

[427] Turkey's panel request, paras. 8.(A).5.b, 8.(B).4.b, and 8.(C).4.b.
[428] Turkey's panel request, para. 8.(D).3.b.
[429] Fns omitted.
[430] Annex 1 lists certain documents for initiation; preliminary, post-preliminary, final, and amended final determinations; and countervailing duty orders as well as related decision memoranda, for each of the respective OCTG, WLP, and HWRP investigations, and the CWP review at issue.
[431] In this regard, we recall that the Appellate Body has made clear that a panel should view the request for consultations as a whole when determining whether the language of the request provides a sufficient basis for considering particular measures are covered by a panel's terms of reference. (Appellate Body Reports, *Argentina – Import Measures*, para. 5.14 (referring to Appellate Body Report, *US – Upland Cotton*, para. 291)).

...

> Turkey considers that the United States' administrative proceedings and measures are inconsistent with Article VI:3 of the GATT 1994, Articles 10, 19.4, and 32.1 of the SCM Agreement, and the specific provisions cited above. Turkey's concerns relate to both the aspects of the measures and underlying administrative proceedings cited above as well as ongoing practices applied in administrative proceedings more generally.

7.277. This excerpt also sets out that Turkey's concerns are focused on the United States' "Injury Determination" in respect of the four proceedings. In addition, the end of this excerpt specifies that "Turkey's concerns relate to both the aspects of the measures and underlying administrative proceedings cited above *as well as ongoing practices applied in administrative proceedings more generally*".[432]

7.278. Based on the inclusion of the reference to "ongoing practices applied in administrative proceedings more generally", as consistent with our approach in Section 7.3.2.1 above, we find that a reasonable reading of section (B) discussing the "Legal Basis of the Complaint" indicates that Turkey's concerns relate not only to preliminary and final countervailing duty measures imposed in the four challenged proceedings, but also to ongoing practices applied in connection with the different aspects of the identified "legal basis" of Turkey's consultations request. One of these aspects concerns "[t]he United States' determination of injury based on cumulated imports, including imports from countries not subject to countervailing duty investigations or reviews".

7.279. Accordingly, we do not consider that Turkey's inclusion of "practices" related to the cumulation of subsidized and non-subsidized imports in the assessment of injury in its panel request improperly expanded the scope or changed the essence of the dispute. Therefore, we reject the United States' request to exclude the alleged injury determination practice measures concerning original investigations and sunset reviews from our terms of reference. For the same reasons as set out in Section 7.3.2.1 above, we also reject the United States' request to exclude Turkey's "as such" claims in relation to the alleged injury determination practices from our terms of reference, as the United States' sole basis for arguing that Turkey's corresponding "as such" claims are outside our terms of reference is that the alleged injury determination practice measures are not within the terms of reference.[433]

7.280. We will therefore consider Turkey's claim in respect of "the [US]ITC's practice of 'cross-cumulating' subsidized and non-subsidized imports, with respect to which antidumping or countervailing duty petitions are filed on the same day".[434]

7.6.3 Turkey's claims concerning the cumulation of subsidized and dumped, non-subsidized imports in original countervailing investigations

7.281. We next consider Turkey's claims raised in the context of original investigations. Turkey claims that the USITC's "practice of 'cross-cumulating' subsidized and non-subsidized imports" in assessing injury in original investigations is inconsistent "as such" with Article 15.3 of the SCM Agreement. Turkey also claims that the USITC cumulated subsidized and dumped, non-subsidized imports in the OCTG, WLP, and HWRP original investigations inconsistently with Article 15.3 of the SCM Agreement.[435]

7.282. Article 15.3 of the SCM Agreement reads:

> Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de*

[432] Turkey's consultations request, p. 2. (emphasis added)
[433] We recall that the United States argued that the issue "is not that Turkey described its claims with respect to the alleged practices 'as such' claims in its panel request, but that Turkey failed to identify those alleged measures in its consultations request altogether". (United States' opening statement at the first meeting of the Panel, para. 8).
[434] Turkey's panel request, paras. 8.(A).5.b, 8.(B).4.b, and 8.(C).4.b.
[435] Turkey's first written submission, paras. 228-230, 343-344, and 456-457.

> *minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

7.283. Turkey submits that "the Appellate Body explained, in no uncertain terms, that there is 'no basis in the text of Article 15.3 of the SCM Agreement for cumulatively assessing the effects of subsidized imports with those of non-subsidized imports.'"[436] Furthermore, Turkey argues that "the Appellate Body interpreted Article 15.3 in *US – Carbon Steel (India)* and found that '[t]he text is clear in stipulating that *being subject to countervailing duty investigations* is a prerequisite for the cumulative assessment of the effects of imports under Article 15.3' and that 'the effects of imports *other than [] subsidized imports* must not be incorporated in a cumulative assessment pursuant to Article 15.3'". [437] Consequently, Turkey submits that the USITC's "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", as a practice, and as applied in the OCTG, WLP, and HWRP proceedings.[438]

7.284. The United States argues that the Panel must reject Turkey's claims because Turkey "has failed to make its legal case" [439] under Article 15.3 of the SCM Agreement. According to the United States, Turkey "has failed to engage in any analysis of Article 15.3 that would allow that burden to be met", in particular by "provid[ing] no interpretation of the text, in context, of Article 15.3, or of the object and purpose of the SCM Agreement".[440] The United States submits that simply quoting statements made by the Appellate Body in a previous dispute is not a sufficient basis on which to make a legal showing.[441] The United States explains:

> 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. It is not for the Panel to supply evidence or arguments necessary to make out a claim for a party. 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.[442]

7.285. We reject the United States' argument that Turkey cannot establish a *prima facie* case by referring to the Appellate Body's interpretation in a previous dispute. A panel's task is to ascertain and apply the relevant law to the facts and evidence before it in making an objective assessment of the matter as required under Article 11 of the DSU. [443] Turkey requests us to follow the Appellate Body's interpretation of Article 15.3 in *US – Carbon Steel (India)* in resolving its claim. We recall that panels may take into account the reasoning followed in prior adopted panel and Appellate Body reports when resolving similar legal issues.[444] In this respect, we note that the panel and the Appellate Body in *US – Carbon Steel (India)* were confronted with the same interpretative issue that is pending before this Panel: whether Article 15.3 of the SCM Agreement permits the cumulation of subsidized and non-subsidized imports in the assessment of injury in original countervailing duty investigations. We therefore find it appropriate to consider Turkey's reliance on the Appellate Body's interpretation of Article 15.3 of the SCM Agreement in our objective assessment of Turkey's claim in this dispute.

7.286. Setting aside the alleged failure to make out its legal case, the United States argues that Turkey's claims must fail because a proper interpretation of Article 15.3 reveals that nothing in the

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[436] Turkey's first written submission, para. 227 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.593).

[437] Turkey's first written submission, para. 231 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.579 (emphasis added)). See also, first written submission, paras. 345 and 458.

[438] Turkey's panel request, paras. 8.(A).5.b, 8.(B).4.b, and 8.(C).4.b.

[439] United States' first written submission, para. 252.

[440] United States' first written submission, paras. 252–257; second written submission, para. 191.

[441] United States' second written submission, para. 192.

[442] United States' second written submission, para. 192.

[443] Appellate Body Report, *EC – Hormones*, para. 156.

[444] Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 108-109. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

text of that provision prohibits the cumulation of subsidized imports with non-subsidized imports that are dumped.[445]

7.287. The United States submits that Article 15.3 of the SCM Agreement is silent on whether the effects of subsidized imports may be cumulated with the effects of non-subsidized imports that are dumped and such silence cannot be read as a prohibition of the cumulative assessment of dumped and subsidized imports in injury assessments.[446] The United States also argues that a prohibition on cumulation of subsidized and non-subsidized, dumped imports would not allow an investigating authority to capture the combined effect of dumped and subsidized imports causing simultaneously injury to the same domestic industry.[447] Finally, the United States submits that, pursuant to Article VI:6(a) of the GATT 1994, a Member shall not impose anti-dumping 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".[448] In the United States' view, this provision provides important context to interpret Article 15.3 of the SCM Agreement. In particular, the expression "as the case may be" contemplates the possibility for an investigating authority to cumulatively assess the injurious effects of dumped and subsidized imports.[449]

7.288. We note that the United States raised these same arguments before the panel and the Appellate Body in *US – Carbon Steel (India)* concerning an "as such" challenge against 19 U.S.C. § 1677(7)(G), the provision in US law governing cumulative assessment of imports in injury determinations.[450] The United States further argues in this dispute that reliance on the Appellate Body Report in *US – Carbon Steel (India)* would have the Panel read the cumulation provisions of the Anti-Dumping Agreement and the SCM Agreement "in wilful isolation" from each other, disregarding the relevant context provided by Article VI of the GATT 1994.[451] We disagree with the United States' view. As we explain below, the panel and the Appellate Body in *US – Carbon Steel (India)* interpreted the text of Article 15.3 in the context of the SCM Agreement, the Anti-Dumping Agreement (in particular, in the context of Article 3.3 concerning cumulative assessment of dumped imports) and Article VI:6(a) of the GATT 1994. In making our own objective assessment of the matter before us, 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 their reasoning as our own in resolving Turkey's claim in this dispute.

7.289. We recall that, before the panel and the Appellate Body in *US – Carbon Steel (India)*, India argued that 19 U.S.C. § 1677(7)(G) requires the USITC to assess cumulatively the effects of subsidized imports with the effects of non-subsidized imports subject to anti-dumping investigations, and is therefore inconsistent with Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.[452] In its interpretation of Article 15.3, the panel in *US – Carbon Steel (India)* found that imports from more than one country being "simultaneously subject to countervailing duty investigations" is a necessary precondition for a cumulative assessment to be undertaken consistently with that provision.[453] On this basis, the panel found that the effects of imports that are not subject to a countervailing duty investigation cannot be assessed cumulatively with the effects of imports that are subject to a countervailing duty investigation. In reaching this conclusion, the panel dismissed the United States' argument that Article 15.3 of the SCM Agreement does not address the permissibility of "cross-cumulation".[454] In the view of the panel, that argument could not be reconciled with the text of the provision.[455] We share this view.

7.290. The panel found further support to its interpretation of Article 15.3 of the SCM Agreement in other paragraphs of Article 15 as well as in Article VI:6(a) of the GATT 1994. The panel found that

[445] United States' first written submission, paras. 251-263; second written submission, paras. 193-198.
[446] United States' first written submission, paras. 260-263; second written submission, para. 195.
[447] United States' first written submission, para. 265; second written submission, para. 196.
[448] United States' first written submission, para. 273; second written submission, para. 197.
[449] United States' first written submission, paras. 274-277; second written submission, para. 197.
[450] United States' first written submission, paras. 264-277; second written submission, paras. 195-198.
[451] United States' first written submission, paras. 270-271 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 571).
[452] Panel Report, *US – Carbon Steel (India)*, paras. 7.324 and 7.328; Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.605-4.606
[453] Panel Report, *US – Carbon Steel (India)*, para. 7.341.
[454] Panel Report, *US – Carbon Steel (India)*, para. 7.342.
[455] Panel Report, *US – Carbon Steel (India)*, para. 7.343.

the consistent reference to "subsidized imports" throughout Article 15 of the SCM Agreement limits the scope of imports that can be cumulated to assess injury.[456] The panel also noted that Article VI:6(a) concerns the effects of subsidization "or" dumping, "as the case may be", and that the use of the conjunction "or" implies that the provision addresses injury caused either by dumping or by subsidization, and not the effects of dumping and subsidization cumulatively.[457] Once again, we share this view.

7.291. The Appellate Body upheld the panel's finding that "cross-cumulation" is inconsistent with Article 15.3 of the SCM Agreement as well as Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.[458] On appeal, the United States had claimed that the panel erred in rejecting its argument that Article 15.3 of the SCM Agreement is silent on the issue of whether cross-cumulation is permitted.[459] To the contrary, the Appellate Body found that Article 15.3 of the SCM Agreement is not silent on the issue. In particular, the Appellate Body explained that Article 15.3 of the SCM Agreement stipulates that an investigating authority may cumulatively assess imports from countries that are simultaneously subject to countervailing duty investigations to determine injury, provided that the conditions established in the last clause of the provision are satisfied.[460] The Appellate Body also sided with the panel's contextual analysis of Article 15 of the SCM Agreement, pursuant to which the consistent reference to "subsidized imports" throughout the various paragraphs of Article 15 supports the understanding that the cross-cumulation of imports in injury assessments is prohibited.[461]

7.292. We note that the panel and the Appellate Body both rejected the United States' view that Article 3.3 of the Anti-Dumping Agreement as interpreted by the Appellate Body in *EC – Tube and Pipe Fittings* and *US – Oil Country Tubular Goods Sunset Reviews* supported the argument that cross-cumulation is permitted under the SCM Agreement.[462] The Appellate Body, for instance, noted that neither case involved the cumulation of the effects of dumped products with those of subsidized, non-dumped products, but concerned instead the cumulation of the effects of dumped imports from several countries. Thus, the Appellate Body concluded – and we agree – that the rationale of the findings in those disputes does not apply to the cumulation of subsidized and dumped, non-subsidized imports.[463]

7.293. The panel and the Appellate Body also rejected the United States' argument that Article 15 must allow an investigating authority to take account of the effects that all unfairly traded imports are having on a domestic industry.[464] Contrary to what the United States had argued, the Appellate Body noted that Article 15 does not contain the phrase "unfairly traded products" or similar language. Accordingly, the Appellate Body saw "no basis in the text of Article 15 for the proposition that, for the purposes of an injury determination pursuant to Article 15, an investigating authority may consider a single group of 'unfairly traded imports' rather than considering 'imports simultaneously subject to countervailing duty investigations' … as stipulated in Article 15.3".[465] In addition, the Appellate Body recalled the panel's finding that the analysis under Article 15 concerns injury caused by "subsidized imports" and not generically, by unfairly traded imports.[466] On this basis, the Appellate Body upheld the panel's findings and rejected the United States' argument that an analysis focusing solely on the effects of either dumped or subsidized imports alone would prevent the investigating authority from adequately taking into account the injurious effects of all unfairly traded imports, consequently frustrating the purpose of the SCM Agreement.[467] We also agree with the panel's and the Appellate Body's assessments in this regard.

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[456] Panel Report, *US – Carbon Steel (India)*, para. 7.346.
[457] Panel Report, *US – Carbon Steel (India)*, paras. 7.347-7.348.
[458] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.629.
[459] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.588.
[460] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.589.
[461] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.580-4.585 and 4.591.
[462] Panel Report, *US – Carbon Steel (India)*, paras. 7.352-7.356; Appellate Body Report, *US – Carbon Steel (India)*, para. 4.593.
[463] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.593. See also Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 116; and *US – Oil Country Tubular Goods Sunset Reviews*, paras. 294-300.
[464] Panel Report, *US – Carbon Steel (India)*, para. 7.355; Appellate Body Report, *US – Carbon Steel (India)*, para. 4.594.
[465] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.594.
[466] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.596.
[467] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.595.

7.294. Finally, we share the panel's assessment that Article VI:6(a) of the GATT 1994 does not support a reading that cumulation of the effects of subsidized and dumped, non-subsidized imports is consistent with the provisions of Article 15 of the SCM Agreement.[468] The Appellate Body agreed with this view. Like the panel, in examining the phrase "the effect of the dumping or subsidization, as the case may be" in Article VI:6(a) within the structure of the overall provision, the Appellate Body found that the use of "or" or the singular "the effect" indicates that the provision refers separately to "dumping" or to "subsidization". Therefore, the Appellate Body agreed with the panel that the phrase "as the case may be" refers to one of two alternatives expressly listed in this provision only, and does not permit investigating authorities to cumulatively assess the effects of dumped and subsidized imports at the same time.[469]

7.295. In light of the above, we find the panel's and the Appellate Body's reasoning regarding the interpretation of Article 15.3 of the SCM Agreement in *US – Carbon Steel (India)* to be persuasive. We therefore adopt this reasoning as our own in making our own objective assessment of the matter before us. We find 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. We therefore find that Article 15.3 of the SCM Agreement does not permit the cumulative assessment of the effects of subsidized imports with the effects of dumped, non-subsidized imports in original countervailing investigations. We will now evaluate Turkey's "as such" and as applied claims in connection with Article 15.3 of the SCM Agreement.

7.6.3.1 Whether the USITC cumulated subsidized and dumped, non-subsidized imports in the OCTG, WLP, and HWRP original investigations inconsistently with Article 15.3 of the SCM Agreement

7.296. In the final injury determination in the OCTG investigation, Turkey submits that the USITC "cumulated imports of OCTG from countries subject to both antidumping and countervailing duty investigations (India and Turkey) with imports from countries subject to only antidumping investigations (Korea, Ukraine, and Vietnam)".[470] In the final injury determination in the WLP investigation, Turkey submits that the USITC cumulated "dumped and subsidized imports from Turkey with dumped imports from Korea".[471] In the final injury determination in the HWRP investigation, Turkey submits that the USITC cumulated dumped and subsidized imports from Turkey "with imports from countries subject to only antidumping investigations, Mexico and Korea".[472]

7.297. In each of the investigations, petitioners requested the launch of anti-dumping and countervailing investigations on the same day.[473] In the OCTG investigation, the USITC found that imports from the Philippines, Chinese Taipei, and Thailand were negligible, and only considered whether to cumulate subsidized and dumped, non-subsidized imports from India, Korea, Turkey, Ukraine, and Viet Nam.[474] The USITC then assessed the conditions of competition between subject imports and like domestic products to determine whether subject imports from each source competed with the domestic like products.[475] In each of the challenged investigations, the USITC was satisfied that the statutory conditions were met, and as a consequence, the USITC cumulated non-negligible imports from countries subject to both countervailing and anti-dumping investigations with imports from countries subject to anti-dumping investigations only. The United States does not

[468] Panel Report, *US – Carbon Steel (India)*, paras. 7.347-7.350.
[469] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.599.
[470] Turkey's first written submission, para. 228 (referring to Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 21).
[471] Turkey's first written submission, para. 344 (quoting Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), fn 37).
[472] Turkey's first written submission, para. 456 (referring to USITC HWRP Final Determination, (Exhibit TUR-38), pp. 10-13).
[473] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 21; Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), p. 10; and USITC HWRP Final Determination, (Exhibit TUR-38), p. 12.
[474] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 23.
[475] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), pp. 21-23; Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), pp. 10-12; and USITC HWRP Final Determination, (Exhibit TUR-38), pp. 12-13.

contest that the USITC cumulated subsidized and non-subsidized imports when assessing material injury in each of the investigations.

7.298. The evidence on the record shows that the USITC cumulated subsidized and dumped, non-subsidized imports in all three investigations under examination. In the OCTG investigation, the USITC cumulated imports from countries subject to both countervailing and anti-dumping investigations (India and Turkey) with imports from countries subject to anti-dumping investigations only (Korea, Ukraine, and Viet Nam).[476] In the WLP investigation, the USITC cross-cumulated imports from a country which was subject to both countervailing and anti-dumping investigations (Turkey) with imports from a country subject only to an anti-dumping investigation (Korea).[477] In the HWRP investigation, the USITC cross-cumulated imports from a country which was subject to both countervailing and anti-dumping investigations (Turkey) with imports from countries subject only to anti-dumping investigations (Mexico and Korea).[478]

7.299. We have found above[479], consistent with the panel and the Appellate Body's interpretation in *US – Carbon Steel (India)*, that Article 15.3 does not authorize the USITC to assess cumulatively the effects of imports that are not subject to simultaneous countervailing duty investigations with the effects of imports that are subject to countervailing duty investigations.

7.300. We therefore uphold Turkey's claim that the USITC cross-cumulated imports in the OCTG, WLP, and HWRP original investigations in a manner inconsistent with Article 15.3 of the SCM Agreement.

7.6.3.2 Whether the USITC has a practice of cumulating subsidized and dumped, non-subsidized imports in original investigations that is inconsistent "as such" with Article 15.3 of the SCM Agreement

7.301. Turkey claims that the USITC "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", in cases when petitions are filed or investigations are initiated on the same day.[480] Turkey claims that this "practice" is "as such" inconsistent with Article 15.3 of the SCM Agreement.

7.302. Turkey argues that the USITC itself considers that it has such a "practice", "which it applies systematically in its injury determination in investigations", and which it considers "to be required by U.S. law, specifically the injury statute, 19 U.S.C. § 1677(7)(G), and judicial decisions interpreting the injury statute".[481] Turkey therefore argues that this practice should be considered "a rule or norm of general application, subject to challenge 'as such'".[482]

7.303. The United States argues that Turkey failed to identify the precise content of the contested practice, but used instead language that "mimics" the US statute governing cumulation, without indicating that subsidized and dumped imports "must" be cumulated.[483] The United States argues that Turkey's citation to the USITC's statements affirming a "practice" of cross-cumulating in two determinations is not sufficient to establish the existence of a practice of general and prospective application.[484] In any event, according to the United States, the fact that an authority may have

[476] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 23.
[477] Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), p. 13.
[478] USITC HWRP Final Determination, (Exhibit TUR-38), p. 13.
[479] See above, para. 7.295.
[480] Turkey's first written submission, para. 222.
[481] Turkey's first written submission, para. 224 and fn 526 (referring to USITC Final Determination on circular welded carbon-quality steel pipe from India, Oman, the United Arab Emirates, and Vietnam, (Turkey has submitted this determination as Exhibit TUR-187); Softwood Lumber from Canada: Final USITC Determination; and Court of Appeals for the Federal Circuit decision, Bingham & Taylor v. United States (Turkey has submitted this decision as Exhibit TUR-205)). See also statement at the first meeting of the Panel, para. 89.
[482] Turkey's first written submission, paras. 223-224 (referring to Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 19); paras. 342-343 (referring to Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), p. 9); and paras. 455-456 (referring to USITC HWRP Final Determination, (Exhibit TUR-38), p. 10).
[483] United States' first written submission, para. 247.
[484] United States' first written submission, para. 248.

employed a practice in the past is not enough to assign to it "an independent operational existence", if that authority can depart from the practice by explaining the reasons for doing so.[485]

7.304. As set out in Section 7.3.3 above, we recall that prior panels and the Appellate Body have recognized that a "practice" may be challenged as a measure if (a) it is attributable to the responding Member; (b) its precise content can be described; and (c) it has general and prospective application.[486] The examination of whether a rule or norm has general and prospective application may vary from case to case.[487] In determining whether a measure has prospective application, complainants are not required to show with "certainty" that a measure will continue to apply in the future.[488] When prospective application is not sufficiently clear from the constitutive elements of the rule or norm, it may be demonstrated through a number of factors, including: the existence of an underlying policy that is implemented by the rule or norm; proof of systematic application of the challenged rule or norm; the extent to which the rule or norm provides administrative guidance for future conduct; and the expectations it creates among economic operators that the rule or norm will be applied in the future.[489]

7.305. As evidence of the challenged practice, Turkey refers to the USITC's statement that is contained in the OCTG, HWRP, and WLP final injury determinations, indicating that the USITC itself considers the challenged practice to be "required" by law:

> For purposes of evaluating the volume and price effects for a determination of material injury by reason of subject imports, section 771(7)(G)(i) of the Tariff Act requires the Commission to cumulate subject imports from all countries as to which petitions were filed … on the same day, if such imports compete with each other and with the domestic like product in the U.S. market.[490]

7.306. Turkey asserts that judicial decisions interpreting the injury statute, 19 U.S.C. § 1677(7)(G), require the USITC to cumulate imports that are subject to countervailing duty investigations with imports that are subject only to antidumping duty investigations, in cases when petitions are filed or investigations are initiated on the same day.[491]

7.307. The United States argues that the USITC's statements and Turkey's reference to the US Court of Appeals for the Federal Circuit regarding the interpretation of 19 U.S.C. § 1677(7)(G) do not support the existence of the alleged practice. Since Turkey has not challenged the statute, the United States argues that the measure is not within the Panel's terms of reference and it would not be appropriate to examine the US Court of Appeals for the Federal Circuit's interpretation of the statute to establish the existence of the alleged practice.[492] The United States also objects that Turkey's reference to a decision of the US Court of Appeals for the Federal Circuit is untimely and thus inadmissible evidence.[493] Moreover, the United States submits that the USITC's statements in

[485] United States' first written submission, para. 248 (referring to Panel Report, *US – Export Restraints*, para. 8.126).

[486] See paras. 7.119 and 7.120 above. See also Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.127; *US – Zeroing (EC)*, para. 198; and *Argentina – Import Measures*, para. 5.104.

[487] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.133.

[488] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.

[489] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132. See also Appellate Body Reports, *US – Zeroing (EC)*, paras. 198, 201, and 204-205; *US – Zeroing (Japan)*, paras. 85 and 88 (quoting Panel Report, *US – Zeroing (Japan)*, para. 7.52); and *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

[490] Turkey's first written submission, para. 223 (quoting Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 19); para. 343 (quoting Excerpt from USITC WLP Final Determination, (Exhibit TUR-116), p. 9); and para. 456 (quoting USITC HWRP Final Determination, (Exhibit TUR-38), p. 10).

[491] Turkey's first written submission, para. 224. In particular, Turkey cites the decision of the US Court of Appeals for the Federal Circuit in Bingham & Taylor v. United States, which Turkey argues demonstrates that the USITC has consistently applied the challenged practice since 1987. (Turkey's statement at the first meeting of the Panel, paras. 89 and 92).

[492] United States' second written submission, para. 187.

[493] United States' second written submission, para. 187.

relation to 19 U.S.C. § 1677(7)(G) simply reflects the content of the US statute governing cumulation, and does not require that subsidized and non-subsidized imports must be cumulated.[494]

7.308. We disagree with the United States' assessment of the evidence that Turkey has submitted. As we found in Section 7.6.3.1 above, in the OCTG, HWRP, and WLP investigations at hand, the USITC cumulated the injurious effects of subsidized and dumped, non-subsidized imports after determining that the statutory requirements for cumulation were met. The United States contends that the USITC's statements in the OCTG, HWRP, and WLP injury determinations do not demonstrate that the USITC will always "cross-cumulate" imports. However, the statements in these determinations demonstrate that the USITC considers that it is *required* to cross-cumulate imports whenever the statutory conditions are met. The evidence thus suggests that the USITC will necessarily follow the contested practice when these conditions are met.

7.309. In particular, in the OCTG and HWRP determinations the USITC has also stated that it has a "long-standing practice"[495] of cumulating imports subject to affirmative subsidy determinations with imports subject to affirmative dumping determinations, when the conditions for cumulation are otherwise met. In describing this "long-standing practice", the USITC referred to injury determinations in Circular Welded Carbon-Quality Steel Pipe from India, Oman, the United Arab Emirates, and Viet Nam and Softwood Lumber from Canada, and also referred to a domestic judicial decision, Bingham & Taylor v. United States.[496] The United States asks us not to consider the USITC's statements or the Bingham & Taylor v. United States decision, both because this evidence was submitted late in the proceeding and because it does not support Turkey's allegations.[497] However, the USITC's statement that it has a "long-standing practice" is contained in the OCTG and HWRP final injury determinations, which Turkey provided in connection with its first written submission. The USITC refers to Bingham & Taylor v. United States in connection with its observation that the USITC has a long-standing practice. We consider statements by the USITC as relevant evidence of the existence of the challenged practice. We also disagree that we are precluded from considering the USITC's own assessment that it has a "long-standing practice" of cumulating subsidized imports with dumped, non-subsidized imports when assessing injury in original investigations.

7.310. We recall that "as such" challenges are "serious" challenges.[498] In particular, the Appellate Body in *US – Zeroing (EC)* warned 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".[499] A party bringing an "as such" claim must submit sufficient evidence to demonstrate that the challenged measure is attributable to the responding Member, its precise content and that it is of general and prospective application. Such evidence may include proof of the systematic application of the challenged rule or norm.[500] In the circumstances before us, the USITC itself considers that it has a long-standing practice of cumulating the effects of imports subject to affirmative subsidy determinations with imports subject to affirmative dumping determinations, when the conditions for cumulation are otherwise met. We therefore consider that Turkey, in the present case, has presented evidence to establish *prima facie* the existence of a practice.

7.311. In response to questioning from the Panel, the United States also submitted four determinations as examples of cases in which it asserts that the USITC in its injury determinations

[494] United States' first written submission, paras. 246-247; second written submission, paras. 181 and 187.

[495] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 20; USITC HWRP Final Determination, (Exhibit TUR-38), p. 12 and fn 44.

[496] Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), fn 110.

[497] United States' second written submission, para. 187. Turkey referred to the Bingham & Taylor v. United States decision in its first written submission and at the first substantive meeting with the Panel. (Turkey's first written submission, fn 526; statement at the first meeting of the Panel, para. 89). Turkey submitted the Bingham & Taylor v. United States decision as Exhibit TUR-205 in response to questioning from the Panel following the first meeting. (Turkey's response to Panel question No. 57, para. 117).

[498] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

[499] Appellate Body Report, *US – Zeroing (EC)*, para. 196.

[500] Appellate Body Report, *US – Zeroing (EC)*, para. 198.

did not cumulate imports of subsidized products with non-subsidized imports subject to anti-dumping investigations initiated on the same day, when the conditions for cumulation were otherwise met.[501]

7.312. The examples that the United States provided, however, fail to rebut *prima facie* that the USITC has a practice of cross-cumulating imports. In each of the four examples, the USITC declined to consider imports from certain countries under investigation pursuant to statutory exceptions contained in 19 U.S.C. § 1677(7)(G)(ii). Pursuant to this provision, when assessing material injury, the USITC will not cumulate imports from (a) Israel, (b) countries concerning which injury determinations have been terminated because of a finding that the volume of imports is negligible, (c) countries concerning which the USDOC has made a preliminary negative anti-dumping or countervailing determination, and (d) beneficiary countries under the Caribbean Basin Economic Recovery Act (CBERA).[502] All that the United States' four examples prove is that the USITC excludes imports from *certain* countries from the injury assessment whenever one of the statutory exceptions applies. However, the USITC will still cumulate the effects of subsidized and dumped, non-subsidized imports from other countries in which petitions were filed, or investigations were initiated, on the same day.[503] This is exemplified in the OCTG final injury determination, in which the USITC excluded imports from certain countries from the investigation because they were negligible in volume. However, as we have found above, despite excluding certain imports from the Philippines, Chinese Taipei, and Thailand, the USITC cumulated imports subject to a countervailing duty investigation with imports subject only to anti-dumping investigations, specifically imports from Turkey, India, Korea, Ukraine, and Viet Nam.[504]

7.313. The United States has also objected to the Panel considering additional evidence submitted by Turkey in response to questioning from the Panel following the first meeting.[505] In its response, Turkey identified 36 determinations issued by the USITC between 1987 and 2017, in which it asserts that the USITC cumulated imports of subsidized products with imports subject to anti-dumping investigations initiated on the same day. The United States considers that the evidence is untimely and contrary to the Panel's Working Procedures.[506] However, as we found above that, on the basis of evidence submitted by Turkey in its first written submission, Turkey has demonstrated *prima facie* that the USITC has such a practice. Therefore, we do not need to address the United States' procedural objection.

7.314. In light of the foregoing, we find that Turkey has demonstrated that the USITC has a practice, in assessing injury in original investigations, of cumulating the effects of subsidized imports with those of dumped, non-subsidized imports from all countries as to which petitions were filed on the same day, if such imports compete with each other and with the like domestic product in the United States. We consider that this practice constitutes a rule or norm that has general and prospective application, as demonstrated based on the evidence before us.

7.315. We recall our conclusion above, consistent with the panel and the Appellate Body's interpretation in *US – Carbon Steel (India)*, that Article 15.3 does not authorize an investigating authority to assess cumulatively the effects of imports that are not subject to

[501] United States' response to Panel question No. 100, paras. 120-121.

[502] Turkey's comments on United States' response to Panel question No. 100, para. 47 and fn 91 (referring to USITC Preliminary Determination on certain cut-to-length steel plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia, (Exhibit TUR-243), p. 16 and fn 97).

[503] In three determinations the USITC did not cumulate imports from certain countries with imports from other sources because they were "negligible" in volume. (USITC Final Determination on stainless steel wire rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Chinese Taipei, (Exhibit TUR-242), pp. 9 and 12; USITC Preliminary Determination on certain cut-to-length steel plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia, (Exhibit TUR-243), p. 16; and Excerpt from USITC OCTG Final Determination, (Exhibit TUR-72), p. 21). In a fourth determination, the USITC applied two of the four statutory exceptions. (USITC Preliminary Determination on carbon and certain alloy steel wire rod from Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela, (Exhibit TUR-244), pp. 12 and 15).

[504] See above, para. 7.297.

[505] Turkey's response to Panel question No. 56, paras. 113-114; United States' response to Panel question No. 100, paras. 117-119.

[506] United States' second written submission, paras. 182-185. We recall that paragraph 7 of our Working Procedures requires that "[e]ach party shall submit all evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purpose of rebuttal, answers to questions or comments on answers provided by the other party."

simultaneous countervailing duty investigations, with the effects of imports that are subject to countervailing duty investigations.[507]

7.316. Accordingly, we find that the USITC's practice of "cross-cumulating" the effects of subsidized imports with those of dumped, non-subsidized imports in original investigations is "as such" inconsistent with Article 15.3 of the SCM Agreement.[508]

7.6.4 Turkey's claims concerning cumulation of subsidized and dumped, non-subsidized imports in sunset reviews

7.317. We next address Turkey's claims that the United States has a practice of cumulating subsidized and dumped, non-subsidized imports in sunset reviews, that is inconsistent with Article 15.3 of the SCM Agreement, both "as such" and as applied in the 2011 CWP sunset review.

7.318. The parties have both cited the findings in *US – Carbon Steel (India)* as relevant to the Panel's assessment. Turkey argues that we should rely on the Appellate Body's finding in *US – Carbon Steel (India)* that cumulation of the effects of subsidized imports with those of dumped, non-subsidized imports in injury determinations in original investigations is prohibited, and find that cumulation of subsidized imports with those of dumped, non-subsidized imports is also prohibited under Article 15.3 in sunset reviews.[509] Turkey argues that the prohibition of such cumulation in sunset reviews is supported by the context of Article 15.3 as well as the object and purpose of the SCM Agreement and relevant negotiating history.[510]

7.319. The United States argues that Turkey's reliance on the Appellate Body's findings in *US – Carbon Steel (India)* concerning original investigations is misplaced. The United States argues that the Panel should instead rely on the panel's findings in *US – Carbon Steel (India)* which directly addressed the question of whether the provisions of Article 15 apply in the context of likelihood-of-injury determinations in sunset reviews. The United States argues that the panel found sunset review proceedings to be governed by Article 21, and not by Article 15 of the SCM Agreement.[511] These findings were not appealed. The United States further requests the Panel to reject Turkey's argument that the object and purpose of the SCM Agreement and negotiating history surrounding cumulation in injury determinations support Turkey's claim.[512]

7.320. In response, Turkey argues that the United States mischaracterizes the panel's findings in *US – Carbon Steel (India)* as that panel only found that Article 21 does not require investigating authorities to redetermine injury pursuant to Article 15 in sunset reviews, and consequently, investigating authorities are not mandated to follow the provisions of Article 15, when making a likelihood-of-injury determination pursuant to Article 21.3 of the SCM Agreement.[513] Turkey argues, however, that the text of Article 15.3 in its context, in light of the object and purpose of the Agreement as well as the negotiating history makes it clear that it prohibits cumulating subsidized imports with dumped, non-subsidized imports.[514]

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[507] See above, para. 7.295.

[508] We note that Japan in its third-party written submission expressed concerns similar to those raised by the United States that dumped imports and simultaneous subsidized imports in a country often have cumulative price or volume effects on the relevant domestic industry, and that the combined effects of subsidized and dumped imports from several countries may not be adequately taken into account if cross-cumulation is prohibited. Thus, the injurious effects of the subsidized or dumped imports may not be properly recognized simply because of the difficulty in disassociating the injury attributable to dumped and subsidized imports. (Japan's third-party submission, paras. 42-43 (referring to United States' first written submission, paras. 276-277)). We understand the United States' and Japan's practical concern, recognizing that economic and statistical methodologies available to investigating authorities do not easily permit separating the injurious effects of dumped and subsidized imports.

[509] Turkey argues that the Appellate Body's findings under Article 15.3 of the SCM Agreement apply "with equal force" to likelihood of injury determinations in sunset reviews. (Turkey's first written submission, para. 558). See also second written submission, paras. 152-153; response to Panel question No. 62, paras. 133-140; and statement at the second meeting of the Panel, para. 103.

[510] Turkey's second written submission, paras. 153-154.

[511] United States' first written submission, paras. 285-291; second written submission, para. 208.

[512] United States' second written submission, paras. 214-216.

[513] Turkey's response to Panel question No. 62, para. 126.

[514] Turkey's response to Panel question No. 62, para. 127.

7.321. We consider that the findings of the panel in *US – Carbon Steel (India)* are directly relevant to our assessment of Turkey's claim that the United States has a practice of cumulating subsidized and dumped, non-subsidized imports in sunset reviews, and Turkey's claim that the USITC cumulated Turkish imports (subject to both anti-dumping and countervailing duty orders) with imports from other countries that were subject only to anti-dumping duty orders in the CWP sunset review.

7.322. In *US – Carbon Steel (India)*, the panel was asked to consider whether Sections 1675a(a)(7) and 1675b(e)(2) governing the cumulative assessment of imports in sunset reviews were inconsistent with Articles 15.1-15.5 of the SCM Agreement. The panel found that, for the "review" of a determination of injury that has already been established in accordance with Article 15, Article 21.3 does not require that injury again be determined in accordance with Article 15. Consequently, the panel concluded that investigating authorities are not bound by the provisions of Article 15 when making a likelihood-of-injury determination under Article 21.3.[515]

7.323. The panel based its findings in *US – Carbon Steel (India)* on the Appellate Body's analysis in *US – Oil Country Tubular Goods Sunset Reviews* concerning the distinction between determinations of injury in original investigations and likelihood-of-injury determinations in the context of the Anti-Dumping Agreement. As the panel noted in *US – Carbon Steel (India)*, Article 21.3 of the SCM Agreement, which authorizes investigating authorities to conduct sunset reviews in the countervailing duty context, is "substantially identical" to Article 11.3 of the Anti-Dumping Agreement and close parallels can also be drawn between Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement.[516] In addition, the panel observed that footnote 45 to Article 15 of the SCM Agreement, defining the term "injury" for the whole Agreement, is identical in language to footnote 9 to Article 3 of the Anti-Dumping Agreement.[517]

7.324. The panel in *US – Carbon Steel (India)* found central to its assessment the Appellate Body's finding in *US – Oil Country Tubular Goods Sunset Reviews* that *determinations of injury* under Article 3 of the Anti-Dumping Agreement are distinct processes from *determinations of likelihood of continuation or recurrence of injury* under Article 11.3. The Appellate Body observed in that case that Article 3 requires investigating authorities to determine whether the domestic industry is facing injury (or threat thereof) at the time of the original investigation, while Article 11.3 concerns the review of an anti-dumping order that is already in place to determine whether that same order should be continued or removed.[518] The Appellate Body concluded that investigating authorities are not mandated to follow the provisions of Article 3 of the Anti-Dumping Agreement when making a likelihood of injury determination.[519]

7.325. While noting that Footnote 9 to Article 3 of the Anti-Dumping Agreement defines "injury" for the entire Anti-Dumping Agreement[520] the Appellate Body considered that this *definition of injury* does not equate to the *determination of injury*, a process that is governed by Article 3 of the Anti-Dumping Agreement.[521] Accordingly, the Appellate Body concluded that the *definition of injury* provided in Footnote 9 applies throughout the Anti-Dumping Agreement, including Article 11.3 which concerns *determinations of likelihood of continuation or recurrence of injury*. However, it found that the various rules contained in Article 3 pertaining to the determination of injury in original investigations do not necessarily apply to determinations of likelihood of continuation or recurrence of injury.[522] The Appellate Body therefore found that not all of the provisions of Article 3 apply to sunset determinations under Article 11.3 of the Anti-Dumping Agreement, especially in the absence

[515] Panel Report, *US – Carbon Steel (India)*, para. 7.389.
[516] Panel Report, *US – Carbon Steel (India)*, paras. 7.389-7.390.
[517] Panel Report, *US – Carbon Steel (India)*, para. 7.390.
[518] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 279 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 124).
[519] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 280.
[520] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 276. Footnote 9 to Article 3 of the Anti-Dumping Agreement provides:

> Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

[521] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 277.
[522] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 277.

of cross-references linking the two provisions.[523] On this basis, the Appellate Body further concluded that an investigating authority is not mandated to follow the provisions of Article 3 when making a likelihood-of-injury determination.[524]

7.326. The panel in *US – Carbon Steel (India)* applied this reasoning *mutatis mutandis* in its assessment of whether the provisions of Article 15 applied in the context of determinations of likelihood of continuation or recurrence of injury under Article 21.3.[525] The panel clarified that an investigating authority is not required to follow the provisions of Article 15 when reviewing a determination of injury that has already been established based on those rules.[526] According to the panel, likelihood-of-injury determinations in sunset reviews are instead governed by Article 21.3 of the SCM Agreement.[527]

7.327. We share the view of the panel in *US – Carbon Steel (India)* as based upon the Appellate Body's analysis in *US – Oil Country Tubular Goods Sunset Reviews* of analogue provisions in the Anti-Dumping Agreement, that Article 21.3 does not require that injury again be determined in accordance with Article 15, and consequently an investigating authority is not mandated to follow the provisions of Article 15 when making a likelihood-of-injury determination under Article 21.3. We will therefore follow that interpretation and adopt it as our own in making our own objective assessment of Turkey's claim in this dispute.

7.328. In the CWP sunset review, the USITC conducted an analysis of the "likelihood of continuation or recurrence of material injury if the antidumping and countervailing duty orders [were to be] revoked".[528] Moreover, Turkey did not submit arguments or evidence that the USITC, as a matter of practice, redetermines injury (as opposed to assessing a likelihood of the continuation of injury) in sunset reviews. Therefore, consistent with the panel's findings in *US – Carbon Steel (India)*, we find that the USITC was not mandated to follow the provisions of Article 15 of the SCM Agreement when making such a likelihood-of-injury determination under Article 21 of the SCM Agreement.[529]

7.329. In light of our approach, we also do not consider that the Appellate Body's findings in *US – Carbon Steel (India)* regarding cumulation of subsidized and dumped, non-subsidized imports in injury determinations in original investigations are relevant to our assessment. We also do not consider it necessary to address Turkey's arguments concerning the object and purpose of the SCM Agreement and relevant negotiating history.[530]

7.330. Accordingly, we find that Turkey has failed to establish a basis for its "as such" and as applied claims that the United States cumulates subsidized and dumped, non-subsidized imports in sunset reviews in a manner that is inconsistent with Article 15.3 of the SCM Agreement. We therefore do not need to address whether the USITC has a practice of cumulatively assessing the effects of subsidized and dumped, non-subsidized imports in sunset reviews, nor do we make findings as to whether the USITC cumulatively assessed the effects of subsidized and dumped, non-subsidized imports in the 2011 CWP sunset review.

7.6.5 Conclusions regarding Turkey's claims under Article 15.3 of the SCM Agreement

7.331. We reject the United States' request for a ruling that Turkey's challenge to alleged practices in relation to the injury determinations in original investigations and sunset reviews, and "as such" claims associated with these practices, are outside the Panel's terms of reference.

7.332. Regarding Turkey's claims in relation to original investigations, we find that the United States cumulated subject imports from countries as to which countervailing and anti-dumping petitions were filed on the same day in the OCTG, WLP, and HWRP original investigations,

[523] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 278.
[524] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 280.
[525] See above, para. 7.323.
[526] Panel Report, *US – Carbon Steel (India)*, para. 7.389.
[527] Panel Report, *US – Carbon Steel (India)*, para. 7.392.
[528] CWP Final Sunset Review Determination, (Exhibit TUR-16), p. 27.
[529] Panel Report, *US – Carbon Steel (India)*, para. 7.389.
[530] We note in any event that Turkey's reference to the negotiating history does not change our assessment. At most, drafting documents submitted by Turkey only demonstrate that certain Members expressed concern with the issue of cross-cumulation of imports in injury assessments. (Turkey's response to Panel question No. 62, paras. 139-140).

inconsistently with Article 15.3 of the SCM Agreement. We also find that the USITC has a practice of cumulating the effects of subsidized imports with those of dumped, non-subsidized imports from all countries as to which petitions were filed on the same day, if such imports compete with each other and with the like domestic product in the United States. We find that this practice constitutes a rule or norm of general and prospective application that is inconsistent "as such" with Article 15.3 of the SCM Agreement.

7.333. Regarding Turkey's claims in relation to sunset reviews, we reject Turkey's claims that the United States acted inconsistently with Article 15.3 of the SCM Agreement, both "as such" as a practice and as applied in the 2011 CWP sunset review proceeding at issue, because an investigating authority is not mandated to follow the provisions of Article 15 of the SCM Agreement when making a likelihood-of-injury determination under Article 21 of the SCM Agreement.

7.7 Turkey's claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994

7.334. Turkey claims that the United States has acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 based on its substantive claims under Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.4, 12.7, 14(d) and 15.3 of the SCM Agreement.

7.335. Article 19.4 provides:

> No countervailing duty shall be levied[51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.
>
> [51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

7.336. The first sentence of Article VI:3 of the GATT 1994 provides in relevant part:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted …[.]

7.337. As reflected in its panel request, Turkey requests findings that the United States has violated Article 19.4 and Article VI:3 "[t]o the extent that the United States' practices described above are inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 12.7, 14(d) and 15.3 of the SCM Agreement".[531]

7.338. We recall that Turkey alleged two specific violations of Article 19.4 and Article VI:3 arising in connection with Article 12.7 claims in the WLP and HWRP investigations in its first written submission. In those investigations, Turkey claims that the USDOC applied countervailing duty rates that it had previously calculated for subsidy programmes in other investigations.[532] In addition to claiming violations of Article 12.7 by selecting these rates, Turkey argues that the United States also acted contrary to its obligations under Article 19.4 and Article VI:3 by applying countervailing duty measures in excess of the amount of subsidization attributable to either WLP or HWRP.[533]

7.339. In response to questioning from the Panel following the first meeting, Turkey characterized these Article 19.4 and Article VI:3 claims as merely "instances" when the USDOC inaccurately calculated the amount of subsidization. Turkey requested that we find Article 19.4 and Article VI:3

[531] Turkey's panel request, para. 9.

[532] In the WLP investigation, Turkey submits that "the USDOC applied countervailing duty rates it had previously calculated for 'similar' subsidy programs in investigations of pasta and OCTG and 'for any program identified in a Turkish CVD proceeding that could conceivably be used' by the respondent, Borusan". (Turkey's first written submission, para. 329). In the HWRP investigation, Turkey submits that "the USDOC applied a countervailing duty rate of 15.58 percent to MMZ for the alleged provision of electricity for less than adequate remuneration, a rate it had previously calculated based on the alleged provision of hot rolled steel for less than adequate remuneration in the OCTG investigation". (Turkey's first written submission, para. 441).

[533] Turkey's first written submission, paras. 329 and 441.

violations whenever we find a violation of Articles 1.1(a)(1), 1.1(b), 2.1(c), 14(d), and 15.3 of the SCM Agreement that results in the application of countervailing duties where no subsidy exists.[534]

7.340. The United States argues that Turkey's Article 19.4 and Article VI:3 arguments concerning the WLP and HWRP investigations constitute new, independent claims[535] that were not identified in Turkey's panel request, and has requested a ruling that these claims are outside our Panel's terms of reference.[536] The United States further requests that the Panel reject Turkey's Article 19.4 and Article VI:3 claims in connection with Articles 1.1(a)(1), 1.1(b), 2.1(c), 14(d), and 15.3, as these claims were only raised at a late stage of the proceedings.[537]

7.341. We note that Turkey considers that its Article 19.4 and Article VI.3 claims are dependent claims. Turkey essentially argues that a Member violates Article 19.4 and Article VI:3 to the extent that it imposes countervailing duties that are inconsistent with any provision of the SCM Agreement. In support, Turkey cites the Appellate Body's statement in *US – Countervailing Measures on EC Products* that, under Article 19.4 and Article VI:3, "investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation".[538]

7.342. The United States disputes that violations of the SCM Agreement may give rise to dependant violations of Article 19.4 and Article VI:3. According to the United States, Article 19.4 and Article VI:3 only prevent the imposition of duties in excess of the amount of the subsidy that is found to exist by an investigating authority. The United States submits that Turkey has not established that any countervailing duty levied had exceeded the relevant calculated amount.[539]

7.343. We are not persuaded by Turkey's argument that the inconsistencies that we have found in this dispute would necessarily give rise to dependant violations of Article 19.4 and Article VI:3. The relationship between the provisions at issue may be more complex than suggested by Turkey. However, in light of our findings above, we do not consider it necessary to address the potential complexities arising from Turkey's additional claims regarding the consistency of the USDOC's and USITC's actions with Article 19.4 and Article VI:3 to resolve the matter before us. We recall that, in order to secure a positive solution to a dispute, the Appellate Body has stated that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute".[540] Thus, panels need address only those claims "which must be addressed in order to resolve the matter in issue in the dispute", while panels "may refrain from ruling on every claim as long as it does not lead to a 'partial resolution of the matter'".[541] If Turkey's additional claims are genuinely dependant on other findings of WTO-inconsistency, we see little value in addressing such additional claims. We therefore refrain from doing so.

[534] Turkey's response to Panel question No. 63, para. 145.

[535] United States' first written submission, para. 35.

[536] United States' first written submission, paras. 34-35. The United States additionally argues that Turkey's Article 19.4 and Article VI:3 challenge with respect to the USDOC's application of countervailing duty rates calculated for "similar" subsidy programmes in the WLP proceeding, is a new, independent claim because "Turkey did *not* raise any arguments under Article 12.7 – the provision on which Turkey's claims under Articles 19.4 and VI:3 depend – regarding USDOC's use of such rates in its application of facts available". (United States' second written submission, para. 28 (emphasis original)).

[537] United States' second written submission, paras. 219-222.

[538] Turkey's first submission, paras. 329 and 441 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139).

[539] United States' first written submission, paras. 185-187.

[540] Appellate Body Reports, *Argentina – Import Measures*, para. 5.190. (emphasis original)

[541] Appellate Body Reports, *Argentina – Import Measures*, para. 5.190 (quoting Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 133; *US – Wool Shirts and Blouses*, DSR 1997:I, p. 339; *US – Tuna II (Mexico)*, paras. 403-404; and *US – Upland Cotton*, para. 732).

7.8 Turkey's claims under Articles 10 and 32.1 of the SCM Agreement

7.344. Turkey also alleges consequential violations of Articles 10 and 32.1 of the SCM Agreement based on its substantive claims under Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.4, 12.7, 14(d), and 15.3 of the SCM Agreement.[542]

7.345. Article 10 of the SCM Agreement reads:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.[543]

7.346. Article 32.1 of the SCM Agreement reads:

> No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

7.347. We recall our finding above that the United States acted inconsistently with the obligations under Articles 1.1(a)(1), 2.1(c), 2.4, 12.7, and 15.3 of the SCM Agreement. We note that the Appellate Body has treated claims under Articles 10 and 32.1 of the SCM Agreement as consequential claims in the sense that, when the essential elements of the subsidy within the meaning of Article 1 of the SCM Agreement are not present, or the right to impose a countervailing duty has not been established, the countervailing duties imposed are inconsistent with Articles 10 and 32.1 of the SCM Agreement.[544] Accordingly, to the extent that we have found that the USDOC's and USITC's determinations to be inconsistent with Articles 1.1(a)(1), 2.1(c), 2.4, 12.7, and 15.3 of the SCM Agreement, we also find that they are inconsistent with the United States' obligations under Articles 10 and 32.1 of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. Having considered the United States' request for preliminary rulings regarding the scope of these proceedings and the responses thereto, we conclude as follows:

a. Turkey's challenge to an alleged practice related to the rejection of in-country prices in the assessment of benefit is within the Panel's terms of reference.

b. Turkey's challenge to alleged practices related to the cumulation of subsidized and non-subsidized imports in the assessment of injury in original investigations and sunset reviews is within the Panel's terms of reference.

c. With respect to the WLP investigation, Turkey's claims under Article 12.7 of the SCM Agreement concerning subsidy programmes other than the Provision of HRS for LTAR are outside the Panel's terms of reference.

d. We decline to rule on the USDOC's initial OCTG final benefit determination in the context of addressing Turkey's as applied claims under Article 1.1(b) and Article 14(d) of the SCM Agreement, as we do not consider findings on this determination would aid in providing a positive resolution to the dispute.

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[542] Turkey's first written submission, paras. 169, 170, 192, 211, 220, 232, 320-321, 330, 338, 346, 430-431, 442, 451, 459, 542-543, 552, and 562.

[543] Fns omitted.

[544] Appellate Body Reports, *US – Softwood Lumber IV*, para. 143; *US – Anti-Dumping and Countervailing Duties (China)*, para. 358.

8.2. For the reasons set forth in this Report, we conclude as follows:

a. With respect to Turkey's claims under Article 1.1(a)(1) of the SCM Agreement relating to the OCTG, WLP, and HWRP countervailing duty investigations and the CWP sunset review, the United States acted inconsistently with Article 1.1(a)(1) because the USDOC failed to apply the correct legal standard and failed to provide a reasoned and adequate explanation for its public body determinations regarding Erdemir and Isdemir.

b. With respect to Turkey's "as such" claim under Article 14(d) relating to the OCTG countervailing duty investigation, Turkey has failed to establish that the USDOC has a practice, in assessing whether a good is provided for LTAR 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. Turkey has thus failed to establish that the United States acted inconsistently "as such" with Article 14(d) of the SCM Agreement.

c. With respect to Turkey's claims under Articles 2.1(c) and 2.4 of the SCM Agreement relating to the OCTG, WLP, and HWRP countervailing duty investigations and the CWP sunset review:

   i. The United States acted inconsistently with Articles 2.1(c) and 2.4 of the SCM Agreement because the USDOC failed to identify and clearly substantiate the existence of a so-called Provision of HRS for LTAR Programme based on positive evidence.

   ii. The United States acted inconsistently with Article 2.1(c) of the SCM Agreement because the USDOC failed to consider the extent of diversification of economic activities within Turkey; and failed to properly evaluate the length of time in which the so-called Provision of HRS for LTAR Programme had been in operation.

d. With respect to Turkey's claims under Article 12.7 of the SCM Agreement:

   i. Turkey has failed to establish that the United States acted inconsistently with Article 12.7 of the SCM Agreement in the OCTG investigation because the USDOC failed to take into account difficulties experienced by Borusan in providing requested information in its questionnaire responses.

   ii. The United States acted inconsistently with Article 12.7 of the SCM Agreement in the OCTG investigation because the USDOC failed to engage in a process of reasoning and evaluation in selecting facts available for missing price information for Borusan's Halkali and Izmit facilities and in calculating the quantity of the HRS purchases at Halkali and Izmit facilities.

   iii. The United States acted inconsistently with Article 12.7 of the SCM Agreement in the WLP investigation because the USDOC failed to engage in a process of reasoning and evaluation in selecting the subsidy rate as a "reasonable replacement" for the missing necessary information for the so-called Provision of HRS for LTAR Programme.

   iv. The United States acted inconsistently with Article 12.7 of the SCM Agreement in the HWRP investigation because the USDOC failed to engage in a process of reasoning and evaluation in selecting the subsidy rates as "reasonable replacements" for missing information relating to MMZ's and Ozdemir's use of certain subsidies.

e. With respect to Turkey's claims under Article 15.3 of the SCM Agreement:

   i. The United States acted inconsistently with Article 15.3 of the SCM Agreement by cumulatively assessing the effects of subsidized imports with those of dumped, non-subsidized imports for purposes of its injury determination in the OCTG, WLP, and HWRP countervailing duty investigations.

ii. The USITC has a practice, in original investigations, of cumulatively assessing the effects of subsidized imports with those of dumped, non-subsidized imports from all countries as to which petitions were filed on the same day, if such imports compete with each other and with the like domestic product in the United States. This practice is inconsistent "as such" with the United States' obligations under Article 15.3 of the SCM Agreement.

iii. Turkey has failed to establish that the United States acted inconsistently with Article 15.3 of the SCM Agreement, either "as such" or as applied in connection with the CWP sunset review, because an investigating authority is not mandated to follow the provisions of Article 15 of the SCM Agreement when making a likelihood-of-injury determination under Article 21 of the SCM Agreement.

f. As a consequence of the inconsistencies with Articles 1.1(a)(1), 2.1(c), 2.4, 12.7, and 15.3 of the SCM Agreement, the United States also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement.

g. We exercise judicial economy with regard to Turkey's claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the SCM Agreement, they have nullified or impaired benefits accruing to Turkey under that Agreement.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under the SCM Agreement.