



MOROCCO – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL FROM TURKEY

REPORT OF THE PANEL

*BCI deleted, as indicated [[***]]*

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| TUR-1 | Notice of initiation | Ministère marocain de l'industrie, du commerce et des nouvelles technologies, Avis public n° 01/13, Relatif à l'ouverture d'une enquête antidumping sur les importations de tôles d'acier laminées à chaud originaires ou exportés des pays de l'Union Européenne et de la Turquie (22 janvier 2013) (Moroccan Ministry of Industry, Trade and New Technologies, Public Notice No. 01/13, concerning the initiation of an anti-dumping investigation on imports of hot-rolled steel sheet originating in or exported from countries of the European Union and Turkey (22 January 2013)) |
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| Exhibit | Short title | Description |
|-----------------|--|--|
| TUR-9 (BCI) | Verification Report for Colakoglu | Ministère marocain de l'industrie, du commerce et des nouvelles technologies, Mission de vérification dans le cadre de l'enquête anti-dumping sur les importations de tôles d'acier laminées à chaud originaires de l'Union européenne et de la Turquie, Rapport de mission, Çolakoğlu Metalurji (22 avril 2014) (Moroccan Ministry of Industry, Trade and New Technologies, Verification mission as part of the anti-dumping investigation on imports of hot-rolled steel sheet originating in the European Union and Turkey, Mission Report, Çolakoğlu Metalurji (22 April 2014)) |
| TUR-10 | Draft final determination | Ministère marocain de l'industrie, du commerce et des nouvelles technologies, Rapport final de l'enquête antidumping sur les importations de tôles d'acier laminées à chaud originaires de l'Union Européenne et de la Turquie, Détermination finale de l'existence du dumping, du dommage et du lien de causalité (21 juin 2014) (Moroccan Ministry of Industry, Trade and New Technologies, Final report of the anti-dumping investigation on imports of hot-rolled steel sheet originating in the European Union and Turkey, Final determination of dumping, injury and causal link (20 June 2014)) |
| TUR-11 | Final determination | Ministère marocain de l'industrie, du commerce et des nouvelles technologies, Rapport final de l'enquête antidumping sur les importations de tôles d'acier laminées à chaud originaires de l'Union Européenne et de la Turquie, Détermination finale de l'existence du dumping, du dommage et du lien de causalité (12 août 2014) (Moroccan Ministry of Industry, Trade and New Technologies, Final report of the anti-dumping investigation on imports of hot-rolled steel sheet originating in the European Union and Turkey, Final determination of dumping, injury and causal link (12 August 2014)) |
| TUR-12 | Public notice of the final determination | Ministère marocain de l'industrie, du commerce et des nouvelles technologies, Avis public n° 16/14, Relatif à l'enquête antidumping sur les importations de tôles d'acier laminées à chaud originaires de l'Union Européenne et de la Turquie, Détermination finale de l'existence du dumping, du dommage et du lien de causalité et clôture de l'enquête (12 août 2014) (Moroccan Ministry of Industry, Trade and New Technologies, Public Notice No. 16/14 concerning the anti-dumping investigation on imports of hot-rolled steel sheet originating in the European Union and Turkey, Final determination of dumping, injury and causal link, and termination of the investigation (12 August 2014)) |
| TUR-13 | Joint Decision No. 3024-14 imposing definitive anti-dumping duties | Arrêté conjoint du ministre de l'industrie, du commerce, de l'investissement et de l'économie numérique et du ministre de l'économie et des finances n° 3024-14 du 30 chaoual 1435 (27 août 2014) portant application du droit antidumping définitif sur les importations de tôles en acier laminées à chaud originaires de l'Union européenne et de la Turquie, Bulletin Officiel, n° 6296 (2 octobre 2014) (Joint Order of the Minister of Industry, Trade, Investment and the Digital Economy and the Minister of the Economy and Finance No. 3024-14 of 30 Shawwal 1435 (27 August 2014) imposing a definitive anti-dumping duty on imports of hot-rolled steel sheet originating in the European Union and Turkey, Official Journal No. 6296 (2 October 2014)) |
| TUR-18 | | Letter dated 18 August 2014 from the MDCCE to the Government of Turkey |
| TUR-19 (BCI) | Erdemir Group's comments on the draft final determination | Erdemir Group's comments on the draft final determination (10 July 2014) |
| TUR-20 (BCI) | Colakoglu's comments on the draft final determination | Colakoglu's comments on the draft final determination (11 July 2014) |
| TUR-25 | Correspondence December 2013-January 2014 | Email correspondence from 31 December 2013 to 10 January 2014 between the MDCCE and Erdemir Group |
| TUR-26 (BCI) | Addendum to questionnaire response | Excerpt from Erdemir Group's addendum to questionnaire response (13 January 2014) |
| TUR-28 (BCI) | Letter of the CIB to the MDCCE | Letter dated 6 March 2014 from the Turkish Steel Exporters' Association to the MDCCE |

| Exhibit | Short title | Description |
|-----------------|--|--|
| TUR-29 (BCI) | Correspondence with customs and commercial documents from Erdemir Group | Email dated 24 June 2014 from Erdemir Group to the MDCCE; and email response dated 7 July 2014 from the MDCCE to Erdemir Group with customs and commercial documents |
| TUR-30 (BCI) | Correspondence with customs and commercial documents from Colakoglu | Email dated 24 June 2014 from Colakoglu to the MDCCE; and email response dated 7 July 2014 from the MDCCE to Colakoglu with customs and commercial documents |
| TUR-48 | Excerpt from USITC's preliminary determination on Lime Oil from Peru | Excerpt from USITC, Lime Oil from Peru, Determination of the commission in investigation No. 303-ta-16 (preliminary) under the tariff act of 1930, together with the information obtained in the investigation (July 1985) |
| TUR-51 | Maghreb Steel's financial report 2012 | Maghreb Steel, Mise à jour du dossier d'information relatif à l'exercice 2012 (Maghreb Steel, Update to the information file for the financial year 2012) |
| TUR-57 (BCI) | Turkey's explanation on Morocco's table of allegedly unreported transactions | Exhibit MAR-11 (BCI) with Turkey's explanation of the alleged discrepancy |
| TUR-58 (BCI) | Movement certificates and commercial invoices | Movement certificates and commercial invoices for line items 2-6, 9, 11-17, 29-32, and 35-40 of exhibit TUR-57 (BCI) |
| TUR-69 | | International Accounting Standard 7, <i>Statement of cash flows</i> (24 March 2010) |
| TUR-70 | | International Accounting Standard 1, <i>Presentation of Financial Statements</i> |
| MAR-8 | | Excerpt from Maghreb Steel's questionnaire response, section G |
| MAR-11 (BCI) | | Table of non-declared transactions |
| MAR-15 | | Excerpt from Maghreb Steel's questionnaire response, section F |

ABBREVIATIONS USED IN THIS REPORT

| Abbreviation | Description |
|---------------------------|---|
| Anti-Dumping Agreement | Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 |
| BCI | Business Confidential Information |
| C&F | cost and freight |
| CIB | Turkish Steel Exporters' Association |
| Colakoglu | Çolakoğlu Metalurji and Çolakoğlu Dis Ticaret A.S |
| DCE | Ministère de l'Industrie, du Commerce et des Nouvelles Technologies, Département du Commerce Extérieur |
| DSB | Dispute Settlement Body |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| Erdemir Group | Ereğli Demir ve Çelik Fabrikaları T.A.Ş and İskenderun Demir ve Çelik A.Ş (İSDEMİR) |
| GATT 1994 | General Agreement on Tariffs and Trade 1994 |
| Hot-rolled steel products | hot-rolled steel |
| MDCCE | Ministère délégué auprès du Ministre de l'Industrie, du Commerce, de l'Investissement et de l'Économie Numérique chargé du Commerce Extérieur |
| SCM Agreement | Agreement on Subsidies and Countervailing Measures |
| USITC | United States 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 |
| WTO | World Trade Organization |

1 INTRODUCTION

1.1 Complaint by Turkey

1.1. On 3 October 2016, Turkey requested consultations with Morocco pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 6 of the Agreement on Import Licensing Procedures with respect to the measures and claims set out below.¹

1.2. Consultations were held on 18 and 28 November 2016, but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 12 January 2017, Turkey requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU with standard terms of reference.² At its meeting on 20 February 2017, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Turkey, 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/DS513/2 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 8 May 2017, Turkey requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 17 May 2017, the Director-General accordingly composed the Panel as follows:

Chairperson: Ms Usha Dwarka-Canabady
Members: Mr Gustav Brink
Mr René Guilherme da Silva Medrado

1.6. China, Egypt, the European Union, India, Japan, Kazakhstan, the Republic of Korea, Oman, the Russian Federation, Singapore, the United Arab Emirates, and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consulting the parties, the Panel:

- a. adopted its Working Procedures⁵ and timetable on 22 August 2017;
- b. revised the timetable on 4 December 2017, on 15 May 2018, and on 4 July 2018; and
- c. adopted, on 22 August 2017, additional procedures for the protection of Business Confidential Information (BCI).⁶

1.8. The Panel held a first substantive meeting with the parties on 29 and 30 November 2017. A session with the third parties took place on 30 November 2017. The Panel held a second substantive

¹ Request for consultations by Turkey, WT/DS513/1, G/ADP/D114/1, G/L/1152, G/LIC/D/51.

² Request for the establishment of a panel by Turkey, WT/DS513/2.

³ DSB, Minutes of the meeting held on 20 February 2017 (5 April 2017), WT/DSB/M/392.

⁴ Constitution note of the Panel, WT/DS513/3.

⁵ See the Panel's Working Procedures in Annex A-1.

⁶ See the Additional Working Procedures of the Panel concerning Business Confidential Information in Annex A-2.

meeting with the parties on 11 and 12 April 2018. On 1 June 2018, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 9 August 2018. The Panel issued its Final Report to the parties on 4 October 2018.

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. This dispute concerns the definitive anti-dumping measures imposed by Morocco on imports of certain hot-rolled steel products (hot-rolled steel) from Turkey.

2.2. On 21 January 2013, the "Ministère de l'Industrie, du Commerce et des Nouvelles Technologies, Département du Commerce Extérieur" (DCE) initiated an investigation with respect to dumping of hot-rolled steel from, among others, Turkey.⁷

2.3. Morocco imposed provisional anti-dumping duties on the imported products at issue⁸, following the preliminary affirmative determination by the "Ministère délégué auprès du Ministre de l'Industrie, du Commerce, de l'Investissement et de l'Économie Numérique chargé du Commerce Extérieur" (MDCCE) of dumping, injury and causation, dated 29 October 2013.⁹

2.4. On 12 August 2014, the MDCCE published the final affirmative determination of dumping, injury, and causation.¹⁰ The definitive measure came into force on 26 September 2014.¹¹

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATION

3.1. Turkey requests the Panel to find that¹²:

- a. the MDCCE acted inconsistently with Article 5.10 of the Anti-Dumping Agreement, because the duration of the investigation at issue exceeded the maximum time limit envisaged in this provision;
- b. the MDCCE used facts available to determine dumping margins for Ereğli Demir ve Çelik Fabrikaları T.A.Ş and İskenderun Demir ve Çelik A.Ş (İSDEMİR) (Erdemir Group) and Çolakoğlu Metalurji and Çolakoğlu Dis Ticaret A.Ş (Colakoglu) in a manner inconsistent with Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II to the Anti-Dumping Agreement;
- c. the MDCCE acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose all "essential facts" with respect to its decision to use facts available to determine dumping margins for Erdemir Group and Colakoglu in a timely manner;
- d. the MDCCE's determination that the domestic industry (Maghreb Steel) was "unestablished" is inconsistent with Article VI:6(a) of the GATT 1994 as well as footnote 9 to Article 3 and Articles 3.1 and 3.4 of the Anti-Dumping Agreement;
- e. the MDCCE's determination that the domestic industry (Maghreb Steel) suffered injury in the form of material retardation is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement; and
- f. the MDCCE acted inconsistently with Articles 6.5, 6.5.1, and 6.9 of the Anti-Dumping Agreement by failing to disclose information concerning the break-even threshold in its analysis of whether the domestic industry was "established".

⁷ Notice of initiation, (Exhibit TUR-1); Initiation report, (Exhibit TUR-2).

⁸ Joint decision No. 2986-13 imposing provisional anti-dumping duties, (Exhibit TUR-5).

⁹ Preliminary determination, (Exhibit TUR-6); Public notice of the preliminary determination, (Exhibit TUR-7).

¹⁰ Final determination, (Exhibit TUR-11); Public notice of the final determination, (Exhibit TUR-12).

¹¹ Joint decision No. 3024-14 imposing definitive anti-dumping duties, (Exhibit TUR-13).

¹² Turkey's first written submission, paras. 11.1-11.2.

3.2. Turkey also requests the Panel to exercise its discretion under Article 19.1 of the DSU and to suggest that Morocco bring its measures into conformity with its WTO obligations by immediately revoking the anti-dumping measure at issue.

3.3. Morocco requests that the Panel reject all of Turkey's claims in this dispute. Morocco also requests that the Panel rule that certain claims are outside the Panel's terms of reference.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the European Union, Japan, and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, and C-3). China, Egypt, India, Kazakhstan, the Republic of Korea, Oman, the Russian Federation, Singapore, and the United Arab Emirates did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 28 August 2018, Turkey and Morocco each submitted written requests for the review of precise aspects of the Interim Report. Neither party requested an interim review meeting. On 12 September 2018, both parties submitted comments on each other's requests for review. The Panel's discussion and disposition of those requests are set out in Annex A-3.

7 FINDINGS

7.1 General principles

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered Agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law. Articles 31 and 32 of the Vienna Convention on the Law of Treaties codify in part these customary rules.¹³

7.1.2 Standard of review

7.2. Article 11 of the DSU provides 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.

In addition, Article 17.6 of the Anti-Dumping Agreement sets out the special standard of review applicable to disputes under the Anti-Dumping Agreement:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

¹³ Appellate Body Report, *US – Gasoline*, DSR 1996:I, p. 16.

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review that a panel must apply with respect to both the factual and the legal aspects of the present dispute. This means that in reviewing the investigating authority's determination in this dispute, we must:

- a. examine whether the authority has provided a reasoned¹⁴ and adequate¹⁵ explanation as to:
 - i. how the evidence on the record supported its factual findings¹⁶; and
 - ii. how those factual findings support the overall determination¹⁷;
- b. not conduct a *de novo* review of the evidence or substitute our judgment for that of the investigating authority;
- c. limit our examination to the evidence that was before the investigating authority during the investigation¹⁸;
- d. take into account all such evidence submitted by the parties to the dispute¹⁹; and
- e. not simply defer to the conclusions of the investigating authority; our examination of those conclusions must be "in-depth" and "critical and searching".²⁰

7.1.3 Burden of proof

7.3. In WTO dispute settlement "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".²¹ Where a party "adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".²² A complaining party establishes a *prima facie* case where, absent effective refutation by the defending party, a panel has as a matter of law to rule in favour of the complaining party.²³

¹⁴ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent".

¹⁵ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[w]hat is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant".

¹⁶ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it".

¹⁷ Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103. See also Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence".

¹⁸ Anti-Dumping Agreement, Article 17.5(ii); Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

¹⁹ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

²⁰ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

²¹ Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 335.

²² Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 335.

²³ Appellate Body Report, *EC – Hormones*, paras. 98 and 104.

7.2 Terms of reference

7.4. Morocco argues that the following claims of Turkey fall outside the Panel's terms of reference and requests the Panel not to rule on them:

- a. the claims under footnote 9 to Article 3 of the Anti-Dumping Agreement, Articles 3.1 and 3.4 of the Anti-Dumping Agreement²⁴, and Article VI:6(a) of the GATT 1994 in respect of the MDCCE's finding that the domestic industry was not "established";
- b. the claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement in respect of the MDCCE's finding of "material retardation" of the establishment of the domestic industry;
- c. the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement in respect of the confidential treatment of the domestic industry's (Maghreb Steel) break-even threshold; and
- d. the claim under Article 6.9 of the Anti-Dumping Agreement in respect of the alleged failure to disclose the essential facts pertaining to the domestic industry's (Maghreb Steel) break-even threshold.

7.2.1 Evaluation

7.2.1.1 Article 6.2 of the DSU: Claim under footnote 9 to Article 3 of the Anti-Dumping Agreement

7.5. In its first written submission, Turkey advanced a claim under footnote 9 to Article 3 concerning the MDCCE's finding that the domestic industry was not "established". On its face, Turkey's request for the establishment of a panel (panel request) does not, however, refer to a claim under footnote 9. Paragraph 4(a) of the panel request states:

The Investigating Authority acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994 by finding that the domestic industry was not "established", and by determining that the establishment of that industry was retarded[.]²⁵

7.6. Morocco argues that Turkey's footnote 9 claim falls outside the Panel's terms of reference because Turkey did not provide a "brief summary of the legal basis" for this claim in the panel request, contrary to the requirements of Article 6.2 of the DSU.²⁶

7.7. Turkey contends that its footnote 9 claim is within the Panel's terms of reference.²⁷ According to Turkey, although the panel request does not mention footnote 9, it nevertheless provided the requisite "brief summary of the legal basis" for the following reasons:

- a. Footnote 9 is a "definitional provision" and, as such, applies to all instances where the Anti-Dumping Agreement references the term "injury". Therefore, by citing Articles 3.1 and 3.4 in the panel request, Turkey also referred to footnote 9.²⁸
- b. In the panel request, Turkey used the language of footnote 9 when referring to the MDCCE's determination that the domestic industry was not "established" and that the establishment of the domestic industry was "retarded".²⁹ It was thus clear that Turkey

²⁴ Morocco's jurisdictional objection includes Turkey's claims under Articles 3.2 and 3.5. Although the request for consultations listed such claims, Turkey limited its claims in the panel request to Articles 3.1 and 3.4. We therefore do not further address Articles 3.2 and 3.5.

²⁵ Fn omitted.

²⁶ Morocco's response to Panel question No. 1.4(a), paras. 31-36; second written submission, paras. 38-46.

²⁷ Turkey's second written submission, paras. 2.12-2.19.

²⁸ Turkey's response to Panel question No. 1.4(a), paras. 38 and 40-41; second written submission, para. 2.15.

²⁹ Turkey's response to Panel question No. 1.4(a), paras. 40-41 and 44-45; second written submission, paras. 2.16-2.17.

was asserting a footnote 9 claim.³⁰ In line with the Appellate Body's findings in *Thailand – H-Beams*, Turkey only needed to cite the language and refer to key factors of footnote 9 in order to "provide a brief summary of the legal basis".³¹

- c. At any rate, the panel request mentions Article VI:6(a) of the GATT 1994 and thereby also referred to "the general definition provided in [f]ootnote 9".³²

7.8. 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.

7.9. The requirements to "identify the specific measure(s)" at issue and to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" are central to the establishment of a panel's jurisdiction. The measure(s) and the legal basis of the complaint – i.e. the claim(s) – constitute the "matter referred to the DSB"³³, which forms the basis of the panel's terms of reference.³⁴ In defining the scope of the dispute, the panel request establishes and delimits the panel's jurisdiction, but it also fulfils a due process objective to the benefit of the respondent and third parties.

7.10. With respect to the requirement that a panel request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", the panel request must "[a]s a minimum requirement ... list the articles(s) of the covered Agreement(s) claimed to have been violated".³⁵ At the same time, deciding whether a claim is sufficiently set out in the panel request is not a mechanical task. Rather, a panel needs to read the panel request in its entirety; it may, in certain cases, infer the statement of a claim from the totality of a panel request, such that a complainant's failure to list a specific provision would not necessarily deprive a panel of jurisdiction to address a claim under that provision.³⁶

7.11. In all cases, however, the panel request must "plainly connect" the challenged measure with the provisions of the covered Agreements claimed to have been violated in order "to present the problem clearly".³⁷ This connection enables the respondent to know what case it has to answer, and to prepare its defence accordingly. Whether the panel request met the requirements of Article 6.2 must, also in every case, be demonstrated "on [its] face".³⁸

7.12. In this dispute, we need to resolve whether the statement of claims in the panel request under Articles 3.1, 3.4, and VI:6(a), in conjunction with the narrative in paragraph 4(a), provided a "brief summary of the legal basis" of the claim under footnote 9 sufficient to clearly present a "problem" concerning the alleged violation of footnote 9.

7.13. Footnote 9 is substantively connected with Articles 3.1 and 3.4 because footnote 9 defines the term "injury" used in those (and other) provisions. However, this does not mean that a statement of claims under Articles 3.1 and 3.4 necessarily implies a claim under footnote 9. Footnote 9 is attached to the heading of Article 3, rather than to Article 3.1 or 3.4 specifically. Footnote 9 therefore

³⁰ Turkey's response to Panel question No. 1.4(a), para. 41.

³¹ Turkey's response to Panel question No. 1.4(a), paras. 42-44 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 90).

³² Turkey's response to Panel question No. 1.4(a), paras. 46 and 48.

³³ See Article 7.1 of the DSU.

³⁴ Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 639 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and *Australia – Apples*, para. 416); *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

³⁵ Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.8 (referring to Appellate Body Reports, *Korea – Dairy*, paras. 123-124, in turn referring to *Brazil – Desiccated Coconut*, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; *India – Patents (US)*, paras. 89 and 92-93; and *US – Carbon Steel*, para. 130), 4.17, and 4.31.

³⁶ Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.33.

³⁷ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

³⁸ Appellate Body Report, *US – Carbon Steel*, para. 127.

applies to all of the provisions of Article 3 – and, by its express terms, more generally to all instances where the term "injury" is used "[u]nder this Agreement". We do not consider that a statement of claim under any provision in the Anti-Dumping Agreement that includes the term "injury", by the mere use of this term, necessarily directs to, and includes, a claim under footnote 9. Nor do we consider that the text of Article 3.1 or 3.4 suggests that claims under these provisions specifically imply a further claim under footnote 9.

7.14. Turkey asserts that footnote 9 contains a substantive obligation that Morocco violated. In the jurisdictional context, however, Turkey argues that footnote 9 serves as a "definitional provision" in determining the meaning of "injury" and thus "is an integral part of the claims under Articles 3.1 and 3.4".³⁹ Turkey is correct in pointing out that the "determination of injury must be made in accordance with the definition of 'injury' provided in Footnote 9".⁴⁰ Yet, it does not follow from Turkey's jurisdictional arguments that an independent claim of violation of an obligation in footnote 9 was identifiable from the panel request when it referred to Articles 3.1 and 3.4. In Turkey's own words, footnote 9 was only "part of the claims under Articles 3.1 and 3.4", not a separate and independent claim. However, Turkey has clearly and repeatedly claimed that the MDCCE's determination that the industry was not "established" was inconsistent with Morocco's obligations set forth in footnote 9, among other provisions.⁴¹ It has also requested us to "find" that the MDCCE's determination that the domestic industry was not "established" is inconsistent with footnote 9.⁴² To pursue a substantive claim under footnote 9, Turkey had to include that claim in its panel request.

7.15. According to Turkey, the narrative language in paragraph 4(a) of the panel request provided sufficient clarity with regard to the inclusion of a footnote 9 claim.⁴³ We, however, read this narrative, first and foremost, in the context of the provisions expressly cited in paragraph 4(a) of the panel request, namely Articles 3.1, 3.4, and Article VI:6(a). Article VI:6(a) contains the general obligation that "[n]o contracting party shall levy any anti-dumping ... duty ... unless it determines that the effect of dumping ... is such ... as to retard materially the establishment of a domestic industry". The narrative language in paragraph 4(a) therefore closely connects with Article VI:6(a). Turkey argues that, as in *US – Anti-Dumping Methodologies (China)*⁴⁴, the narrative of its panel request "unequivocally resembled that of the legal provision invoked" because it used words "found only in Footnote 9".⁴⁵ However, the language used in paragraph 4(a) also resembles the language used in Article VI:6(a) and that paragraph of the panel request even mentions Article VI:6(a). Turkey's argument therefore fails.

7.16. In light of the panel request expressly citing Articles 3.1, 3.4, and VI:6(a), and using language that resembles the language in Article VI:6(a), we do not consider that the panel request, on its face, "plainly connects" the challenged measure, which includes in the case at hand the determination that the domestic industry was not "established", with the provision that was allegedly violated, in this case footnote 9. We are thus not persuaded that the panel request presented any problem regarding an alleged violation of footnote 9 with sufficient clarity.

7.17. Turkey also relies on the report of the Appellate Body in *Thailand – H-Beams*. In that case, the Appellate Body found that the panel request at issue provided a "brief summary of the legal basis" for claims under specific paragraphs of Article 3. According to the Appellate Body, the panel request did so by mentioning Article 3 in combination with its narrative citing the language of Article 3.1 and referring to volume and price effects and the impact on the domestic industry. The dispute in *Thailand – H-Beams* did not present the Appellate Body with the same legal issue currently before us. That case concerned the question whether a general reference to a treaty article, in that instance Article 3, was sufficient to "provide a brief summary of the legal basis" in respect of claims of violation under more specific paragraphs of that article. Here, however, we must resolve a

³⁹ Turkey's response to Panel question No. 1.4(a), paras. 38, 40, and 45.

⁴⁰ Turkey's second written submission, para. 2.15.

⁴¹ Turkey's first written submission, paras. 1.2, 1.4, 8.1-8.85, and 11.1; opening statement at the first meeting of the Panel, paras. 4.1-4.13; and response to Panel's question No. 4.3(a), para. 92.

⁴² Turkey's first written submission, para. 11.1.

⁴³ Turkey's response to Panel question No. 1.4(a), paras. 40-41 and 44-45; second written submission, paras. 2.16-2.17.

⁴⁴ Turkey's second written submission, para. 2.16 (quoting Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.169).

⁴⁵ Turkey's second written submission, para. 2.17. (emphasis added)

different question, that is, whether the references to the specific paragraphs of Articles 3.1 and 3.4 in the panel request were sufficient for purposes of stating a claim under footnote 9.

7.18. On the basis of the above, we conclude that in respect of the claim under footnote 9 Turkey's panel request did not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required by Article 6.2 of the DSU. Turkey's footnote 9 claim therefore falls outside our terms of reference.

7.2.1.2 Article 4.4 of the DSU: Claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement

7.19. At paragraph 5 of the request for consultations, Turkey made the following claims, which include Articles 3.1 and 3.4:

Injury/Causation Determination: The Moroccan authorities failed to provide a reasoned and adequate explanation of their finding of injury and causation and therefore acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement.⁴⁶

7.20. At paragraphs 4(a) and (b) of the panel request, Turkey then stated the following claims under Articles 3.1 and 3.4 concerning the MDCCE's findings of "establishment", "material retardation", and the injury factors:

The Investigating Authority acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994 by finding that the domestic industry was not "established", and by determining that the establishment of that industry was retarded[.]⁴⁷

The Investigating Authority acted inconsistently with Article 3.4 of the Anti-Dumping Agreement by failing to assess all the relevant injury factors set out in that provision. Moreover, the Investigating Authority failed to conduct an appropriate examination of each of the factors it analysed, as well as an objective and unbiased assessment of all these factors collectively.

7.21. Morocco argues that the claims under Articles 3.1 and 3.4, as set out in paragraphs 4(a) and (b) of the panel request, fall outside the Panel's terms of reference. At paragraph 5 of the request for consultations, Turkey failed to provide an "indication of the legal basis" of the claims under Articles 3.1 and 3.4 in respect of the MDCCE's findings concerning "establishment", "material retardation", and the injury factors, contrary to the requirement of Article 4.4 of the DSU.⁴⁸ In this regard, Morocco contends that:

- a. Compared to the panel request, the request for consultations merely referred to Articles 3.1 and 3.4, which is insufficient for an "indication of the legal basis" of the claims at issue. The request for consultations did not mention the issues of "establishment" and "material retardation" of the domestic industry.⁴⁹ It also did not mention the MDCCE's findings in relation to the injury factors.⁵⁰
- b. The reference in the request for consultations to a "failure to provide a reasoned and adequate explanation" is overly generic and, in any event, refers to the standard of review of the Panel, not to an obligation of the MDCCE.⁵¹

7.22. According to Morocco, without an "indication of the legal basis" in the request for consultations, the consultations did not cover the claims in the form ultimately pursued. As a result,

⁴⁶ Emphasis original.

⁴⁷ Fns omitted.

⁴⁸ Morocco's second written submission, para. 17.

⁴⁹ Morocco's responses to Panel question No. 1.1, para. 2, and No. 1.2(a), para. 14; second written submission, paras. 17 and 19.

⁵⁰ Morocco's responses to Panel question No. 1.1, para. 3, and No. 1.2(a), para. 15; second written submission, para. 21.

⁵¹ Morocco's responses to Panel question No. 1.1, para. 4, and No. 1.2(a), paras. 13 and 16; second written submission, paras. 13 and 22.

they did not evolve from the request for consultations because they expanded the scope of the dispute and changed its essence.⁵²

7.23. Turkey contends that its claims under Articles 3.1 and 3.4 are within the Panel's terms of reference. The request for consultations satisfied the requirements of Article 4.4 of the DSU. Paragraph 5 of the request for consultations contains a section titled "Injury/Causation Determination" and mentions, *inter alia*, claims under Articles 3.1 and 3.4. As the MDCCE's injury determination took the form of "material retardation of the establishment of the domestic industry", the reference in the request for consultations to the injury determination logically relates to the finding of injury in that form.⁵³ The request for consultations thus indicated the legal basis for the claims which the panel request then elaborated upon at paragraphs 4(a) and (d).⁵⁴ It also follows that the claims at issue in the panel request did not change the essence of the dispute.

7.24. We recall that Articles 4.4 and 6.2 of the DSU require different levels of specificity for the identification of claims in the request for consultations and the panel request.⁵⁵ While the complainant must only give an "indication of the legal basis" in the request for consultations, it must provide "a brief summary of the legal basis sufficient to present the problem clearly" in the panel request. Neither "precise and exact identity" between the claims in the request for consultations and the panel request is required, nor should "too rigid a standard" of identity be imposed.⁵⁶ In particular, "Article 4.4 of the DSU requires only that a request for consultations contain 'an indication of the legal basis for the complaint'. ... [Which] is a lesser requirement than that of Article 6.2, and may well be satisfied in a particular case by listing the Articles allegedly violated".⁵⁷

7.25. Considering the above, we note that Turkey cited the provisions at issue, Articles 3.1 and 3.4, at paragraph 5 of its request for consultations and expressly challenged the "injury determination".

7.26. Morocco argues that the request for consultations should also have mentioned that Turkey was taking issue with the MDCCE's analysis of "establishment", "material retardation", and the injury factors. In its view, "[i]t was not for Morocco to guess what aspects [of] its injury determination Turkey sought to challenge".⁵⁸ Indeed, the request for consultations did not expressly refer to the MDCCE's findings in respect of "establishment", "material retardation", and the injury factors. Bearing in mind the requirements of Article 4.4 of the DSU, though, we consider that Turkey's concern with these issues was sufficiently clearly indicated by its reference to the MDCCE's "injury determination". This "injury determination" was exclusively based on an injury finding in the form of "material retardation of the establishment of the domestic industry". Necessarily, the request for consultations referred to the "injury determination" in that form. Further, the reference in the request for consultations to Article 3.4, which concerns the examination of the injury factors, made sufficiently clear that the request for consultations challenged the findings concerning those injury factors. As a matter of law, the complainant must explain succinctly in the panel request, not in the request for consultations, *how* or *why* the measure at issue is considered by the complainant to violate the WTO obligation in question.⁵⁹ To require, as Morocco suggests, even greater precision in the request for consultations in respect of the claims under Articles 3.1 and 3.4 would effectively substitute the legal standard of Article 4.4 with that of Article 6.2.

7.27. On the basis of the foregoing, paragraph 5 of the request for consultations adequately indicated the legal basis of the claims under Articles 3.1 and 3.4. These legal bases in the request for consultations were also sufficiently broad to include the claims under Articles 3.1 and 3.4, as subsequently set out in the panel request. The reference in the request for consultations to an

⁵² Morocco's response to Panel question No. 1.2(a), paras. 12-17; second written submission, para. 23.

⁵³ Turkey's response to Panel question No. 1.2(a), para. 11; second written submission, para. 2.9.

⁵⁴ Turkey's opening statement at the first meeting of the Panel, para. 4.27; response to Panel question No. 1.2(a), paras. 8-10.

⁵⁵ Panel Reports, *US – Poultry (China)*, para. 7.43; *EC – Fasteners (China)*, para. 7.206; see also Appellate Body Report, *Argentina – Import Measures*, para. 5.9.

⁵⁶ Appellate Body Reports, *Brazil – Aircraft*, para. 132; *US – Upland Cotton*, para. 293; and *Mexico – Anti-Dumping Measures on Rice*, paras. 137-138. This applies to the extent that the panel request does not expand the scope of the dispute, or change its essence.

⁵⁷ Panel Report, *EC – Fasteners (China)*, paras. 7.207 and 7.322; see also *ibid.* para. 7.206, and Panel Report, *US – Poultry (China)*, para. 7.43.

⁵⁸ Morocco's opening statement at the second meeting of the Panel, para. 15.

⁵⁹ Appellate Body Reports, *EC – Selected Customs Matters*, para. 130; *China – Raw Materials*, para. 226; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.26.

alleged failure "to provide a reasoned and adequate explanation" does not detract from the sufficiency of the "indication of the legal basis". The text of Articles 3.1 and 3.4 does not refer to an obligation to give a "reasoned and adequate explanation". Yet, this phrase does not conflict with the claims, or the obligations, under Articles 3.1 and 3.4. Nor does the language in the request for consultations exclude the claims under Articles 3.1 and 3.4 in the form subsequently pursued in the panel request.

7.28. It follows from the above that in respect of the claims under Articles 3.1 and 3.4 the request for consultations gave the required "indication of the legal basis". We thus reject Morocco's arguments in this regard. As a result, we also do not accept Morocco's argument that the claims under Articles 3.1 and 3.4, as set out in the panel request, could not have evolved from the request for consultations.

7.29. Accordingly, Turkey's claims under Articles 3.1 and 3.4 fall within our terms of reference.

7.2.1.3 The "evolution" of certain claims in the panel request from the request for consultations

7.2.1.3.1 Factual background

7.30. For purposes of finding injury in the form of "material retardation of the establishment of the domestic industry", the MDCCE determined that the domestic industry, composed of the sole Moroccan producer and petitioner Maghreb Steel, was not "established". In doing so, the MDCCE analysed Maghreb Steel's break-even (or profitability) threshold. The MDCCE treated this break-even threshold as confidential, and redacted it from its determination.⁶⁰

7.2.1.3.2 Claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

7.31. In the request for consultations, Turkey did not make any claims under Articles 6.5 and 6.5.1 concerning the MDCCE's confidential treatment of the domestic industry's break-even threshold. Turkey subsequently added claims under these provisions in paragraph 4(d) of the panel request, which states:

The Investigating Authority acted inconsistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement by failing to require the applicant to submit a non-confidential summary of the "profitability threshold" used for its finding of material retardation of the establishment of the domestic industry, or an explanation of why it could not be summarized.

7.32. According to Morocco, given that the request for consultations did not mention Articles 6.5 and 6.5.1, nor the break-even threshold or its confidential treatment, the claims included in the panel request had not been the subject of consultations. Morocco asserts that the claims under Articles 6.5 and 6.5.1 set forth in the panel request therefore could not have evolved from any of the claims in the request for consultations.⁶¹

7.33. Turkey argues that the claims under Articles 6.5 and 6.5.1 evolved from the Article 3.1 claim set forth at paragraph 5 of the request for consultations, cited at paragraph 7.19. above. According to Turkey:

- a. The confidential treatment of the break-even threshold was inconsistent with Articles 6.5 and 6.5.1, such that the MDCCE did not act in accordance with the basic principle of fundamental fairness and thereby did not conduct an "objective examination" within the meaning of Article 3.1.⁶² A close connection thus existed between, on the one hand, the

⁶⁰ Preliminary determination, (Exhibit TUR-6), para. 86, as confirmed in the Final determination, (Exhibit TUR-11), paras. 97-100.

⁶¹ Morocco's first written submission, paras. 31 and 36; responses to Panel question No. 1.1, para. 6, and No. 1.2(b), paras. 18-19; and second written submission, paras. 28-37.

⁶² Turkey's response to Panel question No. 1.2(b), para. 16.

claims under Articles 6.5 and 6.5.1 and, on the other hand, the claim under Article 3.1, and the factual aspect of the injury determination that was subject to consultations.⁶³

- b. Unduly redacting critical information on the break-even threshold meant that the MDCCE did not give a "reasoned and adequate explanation of its injury finding", such that the claims under Articles 6.5 and 6.5.1 naturally evolved from Turkey's request for consultations, at paragraph 5.⁶⁴
- c. In respect of the break-even threshold, Articles 3.1, 6.5, and 6.5.1 relate to the treatment of the same information, with Articles 6.5 and 6.5.1 being more specific in respect of the confidential treatment of a sub-set of information.⁶⁵
- d. The request for consultations took issue with the "Injury Determination", which included the determination of the break-even threshold.⁶⁶
- e. The claims at issue naturally evolved from Turkey's injury claims "as, during consultations, the (important) role of the break-even threshold in the MDCCE's injury determination became clear".⁶⁷

7.34. Morocco argues that, because Articles 6.5 and 6.5.1 were not referred to in the request for consultations, the subsequent claims under these provisions in the panel request could not have evolved from the request for consultations. In our view, however, simply because the provisions at issue are not expressly mentioned in the request for consultations does not necessarily mean that claims under those provisions could not have evolved from the request for consultations. The provisions in the panel request need not be identical to those set out in the request for consultations. Claims under additional provisions may be included in the panel request provided that the "legal basis" in the panel request evolved from the "legal basis" that formed the subject of consultations.⁶⁸ In order to evaluate such "new" claims under its jurisdiction, a panel must examine whether the complainant, by adding these claims, expanded the scope or changed the essence of the dispute in its panel request as compared to its consultations request.⁶⁹

7.35. In order to resolve Morocco's jurisdictional objection, we therefore consider whether the claims under Articles 6.5 and 6.5.1 in the panel request evolved from the claim under Article 3.1 in the request for consultations, without expanding the scope of the dispute or changing its essence. In assessing whether a claim in the panel request has evolved in such a manner, we examine all elements that form the basis of the complaint. In this regard, we consider that "at the very least, some connection must exist between the claims set forth in the panel request and those identified in the request for consultations in terms of either the provisions cited, the obligation at issue or [the] issue in dispute, or the factual circumstances leading to the alleged violation".⁷⁰

7.36. We first turn to a potential "connection" in terms of the provisions cited. The claims in Turkey's panel request relate to Article 6. This article, titled "Evidence", sets out rules on evidence as well as procedural and due process rights of interested parties in anti-dumping investigations. In contrast, Article 3 is titled and concerned with the "Determination of Injury". The legal bases in the panel request and in the request for consultations thus concern entirely different provisions governing different aspects of anti-dumping investigations.

7.37. In respect of a "connection" in terms of the obligations at issue, Article 6.5 contains the requirement that any information which is by nature confidential or which is provided on a

⁶³ Turkey's response to Panel question No. 1.2(b), para. 16.

⁶⁴ Turkey's opening statement at the second meeting of the Panel, para. 4.5.

⁶⁵ Turkey's second written submission, paras. 2.23-2.24.

⁶⁶ Turkey's second written submission, para. 2.21.

⁶⁷ Turkey's response to Panel question No. 1.2(b), para. 17; see also opening statement at the first meeting of the Panel, para. 4.29.

⁶⁸ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

⁶⁹ Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 138; *Argentina – Import Measures*, para. 5.13.

⁷⁰ Panel Report, *China – Broiler Products*, para. 7.224. The panels in *EU – Biodiesel (Argentina)*, paras. 7.48, 7.54, and 7.62; and *China – Publications and Audiovisual Products*, para. 7.122, relied on similar considerations. See also *Australia – Tobacco Plain Packaging*, Preliminary ruling of the Panel, WT/DS458/18, para. 3.46 (appeal of panel report pending).

confidential basis shall be treated as confidential upon good cause shown.⁷¹ According to Article 6.5.1, an investigating authority shall require interested parties providing confidential information to furnish non-confidential summaries thereof.⁷² Articles 6.5 and 6.5.1 thus relate to *procedural* obligations concerning the treatment of confidential information in anti-dumping investigations. In contrast, Article 3.1 concerns the obligation that a determination of injury shall be based on positive evidence and shall involve an objective examination of the volume and price effects of dumped imports and their impact on the domestic industry. This provision establishes a *substantive* obligation concerning the determination of injury. It follows that the obligations of the claims in the panel request and in the request for consultations are of different nature and apply in respect of different actions of the investigating authority.

7.38. Turkey argues that the alleged violation of Articles 6.5 and 6.5.1 affects the "objective examination" under Article 3.1, thus resulting in a close connection between the claims. We disagree. The "objective examination" requirement of Article 3.1 concerns the investigative process. The term "examination" relates to the gathering and evaluation of evidence. This examination must be "objective" in that it is unbiased and "must conform to the dictates of the basic principles of good faith and fundamental fairness".⁷³ Treating information or evidence as confidential inconsistently with the requirements of Article 6.5 and 6.5.1 does not necessarily impinge on the gathering and evaluation of that information or evidence. Regardless of an improper confidential treatment, an investigating authority may nevertheless examine that information or evidence in an unbiased manner. Therefore, an "objective examination" does not, without more, depend on, nor is affected by, the treatment – whether proper or not – of information as confidential. We are thus not convinced that Turkey has established, in this case, a "close connection" between the obligations in Articles 6.5 and 6.5.1 and the "objective examination" obligation under Article 3.1.

7.39. Turkey also contends that the alleged improper treatment of the break-even threshold as confidential equates to the alleged failure "to provide a reasoned and adequate explanation of [the] finding of injury", challenged in the request for consultations. It queries: "how could the MDCCE have provided 'a reasoned and adequate explanation' for the 'establishment' analysis if it unduly redacted critical information on the break-even threshold?"⁷⁴

7.40. We consider that Turkey's position is in error for several reasons. First, and fundamentally, the phrase that Turkey relies upon in the request for consultations, referring to a failure to provide a "reasoned and adequate explanation", is not, in itself, a legal basis from which the claims under Articles 6.5 and 6.5.1 could have evolved. Second, the full narrative of "adequate and reasoned explanation of [the] finding of injury"⁷⁵ makes clear that this phrase relates to an aspect of the anti-dumping investigation that is removed from the claims under Articles 6.5 and 6.5.1. It refers to the MDCCE's explanation of the findings reached in the injury determination, be that in the preliminary or final determination. In contrast, the obligations under Articles 6.5 and 6.5.1 pertain to the treatment of confidential information by the MDCCE and the provision of a non-confidential summary of that information by the interested parties in the investigation. They apply throughout the investigation, including *before* the investigating authority reaches its findings. Third, Turkey's argument confuses the requirement for an investigating authority to give a "reasoned and adequate explanation" of its findings with the distinct issue of (proper) treatment of information as confidential. The requirement to give a reasoned and adequate explanation pertains to the content of an explanation, and its adequacy and sufficiency, in respect of an investigating authority's conclusions and determinations as set out in the written report (and supporting documents).⁷⁶ In reasonably and adequately explaining its conclusions and determinations, an investigating authority may need to rely on information that is confidential and that is therefore redacted in the public version of its written report.⁷⁷ An improper treatment of information as

⁷¹ Article 6.5 also has a second sentence which is not relevant for present purposes.

⁷² Article 6.5.1 also has additional sentences which are not relevant for present purposes.

⁷³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

⁷⁴ Turkey's opening statement at the second meeting of the Panel, para. 4.5.

⁷⁵ Emphasis added.

⁷⁶ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.255.

⁷⁷ Concerning the issue whether "the reasoning supporting the determination be 'formally or explicitly stated' in documents in the record of the investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final determination", the Appellate Body found that the requirements of Article 3.1 do "not imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation". (Appellate Body Report, *Thailand – H-Beams*, paras. 107 and 111 (emphasis original)). This situation differs from the issue whether

confidential, and thus the redaction of this information in the explanations set out in the public version of the written report, does not in itself render the content of the explanations unreasoned or inadequate.

7.41. In any case, the failure to provide a "reasoned and adequate explanation" of the injury findings may be a basis to conclude that an investigating authority failed to comply with its *substantive* obligations under Article 3. It does not, however, necessarily entail, or connect with, a violation of its *procedural* obligation to accord proper confidential treatment under Articles 6.5 and 6.5.1.

7.42. Turkey further argues that, in this instance, Articles 3.1, 6.5, and 6.5.1 relate to the treatment of the same information, the break-even threshold, such that the claims under Articles 6.5 and 6.5.1 evolved from the Article 3.1 claim. Turkey seems to suggest that the factual basis for the claims, the information at issue, is the same and that there is therefore a sufficient "connection" in terms of the underlying factual circumstances. Moreover, the request for consultations took issue with the "injury determination" which, as Turkey correctly points out, included findings in respect of the break-even threshold. In our view, however, the factual basis of the Article 3.1 claim concerns the MDCCE's analysis, including but not limited to the break-even threshold, undertaken in the substantive injury determination. In contrast, the factual basis of the claims under Articles 6.5 and 6.5.1 relates to the MDCCE's confidential treatment of the break-even threshold as a procedural step in the investigation; it does not concern the *determination* of injury on the basis of the break-even threshold. The same evidence, here information in respect of the break-even threshold, may be relevant to the analyses of issues arising under distinct provisions. However, identical evidence does not in and of itself signify a sufficient connection between the factual circumstances that give rise to the alleged violations. We thus consider that the factual bases of the claims at issue are in fact different.

7.43. Turkey asserts that the claims at issue naturally evolved from Turkey's injury claims "as, during consultations, the (important) role of the break-even threshold in the MDCCE's injury determination became clear".⁷⁸ A complaining party may indeed come to know of additional information during consultations – for example, it may develop a better understanding of the operation of a challenged measure – that could warrant revising the list of treaty provisions with which the measure is allegedly inconsistent.⁷⁹ We limit our examination to the text of the request for consultations without inquiring into the actual consultations that took place.⁸⁰ Nevertheless, we observe that, in the facts of this case, Turkey would likely have been aware of the break-even threshold's significance and its confidential treatment by the MDCCE since the issuance of the preliminary determination on 30 October 2013, in which the break-even threshold was redacted. This was long before consultations took place on 18 and 28 November 2016. Turkey had no apparent reason not to include claims under Articles 6.5 and 6.5.1 in the request for consultations, if it took issue with the MDCCE's confidential treatment of the break-even threshold.

7.44. In light of the above, the claims under Articles 6.5 and 6.5.1 in the panel request are not sufficiently closely and clearly connected with the claim under Article 3.1 in the request for consultations. Rather, these claims are distinct and unrelated in terms of the provisions, obligations, and factual circumstances at issue. Moreover, the additional claims under Articles 6.5 and 6.5.1 in fact modified the nature and substance of the dispute from one concerning the MDCCE's compliance with the substantive disciplines on injury determination to one that also encompasses a challenge to the MDCCE's procedural conduct.

7.45. As a consequence, Turkey in its panel request introduced new claims under Articles 6.5 and 6.5.1 that expanded the scope of the dispute and changed its essence. Accordingly, these claims did not evolve from the claim under Article 3.1 subject to consultations. The claims under Articles 6.5 and 6.5.1 thus fall outside our terms of reference.

reasoning or facts, not disclosed in the public report, even formed part of the contemporaneous investigation record. (Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.120-5.145).

⁷⁸ Turkey's response to Panel question No. 1.2(b), para. 17; see also opening statement at the first meeting of the Panel, para. 4.29.

⁷⁹ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

⁸⁰ Appellate Body Report, *US – Upland Cotton*, para. 287.

7.2.1.3.3 Claim under Article 6.9 of the Anti-Dumping Agreement concerning the break-even threshold

7.46. At paragraph 4(c) of its panel request, Turkey advanced a claim under Article 6.9 in respect of the alleged failure by the MDCCE to inform the Turkish interested parties of the essential facts concerning the break-even threshold used in finding that the domestic industry was not "established". Paragraph 4(c) of the panel request reads:

The Investigating Authority also acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing properly to provide the "profitability threshold" used for its finding of material retardation of the establishment of the domestic industry, or alternatively a non-confidential summary of that information.

7.47. In the request for consultations, Turkey had not made this specific claim in relation to the break-even threshold. Paragraph 3 of the request for consultations provides:

Disclosure of Essential Facts: The Moroccan authorities acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose essential facts with respect to the decision to use facts available.⁸¹

7.48. Morocco argues that Turkey's Article 6.9 claim concerning the break-even threshold in paragraph 4(c) of the panel request is outside the Panel's terms of reference. It did not evolve from either the Article 6.9 claim in respect of facts available in paragraph 3, nor from the claims under Articles 3.1 and 3.4 in paragraph 4(a) of the request for consultations.⁸² According to Morocco, the request for consultations contains a claim under Article 6.9 that is limited to the disclosure of the essential facts pertaining to facts available. Also, the reference to Articles 3.1 and 3.4, or the failure to provide a "reasoned and adequate explanation" in the request for consultations is overly generic and concerns obligations that are different from Article 6.9.⁸³

7.49. Turkey argues that its Article 6.9 claim concerning the break-even threshold evolved from the claim in the request for consultations "that Morocco failed to provide a reasoned and adequate explanation of the injury determination".⁸⁴

7.50. The issue before us is whether Turkey's Article 6.9 claim in respect of the break-even threshold evolved from a legal basis in the request for consultations, without expanding the scope of the dispute or changing its essence.

7.51. Turkey argues that "the claim under Article 6.9 is a natural evolution of ... the claim [at paragraph 4(a)] in the consultations request that Morocco failed to provide a reasoned and adequate explanation of the injury determination".⁸⁵ Turkey's argument is problematic for the following reasons, which are in part similar to those already set out above at paragraph 7.40.

7.52. First, the phrase referring to a failure to provide a "reasoned and adequate explanation" is not, in itself, a legal basis from which the Article 6.9 claim could have evolved. Second, the obligation to inform all interested parties of the essential facts pursuant to Article 6.9 does not connect with the requirement to provide a "reasoned and adequate explanation" of the investigating authority's findings in its determinations. Article 6.9 concerns the MDCCE's obligation to make available the *essential facts*, not any explanations of the findings, through a disclosure during the investigation "before a final determination is made".⁸⁶ In this context, Turkey also relies on the reports of the Appellate Body in *China – HP-SSST (Japan)* / *China – HP-SSST (EU)* to argue that investigating authorities have an "overarching obligation" to provide a reasoned and adequate

⁸¹ Emphasis original.

⁸² See paragraph 7.5. above.

⁸³ Morocco's first written submission, paras. 31 and 35; responses to Panel question No. 1.1, para. 5, and No. 1.2(c), paras. 21-23; and second written submission, paras. 28-37.

⁸⁴ Turkey's response to Panel question No. 1.2(c), para. 23; second written submission, para. 2.26; see also opening statements at the first meeting of the Panel, para. 4.29, and at the second meeting of the Panel, para. 4.6.

⁸⁵ Turkey's response to Panel question No. 1.2(c), para. 23.

⁸⁶ Emphasis added.

explanation of their findings.⁸⁷ Irrespective of whether such an "overarching obligation" exists, the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* referred to "the requirement that the investigating authority provide a 'reasoned and adequate' explanation for its conclusions ... in its report on the determination".⁸⁸ Therefore, in any event, the Appellate Body was concerned with findings or conclusions as set out in the "report on the determination", not the disclosure of essential facts that are at issue here.⁸⁹ Third, paragraph 4(a) of the request for consultations refers to the phrase of "reasoned and adequate explanation" *in the context of* Turkey's claims under Articles 3.1, 3.2, 3.4, and 3.5. None of these provisions, however, are related to the Article 6.9 claim; and Turkey neither asserted, nor demonstrated that they are. They concern substantive obligations on the MDCCE in its injury and causation determination, not a procedural requirement that the MDCCE must observe in the investigative process, such as that under Article 6.9.

7.53. We therefore find that Turkey's Article 6.9 claim concerning the break-even threshold could not, and did not evolve from the reference in the request for consultation to the alleged failure to provide a "reasoned and adequate explanation" of the injury determination.

7.54. Further, although not elaborated by Turkey, we consider whether an "evolution" took place from the Article 6.9 claim that Turkey set forth at paragraph 3 of its request for consultations.⁹⁰ At paragraph 3, Turkey claimed that the MDCCE violated Article 6.9 "by failing to disclose essential facts with respect to the decision to use facts available". Here, Turkey linked its Article 6.9 claim specifically to essential facts in respect of facts available. Paragraph 3, including its reference to facts available, must also be read in the context of paragraph 2 of the request for consultations that concerns the use of facts available in the determination of dumping margins. In the request for consultations, Turkey thus narrowed the scope of its Article 6.9 claim to specific essential facts (concerning facts available) in respect of a specific aspect of the determination (the determination of the dumping margin). It did not frame this claim more generally as relating to a wider set of essential facts, for example by tracking more closely the language of Article 6.9 ("essential facts under consideration which form the basis for the decision whether to apply definitive measures").

7.55. Although concerning the same provision and obligation, the additional Article 6.9 claim in the panel request relates to different essential facts (concerning the break-even threshold) in respect of a different aspect of the determination (the injury determination). The Article 6.9 claims therefore concerned different factual bases. Nothing in the Article 6.9 claim in the request for consultations pointed to the factual basis of the subsequently added Article 6.9 claim. If anything, the very specific formulation of the Article 6.9 claim in the request for consultations may have led Morocco to assume in good faith that the essential facts concerning other aspects of the determination were not at issue. In contrast, Turkey formulated other claims in its request for consultations very broadly. For instance, the claims under Articles 3.1, 3.2, 3.4, and 3.5 only referred to the alleged failure to provide a "reasoned and adequate explanation" of the injury and causation findings.

7.56. That said, we also consider that the "new" Article 6.9 claim modified the nature of the dispute. It went beyond the matter circumscribed in the request for consultations (essential facts in respect of facts available in the context of the determination of the margin of dumping) and added the distinct issue of the essential facts concerning the break-even threshold in the context of the injury determination.

7.57. In light of the express limitation of Turkey's Article 6.9 claim in the request for consultations to facts available in respect of the dumping margin determination, and absent any arguments advanced by Turkey, we therefore find that the Article 6.9 claim in respect of the break-even threshold cannot be based on paragraph 3 of the request for consultations, nor has evolved from the legal basis in that paragraph, without expanding the scope of the dispute or changing its essence.

⁸⁷ Turkey's second written submission, paras. 2.27-2.28 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.255).

⁸⁸ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.255.

⁸⁹ Article 6.9 concerns the disclosure, before a final determination is made, of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. It is not concerned with informing interested parties of the ultimate findings or conclusions.

⁹⁰ It is well established that panels are authorized, and even required, to address and resolve jurisdictional issues, if necessary on their own motion (see, e.g. Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36).

7.58. In addition to the above, Turkey repeats the argument that it became aware of the circumstances underlying the Article 6.9 claim during consultations.⁹¹ For the same reason set out above⁹², we do not find Turkey's assertion credible. Moreover, Turkey must have been aware of the alleged failure to disclose the break-even threshold in the disclosure since the disclosure was made on 20 June 2014.

7.59. In light of the foregoing, Turkey's Article 6.9 claim concerning the alleged failure to inform all interested parties of the break-even threshold falls outside our terms of reference.

7.2.1.4 Claim under Article VI:6(a) of the GATT 1994

7.60. Morocco asserts that Turkey's claim of inconsistency with Article VI:6(a) of the GATT 1994 concerning the MDCCE's finding of "establishment" of the domestic industry falls outside the Panel's terms of reference because the request for consultations did not give an "indication of the legal basis" in respect of this claim. It also contends that therefore this claim could not have evolved from the request for consultations.⁹³

7.61. Turkey argues that its claim under Article VI:6(a) is within the Panel's terms of reference. The references to Articles 3.1 and 3.4 in the request for consultations entail a reference to Article VI:6(a) of the GATT 1994. The Article VI:6(a) claim also did not expand the scope, or change the essence, of Turkey's injury claims.⁹⁴

7.62. We do not, however, consider it necessary to resolve Morocco's jurisdictional objection. We decline to make findings regarding Turkey's Article VI:6(a) claim for procedural reasons. Paragraph 6 of the Panel's Working Procedures requires that:

Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.⁹⁵

7.63. It is pertinent to recall the procedural history in respect of Turkey's claim under Article VI:6(a):

- a. At paragraph 4(a), the panel request set out a claim under Article VI:6(a) in respect of the MDCCE's findings of "establishment" and "material retardation".
- b. In its first written submission, Turkey did not mention any claim of inconsistency under Article VI:6(a).
- c. Likewise, Turkey did not advance any claim under Article VI:6(a) in its opening or closing statements of the first substantive meeting, or in its oral responses to the Panel during this meeting.
- d. Following the first substantive meeting, the Panel issued written questions to the parties. In response, Turkey for the first time alleged a violation of Article VI:6(a) in addition to its claims under footnote 9 and Article 3.1.⁹⁶

7.64. In this instance, Turkey asserted its claim under Article VI:6(a) only in response to our written questions. It articulated this claim only after the parties had provided us with written submissions, had attended a substantive meeting and orally responded to the same questions which later prompted Turkey in its written reply to advance an Article VI:6(a) claim. A statement of claim made so late in the proceedings does not comply with the due process requirement of paragraph 6 of our Working Procedures. Similarly, the Appellate Body in *EC – Fasteners (China)* found that "[w]e do not find that assertions made so late in the proceedings, and only in response to questioning by the

⁹¹ Turkey's response to Panel question No. 1.2(c), para. 23.

⁹² See above para. 7.43.

⁹³ Morocco's second written submission, paras. 24-27.

⁹⁴ Turkey's opening statement at the second meeting of the Panel, para. 4.4.

⁹⁵ Working Procedures of the Panel, adopted on 22 August 2017, Annex A-1.

⁹⁶ Turkey's responses to Panel question No. 4.3(a), para. 92, and No. 4.3(b), para. 93.

Panel, can comply with either Rule 4 of the Panel's Working Procedures, or the requirements of due process of law".⁹⁷

7.65. For procedural grounds, we therefore decline to rule on Turkey's Article VI:6(a) claim, and we will neither consider it further nor resolve it.

7.2.2 Conclusion

7.66. For the reasons stated above, we conclude that the claims under Articles 3.1 and 3.4 in respect of the MDCCE's findings of "establishment", "material retardation", and the injury factors are within our terms of reference. The following claims fall outside our terms of reference:

- a. the claim under footnote 9 to Article 3 in respect of the MDCCE's finding of "establishment";
- b. the claims under Articles 6.5 and 6.5.1 in respect of the confidential treatment of the domestic industry's (Maghreb Steel) break-even threshold; and
- c. the claim under Article 6.9 in respect of the alleged failure to disclose the domestic industry's (Maghreb Steel) break-even threshold.

7.67. For procedural reasons, we decline to rule on the claim under Article VI:6(a) of the GATT 1994 in respect of the MDCCE's finding of "establishment".

7.3 Article 5.10 of the Anti-Dumping Agreement: The MDCCE's conclusion of the investigation beyond 18 months after initiation

7.68. The MDCCE concluded the underlying investigation in 18 months and 22 days after its initiation. Turkey claims that, in concluding the investigation in more than 18 months, the MDCCE exceeded the maximum time limit permissible for conclusion of investigations under Article 5.10 of the Anti-Dumping Agreement, and therefore acted inconsistently with that provision.⁹⁸

7.3.1 Provision at issue

7.69. Article 5.10 provides:

Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

7.3.2 Evaluation

7.70. The MDCCE initiated the underlying investigation on 21 January 2013, and concluded it on 12 August 2014, that is, 18 months and 22 days after initiation.⁹⁹ Turkey claims that the MDCCE acted inconsistently with Article 5.10 of the Anti-Dumping Agreement because the MDCCE failed to conclude the underlying investigation within the 18-month maximum time limit permissible under that provision, having exceeded that time limit by 22 days.¹⁰⁰ Morocco does not dispute that the

⁹⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 574 (Rule 4 of the panel's Working Procedures in that case is essentially equivalent to paragraph 6 of our Working Procedures). Panels have also declined to rule on claims that were not advanced in accordance with the equivalent to paragraph 6 of the Panel's Working Procedures. (Panel Reports, *EU – Biodiesel (Indonesia)*, para. 7.141; *US – Washing Machines*, paras. 7.82-7.84).

⁹⁸ Turkey also claims that the MDCCE acted inconsistently with Article 5.10 of the Anti-Dumping Agreement because it exceeded by 6 months and 22 days the 12-month deadline set out under that provision for concluding the underlying investigation, without identifying any special circumstances that justified that extension. (Turkey's first written submission, paras. 5.19-5.20). We note, however, that Turkey's panel request does not include that claim. Further, Turkey does not request us to make a finding in regard to that claim. We will therefore not address that claim in these proceedings.

⁹⁹ Notice of initiation, (Exhibit TUR-1); Public notice of the final determination, (Exhibit TUR-12); and Letter dated 18 August 2014 from the MDCCE to the Government of Turkey, (Exhibit TUR-18).

¹⁰⁰ Turkey's first written submission, paras. 5.10 and 5.19-5.20; opening statement at the first meeting of the Panel, para. 2.1; and second written submission, para. 3.2.

MDCCE exceeded the 18-month deadline for the conclusion of an anti-dumping investigation set out in Article 5.10, but contends that Article 5.10 should be interpreted flexibly and should not be understood as establishing a rigid 18-month deadline.¹⁰¹

7.71. We must therefore evaluate whether, in concluding the underlying investigation 22 days after the maximum permissible time limit of 18 months under Article 5.10, the MDCCE acted inconsistently with that provision.

7.72. We note that Article 5.10 states that investigations shall "in no case" be concluded in more than 18 months. The words "in no case" make it clear that an investigating authority may not, in *any* case, conclude its investigation in more than 18 months, and therefore, allow for no exceptions in adherence to this time limit. Further, we note that our reading of Article 5.10 is consistent with that of the Appellate Body and past panels. The Appellate Body has indicated that the time limits for concluding investigations set out in Article 5.10 are "mandated" under the Anti-Dumping Agreement, while a previous panel has found that these time limits are "strict".¹⁰² In particular, one past panel considered that Article 11.11 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which carries an obligation regarding conclusion of subsidies investigations that is identical to the one pertaining to anti-dumping investigations in Article 5.10 of the Anti-Dumping Agreement, does not permit prolonging the 18-month time limit under any circumstances.¹⁰³

7.73. Morocco however, draws our attention to language used in certain "other contexts" of the WTO Agreements which is similar to that in Article 5.10 of the Anti-Dumping Agreement.¹⁰⁴ Morocco contends, in particular, that the language on deadlines for concluding appellate proceedings in Articles 17.5 of the DSU, and panel proceedings in Articles 12.8 and 12.9 of the DSU, is similar to that in Article 5.10, and yet the Appellate Body and panels have "interpreted" those DSU provisions so as to allow them to exceed those deadlines.¹⁰⁵ Morocco argues that the same flexibility with which the time frames for concluding Appellate Body and panel proceedings have been interpreted, must apply to interpreting the time frame under Article 5.10. Turkey contends, in response, that Articles 17.5, 12.8, and 12.9 of the DSU carry obligations which are different from those in Article 5.10, and are therefore irrelevant for interpreting Article 5.10. Turkey, agreeing with the European Union's views, argues that the DSU provisions in question impose deadlines on the WTO bodies, rather than on individual WTO Members, with a view to contributing to the prompt resolution of disputes. Article 5.10, in contrast, imposes obligations on investigating authorities to protect the rights of other Members' exporters.¹⁰⁶ Morocco dismisses these differences as being "artificial", contending that WTO disputes too are initiated to secure the rights of exporters, and like anti-dumping investigations, involve competing interests and are subject to similar due process considerations.¹⁰⁷

7.74. We consider that the DSU provisions that Morocco cites cannot serve as context for interpreting Article 5.10 of the Anti-Dumping Agreement. Morocco, notably, itself refers to these DSU provisions as appearing in "other contexts" of the WTO Agreements.¹⁰⁸ In particular, we agree with Turkey and the European Union that the DSU provisions in question impose deadlines on the WTO bodies, rather than on individual WTO Members, with a view to contributing to the prompt resolution of disputes, whereas Article 5.10 imposes obligations on investigating authorities to protect the rights of other Members' exporters. As Turkey argues, the conduct of the WTO dispute settlement proceedings, including the time frame for concluding them, is subject to the supervision of the DSB.¹⁰⁹ The conduct of national anti-dumping investigations, in contrast, is not. We agree with Turkey that, in such a situation, it cannot be envisaged that investigating authorities conducting anti-dumping investigations would be permitted to "unilaterally deprive exporters of their rights".¹¹⁰

¹⁰¹ Morocco's first written submission, para. 48.

¹⁰² Appellate Body Report, *US – Hot-Rolled Steel*, para. 73; Panel Report, *US – Softwood Lumber V*, para. 7.333.

¹⁰³ Panel Report, *Mexico – Olive Oil*, paras. 7.121 and 7.123.

¹⁰⁴ Morocco's first written submission, paras. 44-45.

¹⁰⁵ Morocco's first written submission, paras. 44-46.

¹⁰⁶ Turkey's second written submission, para. 3.4 (referring to European Union's third-party submission, para. 10).

¹⁰⁷ Morocco's second written submission, para. 210.

¹⁰⁸ Morocco's first written submission, paras. 44-45.

¹⁰⁹ Turkey's second written submission, para. 3.4.

¹¹⁰ Turkey's second written submission, para. 3.4.

Interpreting the 18-month time limit in Article 5.10 as a flexible time limit, as Morocco considers the Panel should do, would mean that an investigating authority could, in principle, indefinitely delay an investigation, leaving exporters, whose commercial decisions depend on the outcome of the investigation, without any recourse in WTO law. We consider that such an interpretation is inconceivable under Article 5.10. The text of that provision leaves no room for flexibility in the strict obligation to adhere to the 18-month time limit and, in so doing, preserves predictability for the interested parties in an investigation. We therefore reject Morocco's argument for interpreting the time limit under Article 5.10, in light of the DSU provisions, which operate in an altogether different context.

7.75. Moreover, although Morocco asks us to interpret Article 5.10 in light of the DSU *provisions*, it is, effectively, asking us to do so in view of WTO dispute settlement *practice*. Morocco refers not to any formal interpretation of these provisions by the Appellate Body or panels, but to cases where the Appellate Body and the panels have exceeded the time limits set out in the relevant DSU provisions.¹¹¹ In our view, there is no case for importing into the adherence of the time limit under Article 5.10 flexibility from WTO dispute settlement practice, which as stated above, is subject to DSB supervision.

7.76. Morocco further argues that the delay in concluding the investigation beyond 18 months from its initiation resulted from the MDCCE's decision to grant interested parties' requests for additional time for their submissions or additional meetings as well as the MDCCE's need to review additional information that the respondents allegedly submitted "very late" in the investigation.¹¹² Turkey rejects this argument, contending that the strict time limits in Article 5.10 circumscribe any extension that the investigating authority may accord to interested parties. In this regard, it cites the panel's finding in *Mexico – Olive Oil* that there is "no basis ... to prolong an investigation beyond 18 months for any reason, including requests from interested parties".¹¹³ Turkey further argues that the MDCCE's alleged need for additional time to analyse information that the interested parties submitted in their comments to the draft final determination does not justify the delay in concluding the investigation, as the MDCCE itself allowed only a month before the end of the 18-month deadline for its own review of those comments.¹¹⁴

7.77. We note that the panel in *Mexico – Olive Oil* clearly found that requests from interested parties during the investigation proceedings did not justify a delay beyond 18 months in concluding the investigation.¹¹⁵ We agree. In *Mexico – Olive Oil*, similar to the case at hand, the respondent had argued before the panel that the delay in concluding the investigation was justified by requests for extension from interested parties, and additional information that the investigating authority considered interested parties had submitted at allegedly "late" stages in the investigation.¹¹⁶ In our view, an investigating authority may consider such requests from interested parties as part of its due process obligations under Article 6 of the Anti-Dumping Agreement; however, as the Appellate Body has recognized, the investigating authority's need to "'control the conduct' of its inquiry and to 'carry out the multiple steps' required to reach a timely completion" of the proceeding circumscribes its due process obligations.¹¹⁷ The Appellate Body noted, in particular, that Article 5.10 "requires" that investigations be completed in no more than 18 months, and that consonant with that requirement, Article 6.14 of the Anti-Dumping Agreement states that none of the procedures set out under Article 6 is intended "to prevent the authorities of a Member from proceeding expeditiously" in reaching their determinations.¹¹⁸ Therefore, we consider that an investigating authority must plan and conduct its investigation in such a way that it will conclude the investigation within the time limits set out in Article 5.10. In doing so, the investigating authority must, throughout the investigation, balance the interested parties' due process interests with the need to control and expedite the investigating process.¹¹⁹ More specifically, an investigating authority has the obligation,

¹¹¹ Morocco's first written submission, fns 34-35.

¹¹² Morocco's opening statement at the first meeting of the Panel, para. 13.

¹¹³ Turkey's opening statement at the first meeting of the Panel, para. 2.4 (quoting Panel Report, *Mexico – Olive Oil*, para. 7.121).

¹¹⁴ Turkey's opening statement at the first meeting of the Panel, para. 2.5.

¹¹⁵ Panel Report, *Mexico – Olive Oil*, para. 7.121.

¹¹⁶ Panel Report, *Mexico – Olive Oil*, para. 7.119.

¹¹⁷ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 282 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 242, quoting in turn Appellate Body Report, *US – Hot-Rolled Steel*, para. 73, quoting in turn Panel Report, *US – Hot-Rolled Steel*, para. 7.54).

¹¹⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 611.

¹¹⁹ Appellate Body Reports, *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, para. 5.74.

as Turkey argues, to balance the granting of requests for additional time with the strict obligation to conclude the investigation within the maximum time limit.¹²⁰ Similarly, an investigating authority must plan the receipt of submissions from interested parties in such a way that while it has sufficient time to review the information submitted by the respondents, that period for review does not cause it to exceed the 18-month maximum time limit for concluding the investigation.

7.78. Considering the text of Article 5.10, which, as past panels have confirmed, clearly allows for no exceptions in adherence to the 18-month time limit, as well as the Appellate Body's recognition of the mandatory nature of obligations in that provision, we take the view that requests from interested parties in the underlying investigation did not justify a delay in concluding the investigation beyond 18 months after initiation. We therefore find that the MDCCE acted inconsistently with Article 5.10 in exceeding that time limit.

7.4 Article 6.8 of the Anti-Dumping Agreement and paragraphs 1, 3, 5, 6, and 7 of Annex II: Facts available in respect of the investigated Turkish producers

7.79. Turkey's claims under Article 6.8 of the Anti-Dumping Agreement and paragraphs 1, 3, 5, 6, and 7 of Annex II concern the MDCCE's use of facts available in establishing the margins of dumping for the two investigated Turkish producers, Erdemir Group and Colakoglu (the producers).

7.4.1 Factual background

7.80. On 29 October 2013, the MDCCE imposed provisional anti-dumping duties on imports of hot-rolled steel from Turkey. It assigned a 0% provisional duty rate to subject imports from the two producers. In the preliminary determination, the MDCCE calculated their margins of dumping using their reported information, without resort to facts available.

7.81. In an email of 31 December 2013 sent to Erdemir Group, but not to Colakoglu, the MDCCE indicated that the producers had reported 18,800 tonnes of export sales to Morocco for the period of investigation, while Moroccan import statistics registered 29,000 tonnes of imports from Turkey for that period.¹²¹ In that email, the MDCCE identified five traders not reported by the producers and asked Erdemir Group to provide clarification in respect of them and the origin of their exports. In response, Erdemir Group explained that it did not have any information in respect of these traders as they were not customers of Erdemir Group for the subject product.¹²²

7.82. At a public hearing on 4 February 2014, the Turkish Steel Exporters' Association (CIB) addressed the issue of the discrepancy in export sales of approximately 10,000 tonnes. As reiterated in its letter of 6 March 2014 to the MDCCE, the CIB confirmed that the two producers were the sole exporters to Morocco during the period of investigation and that Turkish exports to Morocco did not exceed 19,000 tonnes as reported by the producers.

7.83. The MDCCE did not pursue the matter of the discrepancy of approximately 10,000 tonnes further with either of the producers.¹²³ In particular, it did not investigate the alleged discrepancy during its verification visits at the producers in March and April 2014.

7.84. In the draft final determination¹²⁴ issued on 20 June 2014, the MDCCE, however, referred to the discrepancy of "approximately 10,000 tonnes".¹²⁵ It explained that a review of detailed evidence indicated that unreported export sales from Turkey had been made through third-party traders and that movement certificates (certificates of origin) established that these sales originated from the two producers. The producers had therefore failed to report the entirety of their export sales to

¹²⁰ Turkey's second written submission, para. 3.6.

¹²¹ Correspondence December 2013-January 2014, (Exhibit TUR-25).

¹²² Addendum to questionnaire response, (Exhibit TUR-26 (BCI)), p. 5.

¹²³ In its final determination, the MDCCE refers to a visit to a "public institution", which Morocco identified as the Moroccan Customs, following the issuance of the preliminary determination. During this visit, the MDCCE obtained sales information concerning the allegedly missing 10,000 tonnes. (Final determination, (Exhibit TUR-11), paras. 21 and 56). The MDCCE indicated that it relied on this sales information, comprising customs and commercial documents, to consider that the allegedly missing export sales originated from the Turkish producers. (Final determination, (Exhibit TUR-11), para. 57).

¹²⁴ Through the draft final determination, the MDCCE purported to disclose the essential facts to the producers.

¹²⁵ Draft final determination, (Exhibit TUR-10), para. 51.

Morocco. For this reason, the MDCCE rejected all of the producers' reported information and established their margins of dumping using the petition rate of 11% as facts available.¹²⁶

7.85. On 24 June 2014, the two producers asked the MDCCE to provide the underlying documents on which the MDCCE based its finding that the producers had failed to report the entirety of their export sales. On 7 July 2014, the MDCCE provided them with redacted copies of movement certificates and commercial invoices.¹²⁷ In the MDCCE's view, these documents established that the allegedly missing export sales originated from the producers. The volume of the transactions for which the MDCCE provided these documents amounted to [[***]] tonnes. The MDCCE did not provide any information in respect of any other allegedly unreported export sales, in particular in respect of the remainder of the approximately 10,000 tonnes.

7.86. Within the deadline for disclosure comments on 11 July 2014, the producers submitted movement certificates, customs invoices and commercial invoices that, in their view, demonstrated that they had reported the [[***]] tonnes of allegedly unreported export sales in their original questionnaire responses.¹²⁸

7.87. In the final determination, the MDCCE repeated the findings set out in the draft final determination. It also found that the information provided by the producers as part of their disclosure comments did not allow it to clearly establish whether or not the relevant export sales had been reported by the producers. Faced with "doubt and uncertainty" on this issue, the MDCCE maintained its decision to use facts available.¹²⁹

7.4.2 Provision at issue

7.88. Article 6.8 of the Anti-Dumping Agreement provides:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

7.4.3 Evaluation

7.89. Turkey advances claims of inconsistency under Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II. We first address Turkey's claim under Article 6.8, and then turn to Turkey's remaining Annex II claims.

7.4.3.1 Claim under Article 6.8 of the Anti-Dumping Agreement

7.90. Article 6.8 allows for the use of facts available when an interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation. The present claim concerns an alleged failure by the two producers to provide certain necessary information in the form of export sales. The main issue in dispute is whether or not the MDCCE properly established that the two producers had failed to provide any such information.

7.91. In order to resort to facts available as a result of a failure by the producers to report certain export sales, the MDCCE was required to determine affirmatively that these producers had in fact failed to report the relevant export sales. In the draft final determination, the MDCCE made such a determination.¹³⁰ However, in light of the additional evidence provided by the producers, it did not maintain that determination in the final determination. Rather, in the final determination, the MDCCE stated that the explanations and evidence provided by the producers did "not allow [the MDCCE] to

¹²⁶ Draft final determination, (Exhibit TUR-10), paras. 51-58.

¹²⁷ Correspondence with customs and commercial documents from Erdemir Group, (Exhibit TUR-29 (BCI)); Correspondence with customs and commercial documents from Colakoglu, (Exhibit TUR-30 (BCI)).

¹²⁸ Erdemir Group's comments on the draft final determination, (Exhibit TUR-19 (BCI)); Colakoglu's comments on the draft final determination, (Exhibit TUR-20 (BCI)).

¹²⁹ Final determination, (Exhibit TUR-11), paras. 59-61.

¹³⁰ Draft final determination, (Exhibit TUR-10), para. 56.

clearly establish" whether or not the producers had reported the export sales at issue. The MDCCE referred to "doubt and uncertainty" in this regard.¹³¹ The MDCCE thus did not affirmatively determine that the producers had in fact failed to report particular export sales. As Morocco stated, "[t]he [MDCCE] could not rule out that the respondent companies had underreported their sales" and "therefore decided to maintain its conclusion to resort to facts available".¹³² Without any affirmative determination that the producers had in fact failed to report the necessary information, the MDCCE lacked a proper basis for recourse to facts available.

7.92. In our view, the MDCCE's inability to make an affirmative determination of under-reporting by the producers results from the MDCCE's failure to engage meaningfully with the producers on this issue. In this regard, we recall that the investigating authority and the interested party from whom information is requested must cooperate; such cooperation is a "two-way process involving joint effort".¹³³ Failure by an interested party to cooperate only gives rise to the consequences envisaged by Article 6.8 if the investigating authority itself acted in a reasonable, objective, and impartial manner.¹³⁴ Thus, where an investigating authority has legitimate concerns regarding the information provided, it must take reasonable steps to investigate and clarify.¹³⁵ This is reflected in the Anti-Dumping Agreement itself. For example, under paragraph 3 of Annex II, an investigating authority must seek to determine whether this information is verifiable before rejecting submitted information, be that through on-the-spot verifications, further requests for information or other means.¹³⁶ Pursuant to paragraph 6 of Annex II, if the investigating authority rejects evidence or information, it should inform the supplying interested party forthwith, give an opportunity to provide further explanations and consider those explanations.

7.93. In this case, "in the preliminary phase of the investigation"¹³⁷ the MDCCE identified a discrepancy of approximately 10,000 tonnes and, in December 2013, sought additional information in respect of unreported third-party traders from Erdemir Group – but not from Colakoglu. Erdemir Group stated that it could not provide any additional information as these traders were not its customers. The MDCCE did not pursue this matter further with Erdemir Group. According to Morocco, in a public hearing on 4 February 2014, the CIB "clarified that no other Turkish producers had exported to Morocco during the period of investigation. From this statement, the [MDCCE] understood that the missing sales could only originate from Erdemir Group and from Colakoglu".¹³⁸ Thus, since the public hearing on 4 February 2014, and well before verifications at the producers took place, the MDCCE "understood" that the discrepancy arose from unreported export sales of the producers. The MDCCE conducted verifications at the producers between 31 March and 4 April 2014. Nothing in the verification reports indicates, and Morocco does not contend, that the MDCCE pursued the issue of the discrepancy during those verifications.¹³⁹ Nor did the MDCCE engage in any other way with the producers on this issue. Instead, in its draft final determination of 20 June 2014, the MDCCE informed the producers that it would apply facts available because they had failed to report certain export sales. The MDCCE issued its draft final determination without indicating to the producers which export sales it considered that they had failed to report. It was only after the producers asked for clarification in this regard that the MDCCE provided documentary evidence identifying [[***]] tonnes of sales that the producers had allegedly failed to report. The producers responded with documentary evidence of their own to argue that such sales had in fact been reported.

7.94. Morocco contends that the MDCCE did not need to, and could not, address the issue of the discrepancy during verification at the producers. It suggests that verifications are limited to verifying

¹³¹ Final determination, (Exhibit TUR-11), paras. 60-61.

¹³² Morocco's opening statement at the first meeting of the Panel, para. 25. (emphasis added)

¹³³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 104.

¹³⁴ Panel Report, *Guatemala – Cement II*, para. 8.251.

¹³⁵ We recall that "in conducting its investigation, an investigating authority 'must actively seek out pertinent information' and may not remain 'passive in the face of possible shortcomings in the evidence submitted'". (Appellate Body Report, *EU – PET (Pakistan)*, para. 5.130 (referring to Appellate Body Report, *US – Washing Machines*, para. 5.268, quoting in turn Appellate Body Report, *US – Wheat Gluten*, paras. 53 and 55, which refers to Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 199; *US – Anti-Dumping and Countervailing Duties (China)*, para. 344; and Panel Report, *China – Broiler Products*, para. 7.261)).

¹³⁶ Panel Reports, *US – Steel Plate*, para. 7.71; *EC – Salmon (Norway)*, paras. 7.358-7.360.

¹³⁷ Morocco's first written submission, paras. 82 and 96.

¹³⁸ Morocco's opening statement at the first meeting of the Panel, para. 21. (fn omitted)

¹³⁹ Verification Report for Erdemir Group/Isdemir, (Exhibit TUR-8 (BCI)); Verification Report for Colakoglu, (Exhibit TUR-9 (BCI)).

submitted information and do not extend to collecting new information.¹⁴⁰ Moreover, "[t]o require an investigating authority to examine the omission of information in verification would unreasonably expand the scope of verification to essentially proving any negative".¹⁴¹ We disagree. According to paragraph 7 of Annex I of the Anti-Dumping Agreement, the main purpose of verifications is also "to obtain further details". This provision also envisages that there may be "further information which needs to be provided" during verification. Verifications are therefore not limited to verifying previously reported information.¹⁴² Moreover, the MDCCE itself considered the purpose of its verifications to encompass verifying the completeness of the reported export sales data ("exhaustivité des données") which belies Morocco's argument.¹⁴³

7.95. Further, in Morocco's view, in order to clarify the issue of the missing export sales, and to verify the information or documents submitted by the producers, the MDCCE would have needed to conduct verifications at the third-party traders through whom these sales were made. On at least 11 occasions in these proceedings, Morocco asserts that the MDCCE could not conduct such verifications because these third-party traders did not participate in the investigation. In doing so, Morocco does not even once refer to the record of the investigation where the MDCCE set out this specific consideration.¹⁴⁴ In fact, nowhere in its findings did the MDCCE consider that it could neither resolve the issue of the discrepancy, nor verify the information from the producers *because* it could not conduct verifications at third-party traders. Morocco's argument is thus an impermissible *ex post* explanation that we do not accept. Moreover, considering that the allegation concerns additional unreported sales of the producers, we agree with Turkey that:

Whether some of the sales were indeed unreported could easily have been determined by checking the reported sales quantities and values against the companies' accounting documents. This is not an open-ended exercise. Instead, it is the first and most basic step in verifying an exporter's database.¹⁴⁵

In any case, without any basis to properly determine that the two producers had themselves failed to report any export sales, the MDCCE could not have reasonably applied facts available as a result of the MDCCE's inability to verify export sales information at third-party traders.

7.96. Morocco argues that the movement certificates and commercial invoices provided by the producers in response to the draft final determination were different from those relied upon by the MDCCE and thus, in the MDCCE's view, did not sufficiently establish that the allegedly missing export sales had been reported.¹⁴⁶ In these proceedings, Morocco pointed to a certain number of alleged differences between the set of documents of the producers, on the one hand, and that of the MDCCE, on the other hand.¹⁴⁷

7.97. We do not exclude that certain differences alluded to by Morocco might have called into question the explanations and evidence provided by the producers. However, the MDCCE's final determination does not refer to any such differences.¹⁴⁸ Nor is there any indication in the final

¹⁴⁰ Morocco's response to Panel question No. 7.5, para. 18.

¹⁴¹ Morocco's response to Panel question No. 7.5, para. 18.

¹⁴² Morocco's position implies that at verification an investigating authority could simply seek to confirm the information that an interested party had previously furnished, even in case when the investigating authority has a concrete suspicion of under-reporting by that interested party. This, however, would strike us as incompatible with the fundamental task of an investigating authority to "investigate".

¹⁴³ According to Morocco, the "exhaustivité des données" referred only to the data set provided by the producers and did not concern whether the entirety of sales data had been reported. Morocco's argument is entirely implausible and contradicted by the MDCCE's inquiry in this context, e.g. into stocks and production. (Verification Report for Erdermir Group/Isdemir, (Exhibit TUR-8 (BCI)), p. 3; Verification Report for Colakoglu, (Exhibit TUR-9 (BCI)), p. 5).

¹⁴⁴ Morocco's first written submission, paras. 70, 85, 108, and 115; responses to Panel question No. 2.5(a), para. 61, No. 2.5(d), para. 66, No. 2.5(f)(iii), para. 78, No. 2.6(b), para. 82, and No. 7.5, para. 19; second written submission, para. 72; and opening statement at the second meeting of the Panel, para. 43.

¹⁴⁵ Turkey's comments on Morocco's response to Panel question No. 7.5, p. 9.

¹⁴⁶ Morocco's responses to Panel question No. 2.3, paras. 47-48, No. 2.5(a), para. 59, No. 2.5(d), para. 67, and No. 7.3, para. 11; second written submission, paras. 68-69.

¹⁴⁷ Morocco's responses to Panel question No. 2.3, paras. 47-48, No. 2.5(a), paras. 59-60, No. 2.5(c), para. 65, No. 2.5(d), para. 67, and No. 7.3, para. 11; second written submission, paras. 68-69; and opening statement at the second meeting of the Panel, para. 32.

¹⁴⁸ Absent any reasons given by the MDCCE in its determination of why the producers' explanations and evidence were insufficient, we may not, on our own, assess these explanations and evidence. Nor may we

determination that these differences were in fact the reason that led the MDCCE to reject the producers' explanations and evidence. Furthermore, Turkey has explained that at least some of the differences alluded to by Morocco had already been identified and explained by one of the producers, Colakoglu, in its disclosure comments.¹⁴⁹ In these circumstances, we do not accept Morocco's argument that the relevant differences justified the MDCCE's recourse to facts available.

7.98. The facts set out above demonstrate that the MDCCE had ample time to explore the issue of alleged under-reporting by the producers. Instead of doing so, the MDCCE issued a draft final determination applying facts available, and only began to engage meaningfully with the producers as a result of their reaction to that draft final determination. The comments and documentary evidence submitted by the producers resulted in "doubt and uncertainty" on the part of the MDCCE. Whatever differences, as explained above, the MDCCE may have identified in respect of that documentary evidence, those differences were not such as to remove that "doubt and uncertainty".

7.99. In our view, there is even greater "doubt and uncertainty" regarding the producers' alleged failure to report any additional, unidentified export sales that made up the remainder of the approximately 10,000 tonnes mentioned in the final determination. The final determination does not contain any reasoning or evaluation in respect of such additional, unidentified export sales. Nor did the MDCCE engage with the producers in respect of these sales after issuance of the draft final determination, despite the producers' request to see the underlying documents for all allegedly unreported export sales identified by the MDCCE. There was no engagement by the MDCCE with the parties in respect of such sales at all.

7.100. Morocco does not deny that the MDCCE did not provide any detailed information in respect of export sales other than the [[***]] tonnes. Morocco contends that the MDCCE could not disclose information in respect of the remainder of the allegedly unreported export sales, in particular the underlying customs and commercial documents on which the MDCCE relied. According to Morocco, these documents were confidential because they "indicated traders other than those declared in Erdemir Group's and Colakoglu's questionnaire responses".¹⁵⁰ We do not find Morocco's argument persuasive. As the MDCCE found at paragraph 57 of the final determination, the documents that the MDCCE disclosed to the producers in respect of the [[***]] tonnes also pertained to export sales made through unreported traders. This, however, did not prevent the MDCCE from disclosing a redacted version of the relevant documents to the producers. Further, the determination does not reflect that the MDCCE could not provide the documents at issue for confidentiality reasons. It is entirely silent on these sales. Even when transmitting the underlying information in respect of the [[***]] tonnes on 7 July 2014, the MDCCE remained silent on any additionally unreported export sales, or any confidentiality issue that may have prevented it from disclosing information in respect of these sales. We therefore reject Morocco's assertion as an *ex post* explanation.

7.101. Morocco submitted Exhibit MAR-11 (BCI) to demonstrate that the MDCCE had properly established that the producers had failed to report not only the identified [[***]] tonnes of export sales, but also additional, unidentified export sales.¹⁵¹ Turkey argues that this exhibit relates to export sales that were properly reported by the producers and to other export sales that fall outside the scope of the investigation.¹⁵² We note that Exhibit MAR-11 (BCI) contains a table with 40 line items of imports from Turkey to Morocco with a total volume of [[***]] tonnes. It does not contain any reference to Erdemir Group and Colagoklu, or otherwise indicate the specific producers of the listed export sales. The exhibit thus does not demonstrate that the MDCCE found that the listed sales: (a) originated from Erdemir Group and Colagoklu; (b) had not been reported by them; or (c) served as the basis for the MDCCE's recourse to facts available. Indeed, if this document had served as the basis for finding that the producers had failed to report certain export sales, we query why the total amount of sales in this document amounts to [[***]] tonnes, whereas the MDCCE's determination refers to a discrepancy of only "approximately 10,000 tonnes". Morocco has

determine, exclusively on the basis of our own appreciation of these explanations and evidence, whether the MDCCE's conclusion to disregard the producers' explanations and evidence was one that an objective and unbiased investigating authority could have reached.

¹⁴⁹ Colakoglu's comments on the draft final determination, (Exhibit TUR-20 (BCI)), p. 7; Turkey's first written submission, para. 6.76.

¹⁵⁰ Morocco's response to Panel question No. 2.3(b)(ii), para. 55; second written submission, para. 60.

¹⁵¹ Morocco's response to Panel question No. 2.1, paras. 39-40; second written submission, para. 65.

¹⁵² Turkey's second written submission, paras. 4.5-4.22; Turkey's explanation on Morocco's table of allegedly unreported transactions, (Exhibit TUR-57 (BCI)); and Movement certificates and commercial invoices, (Exhibit TUR-58 (BCI)).

provided us no convincing response in this regard.¹⁵³ We therefore consider that Exhibit MAR-11 (BCI) could not have constituted a proper basis for the MDCCE's recourse to facts available. Further, in any event, according to Morocco, this exhibit constitutes an internal working document of the MDCCE. It was not disclosed to the producers during the investigation. The exhibit therefore does not detract from the fact that the MDCCE failed entirely to engage with the producers in respect of any additional, unidentified sales that the producers allegedly failed to report.

7.102. Morocco also refers to the MDCCE's finding that the CIB had informed the MDCCE that Erdemir Group and Colakoglu were the only producers with exports to Morocco during the period of investigation.¹⁵⁴ According to Morocco, the MDCCE thus properly established that the entire discrepancy of approximately 10,000 tonnes, and not only the identified [[***]] tonnes, constituted unreported export sales originating from the producers. However, we share Turkey's view that Morocco selectively quotes from the CIB's statement.¹⁵⁵ In the final determination, the MDCCE more fully reflected that statement according to which the CIB had confirmed that the Turkish exports to Morocco were not in excess of the 19,000 tonnes reported by the producers.¹⁵⁶ The information provided by the CIB thus contradicts, rather than supports, Morocco's assertion that the export sales constituting the discrepancy of approximately 10,000 tonnes, in addition to the reported 18,800 tonnes, pertained to (unreported) export sales of the producers.

7.103. Finally, Turkey argues that the MDCCE could not, without more, reject and replace all the sales information that the producers had reported.¹⁵⁷ We agree. In order to reject the entirety of the export sales data reported by the producers, the MDCCE was required to explain why the alleged failure to report certain sales tainted, or rendered unusable, the sales data that had been reported.¹⁵⁸ The MDCCE, however, failed to do so. In particular, the MDCCE did not indicate how the alleged failure to report certain export sales might have affected the information on the reported 18,800 tonnes of export sales, and more broadly all of the reported information on domestic and export sales. Morocco argues that given the fact that the unreported sales constituted around 50% of the reported sales and 30% of the total sales, the MDCCE was entitled to reject all of the reported information.¹⁵⁹ Morocco's explanation, however, is not reflected in the final determination as a consideration of the MDCCE to disregard all information, and we reject it as an *ex post* explanation. Morocco also relies on statements in the final determination to the effect that the producers had failed to report all their sales, that this amounted to a failure to cooperate and that their explanations were insufficient.¹⁶⁰ These statements, however, provide no basis to rebut Turkey's claim that the MDCCE failed to establish that it was entitled to reject all reported information.

7.104. For all of the above reasons, we conclude that the MDCCE's recourse to facts available in respect of the producers' alleged failure to report the entirety of their export sales is inconsistent with Article 6.8.

¹⁵³ We are not persuaded by Morocco's assertion (Morocco's oral response to the Panel's question at the second meeting of the Panel; response to Panel question No. 7.2, para. 9) that the reference to "approximately 10,000 tonnes" served as an approximation for [[***]] tonnes, a figure that would exceed the proxy by about 20%. Moreover, the [[***]] tonnes are difficult to reconcile with the MDCCE's finding that the import volume from Turkey totalled 29,028 tonnes (Preliminary determination, (Exhibit TUR-6), table 4; this figure was not revised in the final determination), and not [[***]] tonnes (18,800 tonnes of the producers' reported export sales + [[***]] tonnes).

¹⁵⁴ Morocco's responses to Panel question Nos. 2.2(a) and (b), paras. 41-42, and No. 7.1, para. 4; second written submission, para. 65 (referring to Final determination, (Exhibit TUR-11), para. 54); and opening statement at the second meeting of the Panel, para. 38.

¹⁵⁵ Turkey's second written submission, para. 4.23; comments on Morocco's response to Panel question No. 7.1, p. 4.

¹⁵⁶ Final determination, (Exhibit TUR-11), para. 54; Letter of the CIB to the MDCCE, (Exhibit TUR-28 (BCI)).

¹⁵⁷ Turkey's first written submission, paras. 6.107-6.108 and 6.127; second written submission, paras. 4.50-4.51 and 4.66.

¹⁵⁸ Panel Report, *US – Steel Plate*, para. 7.75.

¹⁵⁹ Morocco's response to Panel question No. 2.7, para. 90.

¹⁶⁰ Morocco's opening statement at the second meeting of the Panel, para. 53 (quoting Final determination, (Exhibit TUR-11), paras. 57-58 and 60).

7.4.3.2 Claims under Annex II to the Anti-Dumping Agreement

7.105. Turkey also advances claims of inconsistency under paragraphs 1, 3, 5, 6, and 7 of Annex II.¹⁶¹ The main issues raised by Turkey as part of these claims relate to the assertions that the producers fully cooperated and provided all of their export sales, that the MDCCE did not provide sufficient information in relation to the totality of the allegedly missing export sales, that it did not engage with the explanations and evidence provided by the producers, that it did not sufficiently explain why it rejected the submitted information, and that it rejected more submitted information than it was entitled to.

7.106. Turkey's claims under paragraphs 1, 3, 5, 6, and 7 of Annex II thus concern essentially the same factual issues already addressed in the context of the Article 6.8 claim. Therefore, we do not need to also evaluate the additional claims under paragraphs 1, 3, 5, 6, and 7 of Annex II in order to effectively resolve this dispute or provide guidance in the event this issue arises in implementation.

7.4.4 Conclusion

7.107. Based on the above, we find that Morocco acted inconsistently with Article 6.8 in resorting to facts available to establish the margins of dumping for the two Turkish producers. In this light, we do not consider it necessary to make additional findings as to whether the MDCCE, in resorting to facts available, also acted inconsistently with its obligations under paragraphs 1, 3, 5, 6, and 7 of Annex II.

7.5 Article 6.9 of the Anti-Dumping Agreement: Disclosure of essential facts in respect of the alleged failure to report export transactions

7.108. Turkey claims that Morocco violated Article 6.9 of the Anti-Dumping Agreement by failing to inform the two investigated Turkish producers, Erdemir Group and Colakoglu, of the essential facts regarding the MDCCE's recourse to facts available in respect of their alleged failure to report the entirety of their export sales. Turkey's challenge under Article 6.9 is two-fold: (a) certain essential facts regarding the MDCCE's determination were not disclosed at all; and (b) other essential facts were not disclosed in sufficient time to allow the producers to defend their interests.

7.5.1 Factual background

7.109. On 20 June 2014, the MDCCE issued its final draft determination, in which the MDCCE purported to inform all interested parties of the essential facts under consideration forming the basis for its decision to apply definitive duties. In the draft final determination, and later in the final determination, the MDCCE referred to a discrepancy of "approximately 10,000 tonnes" between the export sales reported by the two producers and the official Moroccan import statistics. It explained that a review of detailed evidence indicated that unreported export sales from Turkey had been made through third-party traders and that movement certificates (certificates of origin) established that these sales originated from the two producers. It found that the producers had therefore failed to report the entirety of the export sales to Morocco. For this reason, the MDCCE rejected all of the reported information, resorted to facts available, and established the margins of dumping for the producers using the petition rate of 11%.¹⁶²

7.110. With regard to the rate of 11%, the draft final determination refers to the report on the initiation of the investigation (initiation report). The initiation report mentions that in calculating this rate, the petitioner had adjusted initial cost and freight (C&F)-based prices in respect of logistical costs, commission of intermediaries, and financing costs to arrive at ex-factory level export prices.¹⁶³ The initiation report indicates a specialized industry publication as one of the sources for the C&F prices. It does not provide more detailed information or data in respect of the C&F prices or the adjustments. The initiation report mentions, however, that the MDCCE verified the export prices

¹⁶¹ Turkey's first written submission, paras. 6.92-6.128; second written submission, paras. 4.42-4.68.

¹⁶² Draft final determination, (Exhibit TUR-10), paras. 51-56 and 58.

¹⁶³ Initiation report, (Exhibit TUR-2), p. 5.

used in the petition on the basis of a comparison with average price information that the MDCCE had derived using import values from import statistics.

7.111. Following the draft final determination, the producers asked the MDCCE to provide the underlying documents on which the MDCCE had relied in finding that they had not reported certain of their export sales. On 7 July 2014, the MDCCE provided movement certificates and associated commercial invoices to the producers in respect of [[***]] tonnes of export sales that, according to the MDCCE, had not been reported by the exporters.¹⁶⁴ The MDCCE did not provide any information in respect of any other export sales that the exporters had allegedly failed to report.

7.5.2 Provision at issue

7.112. Article 6.9 of the Anti-Dumping Agreement provides:

The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.5.3 Evaluation

7.5.3.1 Claims that certain essential facts were not disclosed at all

7.113. Turkey claims that the MDCCE failed, contrary to the requirements of Article 6.9, to disclose: (a) the precise basis for its decision to resort to facts available; and (b) the facts that it used to replace the missing information.¹⁶⁵ In particular, the MDCCE failed to disclose the following three sets of information that Turkey considers to be "essential facts":

- a. The essential facts on the basis of which the MDCCE determined that the producers had failed to report export sales other than the [[***]] tonnes identified in the MDCCE's communication of 7 July 2014 (referred to hereinafter as "additional, unidentified export sales").¹⁶⁶
- b. The data used in arriving at the margin of dumping – based on facts available in the petition – of 11%, in particular the data for the underlying C&F prices and the adjustments.¹⁶⁷
- c. The data and methodology used by the MDCCE in cross-checking the facts available pertaining to the margin of dumping in the petition.

In the following, we will examine Turkey's claims in respect of each set of information.

7.5.3.1.1 Essential facts in respect of the alleged failure to report additional, unidentified export sales

7.114. With regard to Turkey's claim concerning the first set of information, we recall our findings under Article 6.8 that the MDCCE did not properly establish the producers' failure to report the entirety of their export sales, including any additional, unidentified export sales.¹⁶⁸ In the context of this Article 6.9 claim, the issue is thus whether the MDCCE disclosed the essential facts pertaining to those additional, unidentified export sales.

¹⁶⁴ Correspondence with customs and commercial documents from Erdemir Group, (Exhibit TUR-29 (BCI)); Correspondence with customs and commercial documents from Colakoglu, (Exhibit TUR-30 (BCI)).

¹⁶⁵ Turkey's first written submission, para. 7.17 (relying on the legal standard elaborated in Panel Report, *China – Broiler Products*, para. 7.317).

¹⁶⁶ Turkey's first written submission, para. 7.15; responses to Panel question No. 3.1(a), paras. 55-58, and No. 3.2, para. 70; second written submission, para. 52; and opening statement at the second meeting of the Panel, para. 3.25.

¹⁶⁷ Turkey's first written submission, para. 7.16; responses to Panel question No. 3.1(a), para. 63, No. 3.3(a), paras. 71, and No. 3.3(b), para. 72; and second written submission, para. 5.3.

¹⁶⁸ See paras. 7.90. and 7.104. above.

7.115. "Essential facts" refer to those facts that are significant or salient in the process of reaching the decision whether or not to apply definitive measures.¹⁶⁹ Whether a particular fact is in this manner "essential" "depends on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, and the factual circumstances of each case, including the arguments and evidence submitted by the interested parties".¹⁷⁰ In this regard, an investigating authority must disclose information that is sufficiently precise to enable an interested party "to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts".¹⁷¹ The panel in *China – Broiler Products* also held that when applying Article 6.9 in the context of Article 6.8, the essential facts that an investigating authority is expected to disclose include:

(i) the precise basis for its decision to resort to facts available, such as the failure by an interested party to provide the information that was requested; (ii) the information which was requested from an interested party; and (iii) the facts which it used to replace the missing information.¹⁷²

Both parties have relied on this legal standard in their submissions to us. We agree with this legal standard and apply it in the present case.

7.116. Turkey argues that the MDCCE failed to disclose the "precise basis" for its finding that the producers had failed to report any additional, unidentified export sales, and thus the basis for its decision to use facts available in respect of such sales.¹⁷³ In order to disclose the "precise basis", Turkey considers that the MDCCE could have disclosed, for instance, the precise transactions at issue, the movement certificates and commercial invoices listing the allegedly unreported sales, and the names of the traders that had allegedly executed those sales.¹⁷⁴

7.117. Morocco argues that Article 6.9 did not require the MDCCE to disclose the underlying customs and commercial documents for the additional, unidentified export sales. In accordance with Article 6.5, the MDCCE could not disclose those documents because they were confidential.¹⁷⁵ Nevertheless, the MDCCE disclosed the "precise basis for its decision to resort to facts available" in respect of additional, unidentified export sales in the draft final determination and in the final determination.¹⁷⁶ In particular, Morocco refers to parts in the draft final determination indicating that the MDCCE resorted to facts available because it had found a discrepancy in export sales of approximately 10,000 tonnes originating from the Turkish producers, made through unreported traders.¹⁷⁷ In Morocco's view, the draft final determination only needed to provide a summary of the fact that the MDCCE had established the existence of unreported sales.

7.118. We disagree with Morocco's arguments. First, Morocco's reliance on the final determination is insufficient for a disclosure "before a final determination is made", as required by Article 6.9. We also reject Morocco's assertion that the MDCCE disclosed the "precise basis" for its recourse to facts available by informing the producers in the draft final determination that they had failed to report "approximately 10,000 tonnes" of export sales. The MDCCE certainly had a large margin of discretion on how to inform the producers of the relevant essential facts.¹⁷⁸ In this instance, there might have been any number of ways to do so, be that through the disclosure of the underlying customs and commercial documents, through a summary of the relevant information, or others. In the draft final

¹⁶⁹ Appellate Body Reports, *China – GOES*, para. 240; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.

¹⁷⁰ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130 (referring to Appellate Body Report, *China – GOES*, para. 241).

¹⁷¹ Appellate Body Report, *China – GOES*, fn 390 (quoting Panel Report, *EC – Salmon (Norway)*, para. 7.805).

¹⁷² Panel Reports, *China – Broiler Products*, para. 7.317; *China – Broiler Products (Article 21.5 – US)*, paras. 7.368 and 7.401.

¹⁷³ Turkey's first written submission, paras. 7.2, 7.12, and 7.17.

¹⁷⁴ Turkey's response to Panel question No. 3.1(a), para. 56; second written submission, para. 5.2.

¹⁷⁵ Morocco's first written submission, para. 151; second written submission, paras. 106-109.

¹⁷⁶ Morocco's first written submission, paras. 137-138 and 147; second written submission, paras. 95 and 102-105.

¹⁷⁷ Morocco's first written submission, paras. 137 and 147; second written submission, paras. 95 and 103 (quoting Draft final determination, (Exhibit TUR-10), paras. 51 and 55).

¹⁷⁸ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.370.

determination, the MDCCE however referred only in very broad and approximate terms to "approximately 10,000 tonnes" of allegedly unreported export sales. Although the MDCCE subsequently provided more information concerning a subset of [[***]] tonnes, it did not provide any specific information in respect of the additional, unidentified export sales. Without any precision at all on the factual underpinnings of these additional, unidentified export sales, it is not apparent how the very general information in the draft final determination could have allowed the exporters to understand, and therefore comment on, the precise factual basis on which the MDCCE concluded that they had failed to report additional, unidentified export sales.¹⁷⁹

7.119. Morocco also argues that the MDCCE disclosed the names of the traders in the email to Erdemir Group on 31 December 2013.¹⁸⁰ Morocco's assertion that this communication constituted a disclosure for purposes of Article 6.9 raises a number of concerns. But in any event, nothing suggests, and the parties do not assert, that simply listing the names of the traders would have allowed the producers to precisely identify the allegedly unreported sales at issue.

7.120. Finally, Morocco also argues that the underlying customs and sales documents in respect of the additional, unidentified export sales that the producers allegedly failed to report were confidential and thus could not be disclosed.¹⁸¹ Morocco notes that Turkey does not challenge the treatment of this information as confidential under Article 6.5.¹⁸² Regardless of the MDCCE's compliance with Article 6.5, which is not at issue here, we have already found in the context of Article 6.8 that Morocco's reliance on the alleged confidentiality of the underlying documents is not persuasive.¹⁸³ In particular, we recall that the MDCCE did disclose redacted versions of similar documents for the [[***]] tonnes. Moreover, as also explained in that context, Morocco's assertion in respect of the confidentiality of the information is not reflected in the record of the investigation. It is thus an *ex post* rationalization that we do not consider further.

7.121. As a result of the above, Turkey has established its claim that the MDCCE failed to disclose the "precise basis for its decision to resort to facts available" in respect of any additional, unidentified export sales that the MDCCE considered the producers to have failed to report. We therefore uphold Turkey's claim that Morocco acted inconsistently with Article 6.9.

7.5.3.1.2 Essential facts in respect of the calculation of the facts available rate

7.122. The second part of Turkey's claim concerns the MDCCE's alleged failure to disclose the data used to determine the producers' margins of dumping. These margins were based on the rate of 11% identified in the petition, which the MDCCE relied on as facts available. Turkey claims in particular that the MDCCE failed to disclose the C&F prices and the adjustments applied by the petitioner for purposes of determining export prices at the ex-factory level.

7.123. Morocco argues that information as to how the MDCCE calculated the facts available rate of 11% relates to "reasoning, calculation or methodology", none of which constitute essential facts.¹⁸⁴ According to Morocco, the MDCCE also disclosed sufficient information about the sources of the data used in arriving at the 11% rate in the initiation report and in the draft final

¹⁷⁹ It strikes us that Morocco asserted – in response to our questions concerning the reference in the draft final determination and the final determination to "approximately 10,000 tonnes" – that the MDCCE intended this reference as an approximation for a total of [[***]] tonnes of allegedly unreported export sales. (Morocco's oral response to the Panel's question at the second meeting of the Panel; response to Panel question No. 7.2, para. 9). It is already difficult to imagine how, in the circumstances of this case, a mere reference to "approximately 10,000 tonnes" could sufficiently disclose the "precise basis" for the sales making up those approximately 10,000 tonnes. But we entirely fail to see how a reference to approximately 10,000 tonnes could adequately disclose the "precise basis" in respect of even [[***]] tonnes. In order to disclose the "precise basis", we would expect the MDCCE to disclose the exact total amount of the allegedly unreported export sales and to find a way of allowing the producers to understand precisely how that amount has been determined and what individual export sales transactions are at issue.

¹⁸⁰ Morocco's first written submission, paras. 146 and 149; second written submission, paras. 110-111.

¹⁸¹ Morocco's first written submission, para. 151; second written submission, para. 106.

¹⁸² Morocco's second written submission, paras. 107-109.

¹⁸³ See para. 7.100. above.

¹⁸⁴ Morocco's first written submission, para. 152.

determination.¹⁸⁵ Moreover, the sources of the data used for the petition rate are public information.¹⁸⁶

7.124. The "essential facts" to be disclosed under Article 6.9 include the underlying data for particular elements that ultimately comprise normal value and export price, and any adjustments.¹⁸⁷ In the context of recourse to facts available, essential facts also include those "facts ... used to replace the missing information".¹⁸⁸ In this case, the petition rate was based on an export price calculation in which adjustments were applied to C&F prices to arrive at an ex-factory level. The C&F prices are important elements for the calculation of the export price. The adjustments made for netting back to ex-factory level represent "adjustments for differences which affect price comparability", and are required by Article 2.4 of the Anti-Dumping Agreement. Moreover, both the C&F prices and the adjustments (including the underlying data for the adjustments) are "facts ... used to replace the missing information". As a result, we consider that the C&F prices and the adjustments were "essential facts" that the MDCCE had to disclose.

7.125. The draft final determination does not provide any information on the C&F prices or the adjustments applied to them. Morocco correctly points out that the initiation report, to which the draft final determination refers¹⁸⁹, indicates the sources of the information for the C&F prices.¹⁹⁰ The initiation report also indicates that adjustments were made in relation to logistical costs, commission of intermediaries, and financing costs. Further, Morocco refers to a table in the initiation report, listing ex-factory export prices, ex-factory normal values, amounts of dumping, and margins of dumping.¹⁹¹ However, none of this information in the initiation report conveys the data for the C&F prices and for the adjustments used in order to arrive at the ex-factory export prices.¹⁹² Without this information on C&F prices and the adjustments, the producers could not ascertain the accuracy of the petition rate used by the MDCCE as facts available, which they would need to do in order to defend their interests.

7.126. As a result, we find that the MDCCE acted inconsistently with Article 6.9 by failing to disclose the data for the C&F prices and for the adjustments used in establishing the producers' margins of dumping based on facts available.

7.5.3.1.3 Essential facts used by the MDCCE in cross-checking the facts available rate

7.127. Concerning the third set of information, Turkey posits that Article 6.9 required the MDCCE to disclose how it cross-checked the petition rate based on information from import statistics as well as the data it used for that purpose. In particular, Turkey argues that the MDCCE should have disclosed the specific import values against which it checked the petition's export prices as well as information in respect of the transactions and the time periods on which those import values were based.¹⁹³

¹⁸⁵ Morocco's second written submission, paras. 113-118.

¹⁸⁶ Morocco's second written submission, paras. 115 and 117.

¹⁸⁷ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131; Panel Report, *China – Broiler Products*, para. 7.91.

¹⁸⁸ See fn 175 above.

¹⁸⁹ Draft final determination, (Exhibit TUR-10), para. 58; Initiation report, (Exhibit TUR-2), pp. 4-5. Turkey does not take issue with the fact that the MDCCE cross-referenced the initiation report in making its disclosure for purposes of Article 6.9. (Turkey's response to Panel question No. 3.1(a), paras. 61 and 65).

¹⁹⁰ Morocco's second written submission, para. 115.

¹⁹¹ Morocco's second written submission, para. 116.

¹⁹² With respect to the C&F prices, Morocco refers to the reference in the initiation report to a specialized publication, "Tribune de la Sidérurgie", as a relevant and publicly available *source* of information. Morocco's reliance on the reference to this publication is not persuasive. We do not need to consider whether a disclosure under Article 6.9 of particular essential facts could be made by simply referring to an external source, that is apparently not even part of the investigation record, where those essential facts can somehow be retrieved. In any event, the publication at issue was only one of two sources mentioned in the initiation report in respect of the C&F prices – the other being a mere reference to "intermediaries" – and only covered data for one of two months at issue (data for October 2012 was obtained from the publication, data for March 2012 from "intermediaries"). This means that any disclosure whatsoever would have been incomplete, at best.

¹⁹³ Turkey's responses to Panel question No. 3.1(a), paras. 59 and 64, and No. 3.3(a), para. 71; second written submission, para. 5.3.

7.128. Morocco argues that the data that the MDCCE used in cross-checking the petition rate are public information.¹⁹⁴

7.129. We recall that we declined, for procedural reasons, to rule on Turkey's claim under Article VI:6(a) of the GATT 1994.¹⁹⁵ Turkey asserted its Article VI:6(a) claim only in response to our written questions, and thus contrary to paragraph 6 of the Panel's Working Procedures that requires the parties to present the facts of the case and the arguments in the first written submission before the first substantive meeting.

7.130. The same consideration applies to Turkey's Article 6.9 claim in respect of how the MDCCE cross-checked the petition rate, and the data used for that purpose. Turkey's first written submission did not include a statement of this claim. Turkey asserted this claim for the first time in its responses to our written questions, and then in its second written submission.¹⁹⁶

7.131. We therefore rely on paragraph 6 of our Working Procedures to decline ruling on this Article 6.9 claim concerning any "essential facts" used by the MDCCE in cross-checking the facts available rate.

7.5.3.2 Claim that certain essential facts were not disclosed in sufficient time to allow producers to defend their interests

7.132. Turkey argues that the disclosure of the movement certificates and commercial invoices pertaining to the [[***]] tonnes of export sales, through communication on 7 July 2014, did not take place in sufficient time for the producers to defend their interests, contrary to the requirements of Article 6.9.¹⁹⁷

7.133. Turkey's claim at issue here concerns the timing¹⁹⁸ of the disclosure which, according to the first sentence of Article 6.9, shall be "before the final determination", and, pursuant to the second sentence of Article 6.9, "should take place in sufficient time for the parties to defend their interests". Turkey makes three arguments in this respect. First, the investigation exceeded the deadlines set out in Article 5.10. Second, the MDCCE did not meaningfully assess the producers' comments, such that the disclosure itself did not take place in sufficient time for the producers to defend their interests. Third, the producers only had five working days to respond after receiving the underlying documents identifying the [[***]] tonnes of export sales, which was much shorter than the 21-day period provided for by domestic Moroccan law.

7.134. Morocco does not deny that Turkey's claim relates to "essential facts"¹⁹⁹, but asserts that the relevant disclosure took place in sufficient time to allow exporters to defend their interests. The producers had 15 working days from the draft final determination to comment. Even when counting from 7 July 2014, they had five working days to respond and in fact provided comments and additional documentation, without requesting an extension, and thus defended their interests.²⁰⁰

7.135. We are not persuaded by Turkey's arguments. Turkey's first argument regarding the MDCCE's failure to comply with the time limits for conducting the investigation under Article 5.10 is unrelated to the issue whether the producers had *sufficient time* to defend their interests in response to the disclosure. Nothing indicates that the MDCCE's non-compliance with the deadlines for the investigation could have somehow impaired the producers' ability to defend their interests in responding to the disclosure. Regarding the second argument, Turkey appears to suggest that the

¹⁹⁴ Morocco's second written submission, paras. 115 and 117.

¹⁹⁵ See para. 7.65. above.

¹⁹⁶ Turkey's responses to Panel question No. 3.1(a), paras. 59 and 64, and No. 3.3(a), para. 71; second written submission, para. 5.3.

¹⁹⁷ Turkey's first written submission, paras. 7.2 and 7.19; see also response to Panel question No. 3.1(b), paras. 67-69; and second written submission, paras. 5.6-5.7.

¹⁹⁸ Turkey's responses to Panel question No. 3.1(b), para. 67, and No. 3.2, para. 70; second written submission, para. 5.5; and opening statement at the second meeting of the Panel, para. 3.24.

¹⁹⁹ The MDCCE relied on the customs and commercial documents at issue in order to establish that the producers had failed to report [[***]] tonnes of export sales. On this basis, and absent any arguments by the parties to the contrary, we have no reason to doubt that these documents, or at least that information contained therein establishing – in the MDCCE's view – the existence of unreported export sales, constituted essential facts within the meaning of Article 6.9.

²⁰⁰ Morocco's first written submission, para. 153; second written submission, paras. 119-122.

MDCCE's failure to engage with the disclosure comments demonstrates the "rush" with which the investigation was concluded.²⁰¹ However, neither a failure to engage with the disclosure comments, nor a rush in the conclusion of the investigation establishes that the MDCCE had not disclosed the essential facts in sufficient time to allow the producers to defend their interests. Turkey's third argument concerns the limited deadline of five working days to respond to the underlying customs and commercial documents, short of the 21-day period available under Moroccan law to comment on the disclosure of essential facts. We cannot, however, determine in the abstract, based on a specific minimum number of days for giving comments, whether interested parties were afforded sufficient opportunity to defend their interests.²⁰² This will depend on the circumstances of a given case.

7.136. In this instance, we consider that Turkey has not established on the basis of the specific circumstances of this case that the disclosure did not take place in sufficient time for the producers to defend their interests. Turkey does not explain how the deadline of five working days – counting from 7 July 2014 when the MDCCE provided the underlying documents for the [[***]] tonnes of allegedly missing export sales – limited the opportunity of the two producers to defend their interests in time to prepare and submit comments on the essential facts disclosed by the MDCCE. Simply because the underlying documents were made available with only five working days to comment does not demonstrate that the producers could not comment on, challenge, or provide additional information in respect of the essential facts, such that they were unable to defend their interests.²⁰³ In its claims under Article 6.8 and Annex II, Turkey asserts that the Turkish producers proffered explanations and evidence in their disclosure comments establishing that the allegedly missing export sales had been reported. Notwithstanding the short deadline, it thus rather appears that the producers were able to defend their interests, but that based on their comments, the MDCCE did not come to the conclusions that the Turkish producers and Turkey would have liked it to reach.

7.137. As a result of the above, we find that Turkey has not established its claim under Article 6.9 in respect of the alleged failure to disclose the essential facts pertaining to the [[***]] tonnes of export sales in sufficient time for the Turkish producers to defend their interests.

7.5.4 Conclusion

7.138. In light of the above, in respect of Turkey's claims under Article 6.9 we find that:

- a. Turkey has established its claim that the MDCCE acted inconsistently with Article 6.9 by failing to inform all interested parties of any essential facts in respect of the additional, unidentified export sales that the MDCCE considered the producers to have failed to report.
- b. Turkey has established its claim that the MDCCE acted inconsistently with Article 6.9 by failing to inform all interested parties of the data for the C&F prices and for the adjustments used in arriving at the producers' margins of dumping using facts available.
- c. Turkey has not established its claim that the MDCCE acted inconsistently with Article 6.9 by failing to inform all interested parties of the movement certificates and commercial invoices in respect of the [[***]] tonnes of allegedly unreported export sales in sufficient time for the producers to defend their interests.

7.139. Based on paragraph 6 of our Working Procedures, we decline ruling on Turkey's Article 6.9 claim concerning any "essential facts" used by the MDCCE in cross-checking the facts available rate.

²⁰¹ Turkey's response to Panel question No. 3.1(b), para. 69.

²⁰² In this regard, the minimum period for comments on the disclosure established by municipal law has also no bearing on a Member's compliance with Article 6.9.

²⁰³ Appellate Body Reports, *China – GOES*, fn 390; *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, fn 316.

7.6 Articles 3.1 and 3.4 of the Anti-Dumping Agreement: The MDCCE's determination that the domestic industry was unestablished

7.140. In the underlying investigation, the MDCCE found that the domestic industry, which it defined as comprising of the sole domestic producer, Maghreb Steel²⁰⁴, had suffered injury in the form of "material retardation of the establishment of the domestic industry".²⁰⁵ In arriving at this determination, the MDCCE followed a two-step analysis: it first examined, applying five criteria, whether the domestic industry was established. Having found that the domestic industry was unestablished, it proceeded to examine whether the establishment of that industry had been materially retarded.²⁰⁶

7.141. In determining whether the domestic industry was established, the MDCCE applied the following five criteria: (a) how long the domestic industry had been producing the domestic like product; (b) the market share of the domestic like product; (c) whether the domestic industry's production had been stable; (d) whether the domestic industry had reached profitability/break-even point; and (e) whether the domestic industry constituted a "new" industry.²⁰⁷ The MDCCE noted, in its final determination, that it had reached its finding that the domestic industry was unestablished based on a separate and collective consideration of its conclusions on these criteria.²⁰⁸

7.142. Turkey claims that the MDCCE's determination that the domestic industry was unestablished is inconsistent with Article 3.1 and footnote 9 to Article 3 of the Anti-Dumping Agreement, and Article VI:6(a) of the GATT 1994, because that determination was not based on positive evidence and objective examination. In particular, Turkey contends that the MDCCE's findings in relation to each of the five criteria that it relied on for determining whether the domestic industry was established were flawed.

7.143. Turkey further claims that consequent to incorrectly determining that the domestic industry was unestablished, the MDCCE erroneously conducted an injury analysis in the form of "material retardation of the establishment of the domestic industry", instead of material injury to an established domestic industry, and therefore acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.6.1 Provisions at issue

7.144. Article 3.1 of the Anti-Dumping Agreement provides as follows:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

7.145. Article 3.4 of the Anti-Dumping Agreement provides as follows:

The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

²⁰⁴ Final determination, (Exhibit TUR-11), para. 30; Preliminary determination, (Exhibit TUR-6), paras. 22 and 53.

²⁰⁵ The parties in this case do not dispute whether the domestic producer, Maghreb Steel, constituted a domestic industry.

²⁰⁶ Final determination, (Exhibit TUR-11), paras. 80 and 111.

²⁰⁷ Final determination, (Exhibit TUR-11), paras. 83 and 111.

²⁰⁸ Final determination, (Exhibit TUR-11), para. 111.

7.6.2 Evaluation

7.146. Turkey challenges the MDCCE's determination that the domestic industry was unestablished under Article 3.1 and footnote 9 to Article 3 of the Anti-Dumping Agreement, and Article VI:6(a) of the GATT 1994. However, we recall as falling outside our terms of reference, Turkey's claim that the MDCCE's determination that the domestic industry was unestablished is inconsistent with footnote 9 to Article 3 of the Anti-Dumping Agreement. We also recall that for procedural reasons, we decline to rule on Turkey's claim under Article VI:6(a) of the GATT 1994 in respect of the MDCCE's finding of "establishment".²⁰⁹ In light of those jurisdictional and procedural grounds, we will evaluate Turkey's claim under Article 3.1 alone.

7.147. That "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation with respect to the injury determination", is well settled.²¹⁰ Article 3.1 requires that the injury determination be based on positive evidence and involve an objective examination of both: (a) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products; and (b) the consequent impact of these imports on domestic producers of such products.²¹¹ Article 3.1 thus requires, *inter alia*, that an investigating authority base, on objective examination and positive evidence, its inquiry into the impact of dumped imports on domestic producers. It follows that Article 3.1 requires that an investigating authority also base, on objective examination and positive evidence, any of its findings that *form part of* that inquiry into the impact of dumped imports on domestic producers.

7.148. In the underlying investigation, the MDCCE's finding that the domestic industry was unestablished, and that the establishment of the domestic industry was materially retarded, *formed part of* the MDCCE's inquiry into the impact of dumped imports on domestic producers. In particular, the MDCCE proceeded to examine whether the domestic industry had suffered injury in the form of material retardation of its establishment, rather than material injury, only upon finding that the domestic industry was unestablished.²¹² Given that the MDCCE, in examining the impact of dumped imports on domestic producers, relied on its finding that the domestic industry was unestablished, we consider that Article 3.1 required the MDCCE to base that finding on positive evidence and objective examination.²¹³ In the event that the record of the underlying investigation shows that the MDCCE did not base that finding on positive evidence and objective examination, we will then conclude that the MDCCE acted inconsistently with Article 3.1.

7.149. This approach finds support in the findings of other panels and the Appellate Body. In *Argentina – Poultry Anti-Dumping Duties*, the panel examined inconsistency with Article 3.1 independently of other provisions of Article 3.²¹⁴ Similarly, the Appellate Body and several prior panels found violations of Article 3.1, in a first step of their evaluation, independent of any assessment of consistency with other provisions of Article 3. Having found a violation of Article 3.1, they subsequently proceeded to find consequential violations of certain other provisions of Article 3.²¹⁵ Further, in *EC – Countervailing Measures on DRAM Chips*, the panel refrained from taking the view that Article 15.1 of the SCM Agreement, which is the equivalent of Article 3.1 of the

²⁰⁹ See para. 7.67. above.

²¹⁰ Appellate Body Report, *US – Hot-Rolled Steel*, para. 192 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 106).

²¹¹ Article 3.1, read in light of footnote 9 to Article 3, imposes obligations on an investigating authority with respect to its "injury determination", which extend to cases where the injury determined takes the form of material retardation of the establishment of a domestic industry.

²¹² Final determination, (Exhibit TUR-11), paras. 69 and 195; Preliminary determination, (Exhibit TUR-6), para. 92.

²¹³ The parties disagree over whether the Anti-Dumping Agreement requires an investigating authority to determine that the domestic industry is unestablished in the context of making a determination that the establishment of that industry is materially retarded. (Turkey's response to Panel question No. 4.2, paras. 86-87; Morocco's response to Panel question No. 4.2, para. 94). However, in this dispute, we do not need to address that question because in the underlying investigation the MDCCE did determine that the domestic industry was unestablished as part of its analysis of the material retardation of the establishment of the domestic industry. The relevant question, as set out in paragraph 7.148. above, is therefore whether the MDCCE's determination that the domestic industry was unestablished was based on positive evidence and objective examination.

²¹⁴ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.283-7.285.

²¹⁵ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 211-214; Panel Reports, *EU – Biodiesel (Argentina)*, paras. 7.413, 7.415, and 7.431; *Mexico – Anti-Dumping Measures on Rice*, paras. 7.65 and 7.86-7.87.

Anti-Dumping Agreement, does not impose any independent obligations in its own right. It considered that "if an investigating authority lacks positive evidence and has not examined the evidence before it objectively, then the investigating authority would have acted inconsistently with Article 15.1, regardless of any conclusions that might be reached about the other – more specific – obligations under Article 15."²¹⁶

7.150. We have also considered carefully the report of the panel in *China – Cellulose Pulp* concerning this issue. The panel, in that case, took the view that the "basic principles" in Article 3.1 that a determination of injury be based on positive evidence and objective examination do not establish independent obligations, which can be judged separately from the substantive requirements set out in the remainder of Article 3 of the Anti-Dumping Agreement.²¹⁷ We note, however, that these observations of the panel were *obiter*, and did not form a basis of its findings. Further, the panel qualified those observations by stating that a claim of inconsistency with Article 3.1 may not "normally" be made independently of other provisions of Article 3.²¹⁸ We consider that through the use of the word "normally", the panel indicated that in certain cases, claims could be made under Article 3.1 independently of other provisions of Article 3. Indeed, the panel recognized that "a general claim of bias on the part of the investigating authority would fall squarely under Article 3.1".²¹⁹ The panel further suggested that whether an investigating authority's decision-making process was biased can be determined only by scrutinizing the specific decisions that the authority took in the context of its injury analysis.²²⁰ In the underlying investigation, the MDCCE's finding that the domestic industry was unestablished formed part of the MDCCE's injury analysis. In evaluating the consistency of that finding with Article 3.1, we *would* thus review, as the panel in *China – Cellulose Pulp* suggested, a specific decision that the MDCCE took in the context of its injury analysis.

7.151. We therefore agree with Turkey that Article 3.1 can be violated independently when an erroneous act or omission, such as an erroneous finding that the domestic industry in question is unestablished, taints the overall injury analysis.²²¹ We thus evaluate in this dispute Turkey's claim in question under Article 3.1 independently of any other provision in Article 3.

7.6.2.1 Whether the MDCCE acted inconsistently with Article 3.1 in finding that the domestic industry was unestablished

7.152. We note that the MDCCE recognized that an analysis of "material retardation of the establishment of the domestic industry" applies not only to cases where the domestic industry had not yet started producing the like product in question, but also to cases where the domestic industry had not yet reached "une présence stable" (a stable presence) on the market.²²² In the underlying investigation, the domestic industry, Maghreb Steel, had already started producing the like product (hot-rolled steel) during the injury period.²²³ The MDCCE's inquiry into whether Maghreb Steel was an established industry therefore entailed examining whether Maghreb Steel had achieved a stable presence on the market. We note that Turkey does not challenge the use of the standard of stability of presence for purposes of examining whether an "already producing" industry is established. In particular, Turkey does not challenge the MDCCE's application of that standard of establishment to determine whether Maghreb Steel, which had already started production, was established. Turkey recognizes the possibility of "exceptional circumstances" in which an industry, which has already started producing, is not yet established.²²⁴ Turkey asserts that such a determination must however,

²¹⁶ Panel Report, *EC – Countervailing Measures on DRAM Chips*, fn 218.

²¹⁷ Panel Report, *China – Cellulose Pulp*, para. 7.13.

²¹⁸ Panel Report, *China – Cellulose Pulp*, para. 7.15.

²¹⁹ Panel Report, *China – Cellulose Pulp*, fn 47.

²²⁰ The panel observed that whether the decision-making process of the investigating authority was unbiased can "only be determined on the basis of a careful scrutiny of the decisions made by the investigating authority in reaching a conclusion on the question of whether dumped imports caused injury, as set out in the relevant determination and other documents". (Panel Report, *China – Cellulose Pulp*, para. 7.17).

²²¹ Turkey's second written submission, paras. 6.13-6.14.

²²² Final determination, (Exhibit TUR-11), para. 76.

²²³ The injury period in the underlying investigation ran from January 2009 until December 2012. (Final determination, (Exhibit TUR-11), para. 11). Maghreb Steel began production of hot-rolled steel in 2010.

²²⁴ Turkey submits that the breadth of the term "establishment of the industry", read in conjunction with "création d'une branche de la production nationale" and "creación de esta rama de producción" in the French and Spanish versions, respectively, is closer to "bringing into existence" of an industry rather than making the industry "firm or stable". (Turkey's first written submission, para. 8.26). At the same time, Turkey accepts the

be grounded in positive evidence and involve an objective examination, as required under Article 3.1 of the Anti-Dumping Agreement.²²⁵

7.153. The issue we must resolve therefore is whether the MDCCE, consistently with Article 3.1, evaluated, objectively and on the basis of positive evidence, the five criteria enumerated in paragraph 7.141. that it used in finding that the domestic industry was unestablished.

7.154. We recall that "positive evidence" refers to the facts underpinning and justifying the injury determination. It relates to quality of the evidence that authorities may rely upon in making a determination. The word "positive", in particular, means that the evidence must be of an affirmative, objective, and verifiable character, and it must be credible.²²⁶ The term "objective examination" relates to the conduct of the investigation generally. It requires an injury investigation to conform to the dictates of the basic principles of good faith and fundamental fairness, and that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party.²²⁷ Further, the "positive evidence" to be examined by the investigating authority must pertain to the particular substantive elements relevant to the determination made, and the "objective examination" must relate to the consideration and evaluation of that evidence in the investigation at issue.²²⁸

7.155. Similar to the Appellate Body's views, our view is that Article 3.1 does not prescribe a particular methodology that an investigating authority must follow in assessing whether a domestic industry is established.²²⁹ While an investigating authority enjoys a certain degree of discretion in adopting a methodology to guide its analysis, it may, within the bounds of that discretion, have to rely on reasonable assumptions or draw inferences. The exercise of this discretion must nonetheless comply with the requirements of Article 3.1. Accordingly, when an investigating authority's determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified. An investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence. An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis.²³⁰

7.156. We will apply these considerations in evaluating whether the MDCCE's finding that the domestic industry was unestablished was based on positive evidence and objective examination. In our evaluation, we will examine the MDCCE's assessment of each of the five criteria that formed the basis of its finding that the domestic industry was unestablished.

7.6.2.1.1 Whether the MDCCE did not properly assess the temporal criterion in its establishment analysis

7.157. In determining whether Maghreb Steel was established, the MDCCE took into consideration how long the domestic industry had been producing the domestic like product, hot-rolled steel. The MDCCE considered, in particular, the time that had lapsed between when Maghreb Steel began producing and marketing that product, and when it filed its petition containing evidence of injury with the MDCCE.²³¹ In its final determination, the MDCCE noted that Maghreb Steel had provided data that did not go back more than 30 months for hot-rolled steel sheets²³², and only 8 months for

possibility of exceptional circumstances in which an "already producing industry" is not yet established. (Turkey's first written submission, para. 8.28).

²²⁵ Turkey's first written submission, para. 8.28.

²²⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

²²⁷ Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

²²⁸ Panel Report, *China – Cellulose Pulp*, para. 7.16.

²²⁹ Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.52.

²³⁰ Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.52 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 204-205).

²³¹ In its preliminary determination, the MDCCE found that Maghreb Steel had been producing hot-rolled steel sheets for 28 months before filing its petition, and thick sheets for eight months before the underlying investigation was initiated. (Preliminary determination, (Exhibit TUR-6), paras. 73-74).

²³² The MDCCE noted in its final determination that its findings on injury to the domestic industry pertained to the entire range of products mentioned in the application by the domestic producer. The MDCCE stated, however, that it made a distinction between the various product segments (i.e. hot-rolled steel sheets and thick sheets) when this proved useful for a better understanding of the data. (Final determination,

thick sheets, and considered that time frame as not long enough to permit an assessment of material injury.²³³ In this regard, the MDCCE reasoned that, based on international practice, a material injury analysis requires a review of historical data for at least three years.²³⁴ However, in applying the temporal criterion to determine whether Maghreb Steel was established, the MDCCE also considered that the application of the temporal criterion should be analysed on a case-by-case-basis and take into account the nature of the industry in question. In this regard, the MDCCE noted that in the case at hand, the starting up of production and the marketing of a product such as hot-rolled steel sheets requires a lead time of more than two years, in view of the difficulty of mastering a heavy industry such as hot-rolling, as well as high-entry costs and the scale of the investment. It further stated that the marketing of steel products involves particular time frames owing to the difficulties inherent in the commercial negotiations, long delivery lead times, and transportation, among others.²³⁵ The MDCCE thus reached its finding that Maghreb Steel had not been producing and selling hot-rolled steel for a period sufficient for it to be considered an established industry.

7.158. In order to assess whether the MDCCE's finding that Maghreb Steel had not been producing and selling hot-rolled steel for a period adequate for it to be considered an established industry was based on positive evidence and objective examination, we must evaluate the MDCCE's reasoning, set out in the preceding paragraph, for that finding.

7.159. We will therefore first assess whether the MDCCE properly concluded that a material injury analysis *requires* a review of historical data for at least three years. In its final determination, the MDCCE stated that this conclusion was not arbitrary, but was based on international practice.²³⁶ At the outset, we consider that an unbiased and objective investigating authority would not have concluded that international practice did *require* that a determination of material injury be based on three years of data. Given the absence of any requirement in the WTO covered Agreements that a material injury analysis be based on a review of data for at least three years, international practice could not have set out that requirement and bound the MDCCE in that regard. We therefore consider that the MDCCE did not objectively conclude that a material injury analysis *requires* a review of historical data for at least three years.

7.160. Turkey argues that the MDCCE's conclusion that a material injury analysis requires a review of historical data for at least three years runs contrary to the Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations (hereinafter "the Recommendation") adopted by the Committee on Anti-Dumping Practices.²³⁷ Turkey contends that although the Recommendation lays down a general rule that the period of investigation of injury *should* be at least three years, it recognizes the possibility that a shorter period may be chosen if data is available for a shorter period. Morocco contends, in response, that the Recommendation did not legally bind WTO Members, and therefore did not preclude the MDCCE from concluding that given historical data for a period of less than three years, it could not assess material injury in the underlying investigation.²³⁸ Turkey submits that it refers to the Recommendation, not to ask the Panel to apply it as binding law, but as evidence of the recognition by a WTO body, composed of all WTO Members, that injury periods may effectively be shorter than three years.²³⁹

7.161. We note that the record of the investigation does not indicate that the MDCCE took the Recommendation into consideration in determining whether it had data covering a period that was sufficiently long for it to assess material injury. Nor did the Anti-Dumping Agreement or the covered Agreements *require* the MDCCE to take the Recommendation into consideration because, as Morocco argues, it does not legally bind WTO Members.²⁴⁰ Past panels have recognized that the

(Exhibit TUR-11), paras. 122-123). There is no dispute among the parties regarding the coverage of the product under consideration, which in this case is hot-rolled steel. In our analysis, we refer to the specific sub-products, i.e. hot-rolled steel sheets and thick sheets, rather than the product under consideration, i.e. hot-rolled steel, only where the MDCCE specifically refers to those specific sub-products in its determination.

²³³ Final determination, (Exhibit TUR-11), paras. 84-85.

²³⁴ Final determination, (Exhibit TUR-11), para. 87.

²³⁵ Final determination, (Exhibit TUR-11), para. 91.

²³⁶ Final determination, (Exhibit TUR-11), para. 87.

²³⁷ Turkey's first written submission, para. 8.41 (referring to Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, G/ADP/6 (5 May 2000), para. 1).

²³⁸ Morocco's first written submission, para. 180 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 169).

²³⁹ Turkey's opening statement at the first meeting of the Panel, para. 4.2.

²⁴⁰ Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.62.

Recommendation is "a non-binding guide to the common understanding of Members on appropriate implementation of the AD Agreement".²⁴¹ Given that even as a "guide", the Recommendation is non-binding, we do not consider it necessary for purposes of resolving the issue at hand, to assess whether the MDCCE's consideration that a material injury analysis requires a review of historical data for at least three years, did run contrary to the Recommendation. We therefore reject Turkey's argument in this regard.

7.162. We will next evaluate whether the MDCCE's conclusion that the starting up of production and the marketing of hot-rolled steel sheets requires a lead time of more than two years was based on positive evidence. Turkey argues that the MDCCE did not substantiate that conclusion with any evidence on the record.²⁴² Morocco contends, in response, that certain statements in the report of the initiation of the investigation, addressing Maghreb Steel's investment and certain difficulties that the company faced in its first year of producing hot-rolled steel, do substantiate that consideration.²⁴³ Morocco asserts that the MDCCE stated that:

In 2010, the company Maghreb Steel undertook a major investment to build a hot-rolling complex comprising two hot-rolling mills for the production of coil and thick sheet, with capacities of one million tonnes and 500,000 tonnes, respectively, and an electric steel plant with a capacity of one million tonnes.²⁴⁴

7.163. In the same report, the MDCCE stated that:

The analysis of the injury indicators, above, shows that Maghreb Steel is encountering numerous difficulties during the start-up years of its hot-rolling activity.²⁴⁵

7.164. We note that the first statement addresses Maghreb Steel's investment towards the production of hot-rolled steel. The second statement addresses difficulties Maghreb Steel faced in its first year after having started production of hot-rolled steel. Neither statement, however, substantiates the MDCCE's consideration that the starting up of the production and marketing of a product such as hot-rolled steel sheet requires, *in particular*, a period of time of *more than two years*.

7.165. Further, the same report in which these two statements appear states that Maghreb Steel's achievements in terms of production and sales during the years 2011 and 2012 (1st semester) stood well *below* the objectives of its investment project foreseen in the company's Business Plan.²⁴⁶ This statement, notably, appears in the part of the report discussing injury caused by dumped imports. This statement, and its appearance in the context of a discussion of injury caused by dumped imports under the section entitled "Conclusion sur les éléments du dommage", indicates that Maghreb Steel was forecasted to perform better than it actually did.²⁴⁷

²⁴¹ Panel Report, *US – Hot-Rolled Steel*, fn 152.

²⁴² Turkey's first written submission, paras. 8.43-8.45.

²⁴³ Morocco's first written submission, para. 183.

²⁴⁴ The MDCCE's original statement in French is as follows:

En 2010, la société MAGHREB STEEL a entamé un investissement considérable par l'édification d'un complexe de laminage à chaud comprenant deux laminoirs à chaud de bobines et de tôles fortes, de capacités respectives d'un million de tonnes et 500 000 tonnes, et d'une aciérie électrique d'une capacité d'un million de tonnes.

(Initiation report, (Exhibit TUR-2), p. 5).

²⁴⁵ The MDCCE's original statement in French is as follows:

L'analyse des indicateurs de dommage, ci-dessus, montre que MAGHEB [sic] STEEL rencontre beaucoup de difficultés au cours des premières années de démarrage de son activité de laminage à chaud.

(Initiation report, (Exhibit TUR-2), p. 11).

²⁴⁶ The statement in question set out in the report on the initiation of the investigation is as follows:

Les réalisations de MAGHREB STEEL en termes de production et de ventes au cours des années 2011 et 2012 (1^{er} semestre) sont très en deçà des objectifs prévus dans le business plan de son projet d'investissement.

(Initiation report, (Exhibit TUR-2), p. 11).

²⁴⁷ The concluding paragraph in the section entitled "Conclusion sur les éléments du dommage" in the report on the initiation of the investigation states that:

Ainsi, vu que les réalisations de MAGHREB STEEL sont largement en deçà des prévisions fixées dans le plan d'affaires ayant justifié son investissement, le DCE considère qu'il y a effectivement un retard dans le démarrage d'une branche de production nationale de tôles en acier laminées à

The "difficulties" faced by Maghreb Steel that the report of initiation of the investigation refers to, under the section entitled "Conclusion sur les éléments du dommage", therefore did not necessarily reflect the norm in the hot-rolled steel industry, which belies Morocco's reliance on that reference, as reflecting difficulties that companies generally faced in their first year after having started production of hot-rolled steel. Therefore, we consider that the MDCCE's conclusion that the starting up of production and the marketing of hot-rolled steel sheets requires a lead time of more than two years was not based on positive evidence.

7.166. Based on the foregoing, we consider that the MDCCE did not properly find that Maghreb Steel had produced hot-rolled steel for a period inadequate to consider it an established industry.

7.6.2.1.2 Whether the MDCCE did not properly assess the market share criterion in its establishment analysis

7.167. In determining whether Maghreb Steel was established as an industry, the MDCCE declined to consider Maghreb Steel's share in total domestic consumption of the domestic like product that the company had secured through its sales to the merchant market, as well as certain transfers to its captive market. The MDCCE did so after initially setting out "market share" as a relevant indicator of establishment. The MDCCE did not take into consideration Maghreb Steel's total market share because it considered that the merchant market was the only market where imports could compete with the domestic like product.²⁴⁸ The MDCCE further rejected considering Maghreb Steel's share even in the merchant market on the basis that the company had secured that share through loss-making sales, and therefore that market share could not be taken as indicating the company's stability.²⁴⁹ For these reasons, the MDCCE decided not to rely on Maghreb Steel's market share in determining whether the domestic industry was established.²⁵⁰ Turkey asserts that Maghreb Steel had secured 70% of the total market, and 40% of the merchant market, for the domestic like product in 2012. Morocco does not contest these figures.²⁵¹

7.168. According to Turkey, the MDCCE offered no meaningful explanation for disregarding Maghreb Steel's total market share in assessing whether the domestic industry was established. Turkey argues that whether Maghreb Steel dedicated part of its production to captive consumption was irrelevant to the issue of whether it was established.²⁵² Morocco responds that the MDCCE did explain that the merchant market was the only market where domestic products could compete with imports and therefore the MDCCE considered it appropriate to focus on the merchant market for purposes of determining whether the domestic industry was established.²⁵³

7.169. We will first evaluate whether the MDCCE improperly disregarded Maghreb Steel's total market share in determining whether the company was established because that total market share included Maghreb Steel's captive production.

7.6.2.1.2.1 Whether the MDCCE improperly disregarded Maghreb Steel's total market share

7.170. At the outset, we note that the MDCCE had undertaken to consider the market share of the "domestic industry" for purposes of assessing whether the "domestic industry" was established. The MDCCE sought to make this assessment within the broader context of its "determination of injury" under Article 3, and particularly in order to ascertain whether the domestic industry had suffered injury in the form of "material retardation of the establishment of the domestic industry".²⁵⁴ The

chaud et que par conséquent, MAGHREB STEEL a subi un dommage au sens de l'Article 3 de l'Accord Antidumping.

(Initiation report, (Exhibit TUR-2), p. 11).

²⁴⁸ Final determination, (Exhibit TUR-11), para. 94.

²⁴⁹ Final determination, (Exhibit TUR-11), para. 95.

²⁵⁰ Final determination, (Exhibit TUR-11), para. 96.

²⁵¹ Turkey's first written submission, para. 8.50; Morocco's first written submission, paras. 185-189. We note that Turkey also asserts that Maghreb Steel had secured a share of over 37% in the merchant market in 2011. (Turkey's second written submission, para. 6.36; response to Panel question No. 8.8, para. 14). Morocco rejects Turkey's assertion in this regard, and submits that Maghreb Steel's share in the merchant market in 2011 stood at 24% instead. (Morocco's comments on Turkey's response to Panel's question No. 8.8).

²⁵² Turkey's first written submission, paras. 8.51-8.52.

²⁵³ Morocco's first written submission, para. 186.

²⁵⁴ Final determination, (Exhibit TUR-11), paras. 68 and 111.

term "domestic industry" within the context of an injury determination under Article 3, however, has to be understood as meaning the domestic industry in totality, and does not distinguish between the captive market and the merchant market. The Appellate Body has made it clear, in this regard, that captive production may not be excluded from either the definition of the domestic industry or from the injury analysis.²⁵⁵ In *US – Hot-Rolled Steel*, the Appellate Body explained that it follows clearly from the definition of injury in footnote 9 to Article 3 of the Anti-Dumping Agreement that the focus of the injury determination is the state of the "domestic industry", which, read in light of Article 4.1 of the Anti-Dumping Agreement, is the domestic industry *in totality*.²⁵⁶ The Appellate Body further noted that while nothing in the Anti-Dumping Agreement prevents investigating authorities from examining a domestic industry by part, sector or segment, Article 3.1 requires that such sectoral examination be conducted in an "objective" manner. This requirement means that in cases where investigating authorities examine one part of a domestic industry, they should, in principle, examine in like manner all of the other parts that make up the industry, as well as examine the industry *as a whole*. Alternatively, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry.²⁵⁷ The Appellate Body reasoned that different parts of the domestic industry may exhibit different economic performance within a particular period. To examine only the parts of an industry which are performing poorly may result in highlighting the negative data in the poorly performing part without drawing attention to the positive data in other parts of the industry.²⁵⁸

7.171. We agree with the Appellate Body's reasoning, and consider that it also applies in the particular context of the MDCCE's establishment analysis. A determination of "material retardation of the establishment of the domestic industry" under Article 3.1 would not be based on an "objective examination", if an investigating authority found, as part of that determination, that the domestic industry in question was unestablished, having examined only a part and not the totality of that domestic industry. In examining only one part of the domestic industry, the authority may well have examined the part with less operational stability without also examining a part that was more operationally stable, leading the authority to conclude that the industry is unestablished. Examining the industry in totality, however, may have led the authority to reach a different conclusion regarding the state of establishment of the industry.²⁵⁹ We therefore consider that an objective and unbiased authority, in assessing the domestic industry's market share for purposes of determining whether that industry is established, would take into consideration the market share for both the captive and merchant market segments, or alternatively, would give a satisfactory explanation for why it could not do so. In the underlying investigation, the MDCCE failed to do either.

7.172. As noted in paragraph 7.167, the MDCCE declined to consider Maghreb Steel's total market share in assessing whether the domestic industry was established because it considered that the merchant market was the only market where imports could compete with the domestic like product.²⁶⁰ In a separate part of its final determination, the MDCCE explained that having examined the data from the domestic industry, it considered that captive sales of hot-rolled steel did not compete with imports for two reasons: First, captive production is transferred within Maghreb Steel without any price being paid. According to the MDCCE, the absence of pricing in internal transactions indicated that captive sales were not marketed under the same conditions as on the merchant market. Second, the cold-rolled steel downstream unit of Maghreb Steel has practically stopped purchasing hot-rolled steel sheet from independent suppliers since Maghreb Steel can itself produce hot-rolled steel sheet.²⁶¹ Morocco argues that these reasons formed the basis for the MDCCE's conclusion that Maghreb Steel's captive transfers of hot-rolled steel did not compete with imports, and led the MDCCE to disregard the company's total market share.²⁶²

7.173. In our view, even if the MDCCE was correct that captive transfers of hot-rolled steel did not compete with imports, an unbiased and objective authority would not, for that reason alone, disregard the domestic industry's captive transfers in assessing whether the domestic industry was established. Recalling the MDCCE's standard of stability of presence for purposes of examining

²⁵⁵ Appellate Body Report, *US – Cotton Yarn*, para. 102.

²⁵⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 190.

²⁵⁷ Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

²⁵⁸ Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

²⁵⁹ We recall here that the MDCCE had sought to apply a standard of stability of presence for purposes of examining whether Maghreb Steel was established.

²⁶⁰ Final determination, (Exhibit TUR-11), para. 94.

²⁶¹ Final determination, (Exhibit TUR-11), para. 138.

²⁶² Morocco's response to Panel question No. 4.12, para. 108.

whether Maghreb Steel was established, we consider that a domestic industry may be established, in the sense of having stable operations, even if it engages primarily in captive transfers. Indeed, the McLellan report, upon which the MDCCE had relied in its findings in the investigation, had concluded that almost half of Maghreb Steel's production, which was directed to the captive market, had access to "un marché garanti" (a guaranteed market) and would therefore hold "bonnes perspectives commerciales" (good commercial prospects) for the domestic industry.²⁶³ In our view, an unbiased and objective investigating authority, in analysing the market share of the domestic industry for purposes of determining the stability of its operations, would not disregard a guaranteed market which accounted for half of that industry's production. This was because, as the McLellan report itself recognized, the fact that the captive market was guaranteed held good commercial prospects for the domestic industry, which in turn, pointed to the overall viability – and therefore stability – of the domestic industry.

7.174. Furthermore, even if we were to accept the MDCCE's reasoning that it is the domestic industry's presence in the merchant market which determines whether that industry is established, in our view, a domestic industry may be willing to divert "captive sales" to the "merchant market" if it is more profitable for it to do so. Maghreb Steel had secured 70% of the total market in Morocco for hot-rolled steel towards the end of the injury period. Even if a certain percentage of that share was dedicated to the captive market, an unbiased and objective authority would have questioned whether Maghreb Steel had the option to, if it wished, divert some or all of its captive production to the merchant market. Particularly in the context of assessing whether Maghreb Steel was an established industry, it was relevant for the MDCCE to have considered that it may well be easier for a company currently making "captive sales" of a product to enter the merchant market than it would be for a company with no production of that product. The MDCCE, however, did not do so.

7.175. Therefore, we consider that the MDCCE did not act objectively in concluding that it could not consider Maghreb Steel's total market share of hot-rolled steel in its establishment analysis because that share consisted of captive transfers of hot-rolled steel.

7.176. We recall further that the MDCCE, in assessing whether the domestic industry was established, rejected considering even Maghreb Steel's market share in respect of its merchant market sales, on the basis that those sales were made at a loss. We will next evaluate the MDCCE's basis for not considering Maghreb Steel's merchant market share in assessing whether the domestic industry was established.

7.6.2.1.2.2 Whether the MDCCE improperly rejected Maghreb Steel's share in the merchant market

7.177. Turkey argues that the MDCCE's conclusion that Maghreb Steel's share in the merchant market did not indicate stability because Maghreb Steel made its sales to that market at a loss, was flawed. In particular, Turkey contends that the MDCCE did not substantiate with positive evidence on the record its assertion that those sales were made at a loss.²⁶⁴ Further, in dismissing Maghreb Steel's merchant market share in its analysis of establishment, the MDCCE extrapolated its finding that sales in 2012 were made at a loss to apply to the full injury period.²⁶⁵ Morocco responds that because the MDCCE noted that sales were made at a loss in the context of addressing the year 2012 does not mean that the MDCCE's finding regarding sales at a loss was made solely for 2012. In this regard, Morocco refers to certain statements in the final determination, where the MDCCE addressed the sales made at a loss without reference to a specific year.²⁶⁶

7.178. We note that the MDCCE, in referring in its final determination to Maghreb Steel's loss-making sales as a basis for not considering Maghreb Steel's merchant market share, did not expressly refer to any evidence to substantiate its conclusion that those sales were made at a loss.²⁶⁷ The MDCCE also did not specify which year(s) in the injury period the company had incurred those losses. Turkey asserts that in certain parts of its final determination the MDCCE stated that

²⁶³ Preliminary determination, (Exhibit TUR-6), para. 120.

²⁶⁴ Turkey's opening statement at the first meeting of the Panel, para. 4.4.

²⁶⁵ Turkey's second written submission, para. 6.40.

²⁶⁶ Morocco's opening statement at the second meeting of the Panel, para. 83 (referring to Final determination, (Exhibit TUR-11), paras. 95 and 180).

²⁶⁷ Final determination, (Exhibit TUR-11), para. 95.

sales at a loss occurred only in 2012.²⁶⁸ In particular, Turkey refers to the MDCCE's statement below, in the context of the MDCCE's analysis of the volume of dumped imports:

Over the period 2010-2012, even if the share of imports declined by 13%, it still always remained above non-negligible levels, and still held more than half of the merchant market in 2012 (57.34%). It should also be recalled that Maghreb Steel's market share in 2012 was only obtained thanks to below-cost sales.²⁶⁹

7.179. We note that the above statement indicates that although the MDCCE assessed the trend in the share of imports over the entire period 2010-2012, in noting that Maghreb Steel had secured market share only due to sales at losses, the MDCCE referred only to 2012.

7.180. Turkey further asserts that in analyzing Maghreb Steel's sales volumes in its final determination, the MDCCE stated:

It should be pointed out that almost all the sales in 2012 were made at a loss (99%).²⁷⁰

7.181. We note that the above statement indicates that the MDCCE, once again, referred only to losses in 2012 and not in the remaining period of investigation. Turkey argues that the above statements indicate that the MDCCE extrapolated its finding that sales in 2012 were made at a loss to apply to the full injury period.²⁷¹

7.182. We consider that while these statements do not conclusively indicate that the MDCCE, as Turkey argues, extrapolated its finding that sales in 2012 were made at a loss to apply to the full injury period, they do raise a doubt as to whether the MDCCE found that Maghreb Steel incurred losses only in 2012 or also in the rest of the injury period. We note, in particular, that there is no determination by the MDCCE that sales to the merchant market were made at a loss in 2010 and 2011.

7.183. In this regard, Morocco posits that the fact that the sales were made at a loss is demonstrated by Maghreb Steel's failure to reach its break-even threshold.²⁷² In particular, Morocco points to the MDCCE's statement that Maghreb Steel's production in 2012 represented barely 63% of its break-even point, which left the company far from a level where it would not realize a loss.²⁷³ Morocco further asserts that the MDCCE had explained in its determinations that Maghreb Steel had "never" met its break-even threshold, and points to Maghreb Steel's questionnaire response as support for this conclusion. Morocco submits that as the record evidence demonstrated that Maghreb Steel had never met its break-even threshold, the MDCCE properly concluded that its sales were made at a loss.²⁷⁴

7.184. We agree with Turkey, however, that nothing in the MDCCE's record demonstrates that Maghreb Steel's failure to meet its break-even threshold meant that the company's sales incurred losses.²⁷⁵ The MDCCE did not explain, either in its determination or elsewhere in the record of the underlying investigation, how it had arrived at Maghreb Steel's break-even threshold: in particular, it remains unclear what price the MDCCE assigned to transfers of hot-rolled steel to the captive market in Morocco. Without that information, we have no basis to conclude that Maghreb

²⁶⁸ Turkey's second written submission, para. 6.38.

²⁶⁹ The MDCCE's original statement in French is as follows:

Sur la période 2010-2012, même si la part des importations a baissé de 13%, elle s'est toujours maintenue à des niveaux non-négligeables, dépassant encore la moitié du marché libre en 2012 (57,34%). Aussi, il convient de rappeler que la part de marché obtenue par MAGHREB STEEL en 2012 n'a été possible que grâce à des ventes à perte.

(Final determination, (Exhibit TUR-11), para. 136).

²⁷⁰ The MDCCE's original statement in French is as follows: "[i]l est à préciser que la quasi-totalité des ventes de 2012 été faite à perte (99%)". (Final determination, (Exhibit TUR-11), para. 176).

²⁷¹ Turkey's second written submission, para. 6.40.

²⁷² Morocco's first written submission, para. 187; second written submission, para. 148.

²⁷³ Morocco's second written submission, para. 148 (referring to Preliminary determination, (Exhibit TUR-6), para. 87); first written submission, para. 187.

²⁷⁴ Morocco's response to Panel question No. 4.17, para. 119 (referring to Preliminary determination, (Exhibit TUR-6), paras. 86-87 and Final determination, (Exhibit TUR-11), para. 100).

²⁷⁵ Turkey's second written submission, paras. 6.43-6.44.

Steel's failure to meet the break-even threshold meant that the company had incurred a loss in *any* year of the injury period, including 2012.

7.185. The MDCCE understood a company to meet its break-even threshold when its total revenue equals its total costs.²⁷⁶ However, in Maghreb Steel's case, at least part of the company's production of hot-rolled steel could not have brought revenue because the MDCCE had found that it was transferred to the captive market free of charge.²⁷⁷ That being the case, the question arises whether, in determining whether Maghreb Steel's total costs were equal to its total revenue, the MDCCE compared the company's total costs, which included the cost of producing the domestic like product that the company transferred to its captive market *and* that which it sold to the merchant market, with revenue *only* from the sales to the merchant market, as those were the only revenue-making sales. In such comparison, the cost side of the equation would be incongruent with the revenue side because the cost of production pertains to the cost of Maghreb Steel's total production but the revenue pertains to only part of its production. As Turkey argues, such comparison would yield unreasonable results.²⁷⁸ Morocco contends, however, that the break-even threshold did consider the revenues from Maghreb Steel's total production.²⁷⁹ Morocco asserts, in particular, that Maghreb Steel's questionnaire response states clearly that in determining whether the company had met its break-even threshold, the company took into account "les ventes intersites" (transfers to the captive market). Morocco further asserts that the MDCCE had relied upon Maghreb Steel's questionnaire response in determining that the company had not met its break-even threshold.²⁸⁰

7.186. We note, at the outset, that the contents of Maghreb Steel's questionnaire response do not amount to a determination by the MDCCE. Nor does the MDCCE's determination clearly show that the MDCCE relied on that questionnaire response in determining that Maghreb Steel had not met its break-even threshold. The MDCCE in its determination simply refers to "[d]onnées collectées auprès de Maghreb Steel" (data from Maghreb Steel) as a source for information on the company's break-even threshold, without specifically referring to the company's questionnaire response.²⁸¹ We consider however that, even if we were to accept Morocco's assertion that Maghreb Steel's questionnaire response serves as evidence that the MDCCE did, in calculating total revenue, include transfers to the captive market in terms of *volume* of production transferred, the record does not indicate the *price* which the MDCCE assigned to those transfers in order to arrive at the revenue. This is particularly puzzling considering the MDCCE's statement in its determination that those transfers to the captive market were made without a price.²⁸² In our view, the price assigned to the transfers was critical in determining revenue earned because revenue is a function of price. The total revenue would be lower, higher or equal to the total cost, depending on the price assigned to the transfers, therefore having a direct bearing on whether the MDCCE would consider Maghreb Steel to have met its break-even threshold.

7.187. Morocco asserts that a "hypothetical price" was assigned to the transfers to the captive market, which was equivalent to the market price.²⁸³ We consider, however, that nothing in the MDCCE's determination or record shows that the MDCCE, or even Maghreb Steel, had assigned such a "hypothetical price" to those transfers in arriving at the total revenue for the domestic like product. In response to the Panel's question asking Morocco to identify record evidence showing that the MDCCE had assigned a "hypothetical price" to captive transfers, Morocco points to the "[p]rix de vente unitaire" (unit price), set out in certain tables pertaining to "Détail du calcul du seuil de rentabilité et point mort"²⁸⁴ in Maghreb Steel's questionnaire response. Morocco submits that these tables indicate the "[p]rix de vente unitaire" (unit price) without differentiating between the captive or merchant markets. Morocco further asserts that below the tables, Maghreb Steel explains that

²⁷⁶ Preliminary determination, (Exhibit TUR-6), para. 83.

²⁷⁷ Final determination, (Exhibit TUR-11), paras. 110 and 138. Further, Morocco has not presented any evidence to show that any revenue was attributed to these transfers in Maghreb Steel's books. Indeed, Morocco confirms that Maghreb Steel's hot-rolled steel production branch did not charge for the transfer of hot-rolled steel to the cold-rolled steel branch. (Morocco's response to Panel question No. 9.8, para. 70).

²⁷⁸ Turkey's opening statement at the first meeting of the Panel, para. 4.5.

²⁷⁹ Morocco's second written submission, paras. 153-154.

²⁸⁰ Morocco's second written submission, para. 155.

²⁸¹ Preliminary determination, (Exhibit TUR-6), para. 86 and table 2.

²⁸² Final determination, (Exhibit TUR-11), para. 138.

²⁸³ Morocco's second written submission, para. 157.

²⁸⁴ "Details of the calculation of the profitability threshold and break-even point".

"[t]he break-even threshold in 2012 amounts to around [] tons against real sales (including internal sales) of [] tons", and that internal transfers were thus included in this calculation.²⁸⁵

7.188. We consider however, that nothing in the term "[p]rix de vente unitaire" (unit price), or in the explanation following the table indicating that the "ventes réelles" (real sales) included "les ventes intersites" (internal sales), establishes either that Maghreb steel had assigned a "hypothetical price" to captive transfers, or that that hypothetical price was equivalent to the market price. We cannot assume, in the absence of a finding by the MDCCE, that the "[p]rix de vente unitaire" (unit price) was applicable also to Maghreb Steel's captive transfers, particularly in light of the MDCCE's finding that these transfers were made without a price. In light of that finding, if such a hypothetical price had been applied to the captive transfers, the application of that price should have been clear from the MDCCE's determination. Given Morocco's failure to identify in the MDCCE's determination any express and clear reference to the price assigned to captive transfers, we reject Morocco's argument in this regard as *ex post* rationalization, and conclude that the record evidence does not show that the MDCCE's conclusion that Maghreb Steel had not met its break-even threshold was based on positive evidence. Because there was inadequate evidence on the record to support the MDCCE's conclusion that Maghreb Steel had failed to meet its break-even threshold, that unfounded conclusion could not have served as a proper basis for finding that the company had sold to the merchant market at a loss.

7.189. Further, even if there was evidence on the MDCCE's record that Maghreb Steel had sold to the merchant market at a loss, that fact in itself would not have justified disregarding the domestic industry's market share in assessing whether the industry was established. Turkey asserts that a 40% merchant market share is indicative of establishment, as the fact that Maghreb Steel succeeded in securing 40% of merchant sales with respect to a product that used to be totally imported prior to 2009, is because the company had well-established selling and distribution channels in the market place.²⁸⁶

7.190. In considering the issue of establishment in the context of the stability of an industry's presence, an objective and impartial investigating authority would be expected to consider whether an industry's ability to capture as much as 40% of the merchant market, even through selling at a loss, nevertheless indicates that the presence of that industry is sufficiently stabilized. In our view, once a certain share of the market is secured, the fact that sales are made at a loss does not necessarily preclude a determination that the presence of an industry is sufficiently stabilized for that industry to be established (in which case the sales at a loss would be considered in the context of an assessment of material injury). On the one hand, sales at a loss may not be sustainable, and therefore indicative of a lack of stability. On the other hand, the fact that an industry accounts for as much as 40% of the merchant market might suggest stability in the sense of established selling operations, market presence, and client base. These latter considerations may be particularly relevant given the MDCCE's finding that the marketing of steel products involves particular time frames owing to the difficulties inherent in the commercial negotiations, long delivery lead times, and transportation, among others.²⁸⁷ These are but some of the issues that an objective examination by the MDCCE might have addressed.

7.191. For the foregoing reasons, we consider that the MDCCE did not act objectively in dismissing Maghreb Steel's merchant market share based on the reasoning that the company's sales were allegedly made at a loss. We consider that the MDCCE improperly dismissed Maghreb Steel's total market share in assessing whether the domestic industry was established. Further, we conclude that the MDCCE improperly disregarded Maghreb Steel's merchant market share.

²⁸⁵ The original statement of the MDCCE is as follows: "[l]e point mort en tonnes en 2012 s'élève à environ [] T contre des ventes réelles (y compris les ventes intersites) de [] T". (Morocco's response to Panel question No. 9.11, paras. 77-78 (quoting Excerpt from Maghreb Steel's questionnaire response, section G, (Exhibit MAR-8), p. 9)).

²⁸⁶ Turkey's first written submission, para. 8.52.

²⁸⁷ Final determination, (Exhibit TUR-11), para. 91.

7.6.2.1.3 Whether the MDCCE in its establishment analysis did not properly conclude that Maghreb Steel had not met its break-even threshold

7.192. For the reasons discussed in paragraphs 7.183. -7.188. above we consider that the MDCCE's determination does not show that its conclusion that Maghreb Steel had not met its break-even threshold was based on positive evidence.

7.193. Further, we note that contrary to Morocco's assertion that Maghreb Steel had "never" met its break-even threshold²⁸⁸, Turkey argues that the MDCCE's determination does not demonstrate that the MDCCE had assessed whether the company had failed to meet its break-even threshold *throughout the injury period*. Turkey contends that the MDCCE improperly based its finding that Maghreb Steel had not met the break-even threshold on a comparison between only the level of production in 2012 and the break-even threshold.²⁸⁹ In its preliminary determination, the MDCCE specified that Maghreb Steel's production in 2012 amounted to barely 63% of its break-even point under normal market conditions.²⁹⁰ The MDCCE noted further that, based on that information, it must be concluded that Maghreb Steel had not yet reached its break-even point.²⁹¹ Turkey argues that these statements of the MDCCE show that the MDCCE took into account only the data pertaining to 2012 to assess whether Maghreb Steel's production had reached the break-even threshold.²⁹² We consider that these statements of the MDCCE do not conclusively show that the MDCCE had assessed whether Maghreb Steel had failed to meet its break-even threshold in each year of the injury period.

7.194. Morocco points to the MDCCE's statement in its final determination that Maghreb Steel "is far from having reached its break-even point"²⁹³, as evidence of a general finding by the authority that Maghreb Steel had not reached its break-even threshold.²⁹⁴ That statement, however, does not specify the particular years in which Maghreb Steel failed to reach its break-even threshold and, therefore, also does not conclusively show that the MDCCE had assessed whether Maghreb Steel had failed to meet its break-even threshold in each year of the injury period. Further, we recall that Morocco submits that the MDCCE's finding that Maghreb Steel had never met the break-even threshold was based on Maghreb Steel's questionnaire response. Maghreb Steel's questionnaire response, however, does not provide a break-even threshold for the years 2010 and 2011.²⁹⁵ This indicates that the MDCCE could not have assessed whether Maghreb Steel had failed to meet its break-even threshold for the years 2010 and 2011, and objectively concluded, solely on the basis of the data provided for 2012, that Maghreb Steel had failed to meet its break-even threshold *throughout* the injury period.

7.195. We further recall that Morocco has confirmed in these proceedings that the break-even threshold was calculated only for 2012.²⁹⁶ In light of that fact, we fail to comprehend how the MDCCE could have assessed whether Maghreb Steel had failed to meet its break-even threshold throughout the injury period.

7.196. In this regard, we understand Morocco to contend that comparing Maghreb Steel's break-even threshold, set out in table 2 of the MDCCE's preliminary determination, with the

²⁸⁸ Morocco's response to Panel question No. 4.17, para. 119 (referring to Preliminary determination, (Exhibit TUR-6), paras. 86-87; and Final determination, (Exhibit TUR-11), para. 100).

²⁸⁹ Turkey's first written submission, para. 8.61 (referring to Preliminary determination, (Exhibit TUR-6), para. 87); second written submission, paras. 6.61-6.65.

²⁹⁰ Preliminary determination, (Exhibit TUR-6), para. 87.

²⁹¹ Preliminary determination, (Exhibit TUR-6), para. 88.

²⁹² Turkey's second written submission, para. 6.62.

²⁹³ The MDCCE's original statement in French is as follows: "[M]aghreb Steel est encore loin d'avoir atteint son seuil de rentabilité, chose que les exportateurs n'ont pas démenti." (Final determination, (Exhibit TUR-11), para. 100).

²⁹⁴ Morocco's response to Panel question No. 8.9(a), para. 49 (referring to Final determination, (Exhibit TUR-11), para. 100).

²⁹⁵ We note that Morocco has confirmed, in response to our questions, that Maghreb Steel's questionnaire response provides the break-even threshold only for 2012. (Morocco's response to Panel question No. 8.9(b), para. 50 (referring to Excerpt from Maghreb Steel's questionnaire response, section G, (Exhibit MAR-8), p. 8)). Maghreb Steel's questionnaire response sets out a "0" (zero) with respect to the break-even threshold for 2010 and 2011. Morocco submits that the "0" refers to the fact that Maghreb Steel calculated only one break-even threshold, and did not calculate separate thresholds for 2010 and 2011. (Morocco's response to Panel question No. 8.9(c), para. 51).

²⁹⁶ Morocco's responses to Panel question No. 8.9(b), para. 50 (referring to Excerpt from Maghreb Steel's questionnaire response, section G, (Exhibit MAR-8), p. 8); and No. 8.9(c), para. 51.

indexed actual production volumes in 2010 and 2011, set out in table 7 of the MDCCE's preliminary determination, shows that Maghreb Steel failed to meet the break-even threshold in 2010 and 2011.²⁹⁷ Turkey argues in response that table 2, based on Morocco's own submission, is based on Maghreb Steel's questionnaire response, which provides the break-even threshold only for 2012. Therefore table 2 does not support Morocco's arguments that the MDCCE assessed the break-even threshold for the whole injury period. Further, table 7 provides data on production volume only, while the break-even threshold was derived from a comparison of the totality of revenues against the totality of costs. Turkey contends that it remains unclear from table 7 how it is possible to derive the break-even threshold from information on production volumes only.²⁹⁸

7.197. Morocco's arguments fail to persuade us. Morocco's position is based on conclusions drawn from piecing together distinct elements of the MDCCE's preliminary determination, without any indication that such exercise was actually undertaken by the MDCCE. Further, even if such analysis was undertaken by the MDCCE, it would not provide a proper assessment of Maghreb Steel's break-even threshold for 2010 and 2011. As noted, Morocco has confirmed that the break-even threshold was calculated only for 2012.²⁹⁹ Morocco has failed to demonstrate how the actual production volumes in 2010 and 2011 respectively can be compared with the break-even threshold calculated for 2012, a different year, to show that Maghreb Steel failed to break even, and suffered losses, in 2010 and 2011. Considering that the MDCCE understood a company to meet its break-even threshold when its total revenue equals its total costs³⁰⁰, and given that costs and selling prices may vary across different years, Morocco has not presented us with any basis in the MDCCE's determination to conclude that the break-even threshold calculated for 2012 served as an appropriate benchmark against which to assess whether Maghreb Steel broke even in 2010 and 2011. Absent such demonstration and in order to meaningfully assess whether or not a company had broken even in a particular year, an unbiased and objective authority would not compare a company's *actual volumes sold in that year* to the *break-even threshold for another year*, where that break-even threshold is calculated on the basis of cost and selling price data for that other year.

7.198. As Morocco did not identify on the record evidence based on which the MDCCE found that Maghreb Steel had not met its break-even threshold throughout the injury period, we consider that the MDCCE improperly made that finding.

7.6.2.1.4 Whether the MDCCE did not properly assess the production stability criterion in its establishment analysis

7.199. In the underlying investigation, the MDCCE assessed Maghreb Steel's monthly production data for the domestic like product over the period 2010-2012, to find that the company's production had fluctuated significantly month-on-month, reaching as much as 60% of production from one month to the next, and had completely stopped in February 2012.³⁰¹ The MDCCE concluded that sharp and significant variations in Maghreb Steel's monthly production over the injury period indicated that the company's production had not stabilized. The MDCCE reached this conclusion even though Maghreb Steel's production had increased from 2010 to 2012.³⁰²

²⁹⁷ Morocco submits that Maghreb Steel's failure to meet its break-even threshold in all three years of the injury period, including 2010 and 2011, is evident from tables 2 and 7 read together with paragraph 87 of the MDCCE's preliminary determination. Table 2 sets out Maghreb Steel's break-even threshold, in terms of volume of production. Table 7 provides Maghreb Steel's actual production levels for 2010, 2011, and 2012. Paragraph 87 sets out, in relevant part, the MDCCE's finding that Maghreb Steel's production in 2012 represented barely 63% of its break-even point. Morocco argues that as the production in 2010 was significantly lower than in 2012, table 7 read together with paragraph 87 shows that the profitability threshold was not met in 2010. Although production in 2011 was higher than in 2010, reading table 7 together with paragraph 87 shows that the difference in production volumes between 2011 and 2012 was not sufficient to overcome the 63% shortfall between actual production and the profitability threshold identified in paragraph 87. (Morocco's response to Panel question No. 8.9(a), para. 48).

²⁹⁸ Turkey's comments on Morocco's response to Panel question No. 8.9(a).

²⁹⁹ Morocco's response to Panel question No. 8.9(b), para. 50 (referring to Excerpt from Maghreb Steel's questionnaire response, section G, (Exhibit MAR-8), p. 8), and No. 8.9(c), para. 51.

³⁰⁰ Preliminary determination, (Exhibit TUR-6), para. 83.

³⁰¹ Final determination, (Exhibit TUR-11), para. 103.

³⁰² Final determination, (Exhibit TUR-11), paras. 102-104; Preliminary determination, (Exhibit TUR-6), paras. 90-91. Turkey asserts that the monthly average production in 2010, 2011, and 2012 was well above the starting point. (Turkey's response to Panel question No. 4.18, para. 140). Morocco does not contest this assertion.

7.200. Turkey argues that some monthly fluctuation in the production of hot-rolled steel is expected, considering the nature of that product and the variations of demand for it, as is confirmed by the variations in the volumes of hot-rolled steel imports over the injury period.³⁰³ Turkey further asserts that Maghreb Steel's production of hot-rolled steel fluctuated within a "reasonable range" during the months within the period June 2010-2012 because these fluctuations, when viewed on the basis of average monthly production, were in line with global and domestic demand and prices.³⁰⁴ Turkey also observes that, even in difficult economic times affecting the global steel industry, Maghreb Steel was able to increase its domestic sales by 9.3% to the detriment of imports.³⁰⁵

7.201. Morocco contends in response that neither footnote 9, assuming it requires a determination of establishment, nor Article 3.4 of the Anti-Dumping Agreement, required the MDCCE to inquire into factors such as demand and other market conditions in the context of assessing whether the domestic industry was established. This was because these "other factors" were non-attribution factors, which an investigating authority must evaluate while analysing the causation of injury under Article 3.5 of the Anti-Dumping Agreement, and Turkey has not brought a claim under that provision.³⁰⁶ Morocco also argues that the Anti-Dumping Agreement does not require a determination of non-establishment to include an assessment of trends in the volume of imports (other than the analysis of the volume of dumped imports contemplated in Article 3.2).³⁰⁷

7.202. We recall that in the underlying investigation the MDCCE had examined Maghreb Steel's stability of production as one of the criteria for determining whether the domestic industry was established. We accept that the question of stability of production has an important bearing on the broader question of whether or not the operations of an industry are sufficiently stabilized to consider that industry as being established. That said, the stability of production must be viewed in light of the industry at issue and the prevailing market conditions³⁰⁸, for even a well-established industry of long standing will not be able to maintain stable production when the prevailing market conditions, or the cyclical nature of an industry, do not allow it. In this regard, we note that Morocco does not respond to Turkey's specific argument that the variations in monthly average production were in line with the variations in Morocco's demand for hot-rolled steel over the 2010-2012 period, and that imports over that period experienced similar variability. Nor does Morocco respond to Turkey's specific argument that any fluctuations in production should also be viewed in light of Maghreb Steel's ability to increase its domestic sales by 9.3% over the same period. An objective and impartial investigating authority would weigh any instability suggested by production fluctuations against variability in the prevailing market conditions, as evidenced on the record, and against the broader operational stability suggested by the increase in sales.

7.203. Rather than addressing the substance of Turkey's arguments, Morocco contends that "if the issue is whether the trend in imports is a reason why domestic production did not stabilize", this would be precisely the kind of non-attribution analysis contemplated in Article 3.5. Morocco asserts that the MDCCE did assess the trends of the import volumes and their effect on Maghreb Steel's production levels in its causation analysis, and refers to certain statements pertaining to the trend in volume of dumped imports that the MDCCE made in that context.³⁰⁹

7.204. The issue here however is not whether the MDCCE examined whether the trend in imports was a reason why domestic production did not stabilize. The issue, instead, is whether the MDCCE assessed the trend in import volumes of hot-rolled steel to ascertain whether imports underwent fluctuations similar to those experienced in respect of Maghreb Steel's production, so as to analyse the perceived lack of stability in Maghreb Steel's production in its proper context. In our view, import fluctuations, as evidenced on the record, would be an important element to assess whether the industry's production fluctuations were a reflection of the market conditions. We therefore reject Morocco's argument in this regard.

³⁰³ Turkey's opening statement at the first meeting of the Panel, para. 4.9.

³⁰⁴ Turkey's second written submission, para. 6.73; response to Panel question No. 4.18(b), paras. 144-147 (referring to Preliminary determination, (Exhibit TUR-6), p. 103 and table 5; and Maghreb Steel's financial report 2012, (Exhibit TUR-51), pp. 47, 56, and 60).

³⁰⁵ Turkey's second written submission, para. 6.73; response to Panel question No. 4.18(b), para. 149.

³⁰⁶ Morocco's response to Panel question No. 4.16(c), paras. 115-117.

³⁰⁷ Morocco's response to Panel question No. 8.3, para. 26.

³⁰⁸ In respect of captive production, it may also be necessary to consider any variability in light of variability in upstream operations.

³⁰⁹ Morocco's response to Panel question No. 8.3, paras. 28-31.

7.205. We note further that Turkey asserts that at least one interested party had argued before the MDCCE, during the investigation, that the monthly fluctuation in Maghreb Steel's production of hot-rolled steel simply reflected the evolution of demand, among certain other constraints (prices of raw materials, maintenance of facilities *et al*).³¹⁰ Morocco contends in response that the MDCCE did address that argument by stating in the context of its causation analysis that it had not found any correlation between the evolution of domestic demand and injury suffered by Maghreb Steel.³¹¹

7.206. We consider that at issue here is whether the MDCCE assessed the relationship between, among others, *domestic demand* and, specifically, the *fluctuations in Maghreb Steel's production of hot-rolled steel*, rather than between *domestic demand* and *injury to Maghreb Steel*.³¹² We therefore reject Morocco's argument that suggests that, in assessing the correlation between the evolution of domestic demand and injury suffered by Maghreb Steel, the MDCCE also analysed the relationship between domestic demand and fluctuations in Maghreb Steel's hot-rolled steel production. Nothing in the record indicates that the MDCCE undertook the latter analysis.

7.207. We therefore consider that the MDCCE did not properly conclude that Maghreb Steel's production was unstable.

7.6.2.1.5 Whether the MDCCE did not properly assess the "new industry" criterion in its establishment analysis³¹³

7.208. In assessing whether Maghreb Steel was a "new" and therefore unestablished industry, the MDCCE noted that international practice distinguishes between cases where an industry expands its activities by introducing a new product line alongside old ones, and those where the industry concerned invests in the creation of a new industry.³¹⁴ In this regard, the MDCCE referred, among

³¹⁰ Turkey's response to Panel question No. 4.18(c), para. 150 (quoting Maghreb Steel's financial report 2012, (Exhibit TUR-51), p. 53).

³¹¹ Morocco's response to Panel question No. 4.16(b), paras. 113-114.

³¹² In a similar vein, the Appellate Body noted, in the context of the price effects analysis under Article 3.2 of the Anti-Dumping Agreement, that an investigating authority may not disregard evidence regarding elements that call into question the "explanatory force" of dumped imports for significant price suppression. The Appellate Body stated:

The inquiry into whether dumped imports have "explanatory force" for significant suppression of domestic prices under Article 3.2 of the Anti-Dumping Agreement is distinct from the injury causation and non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement. While the assessments under both Article 3.2 and 3.5 are interlinked elements of the single, overall injury analysis, the inquiry into each provision has a distinct focus. The analysis under Article 3.2 focuses on the relationship between dumped imports and *domestic prices*. In contrast, the analysis under Article 3.5 focuses on the causal relationship between dumped imports and *injury* to the domestic industry.

...

The examination under Article 3.5, by definition, covers a distinct and broader scope than the scope of the elements considered in relation to price suppression under Article 3.2. (Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.53-5.54 (referring to Appellate Body Reports, *China – GOES*, paras. 136, 147, and 152; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141) (emphasis original; fns omitted)).

³¹³ In response to the Panel's question, the parties commented on the relevance of the *Ad Note* to Article XVIII of the GATT 1994 in interpreting the term "establishment" in Article VI:6(a) of the GATT 1994 and footnote 9 to the Anti-Dumping Agreement. Turkey argues that the *Ad Note* to Article XVIII has limited relevance for purposes of the present dispute as Article XVIII is available exclusively to developing country Members. (Turkey's response to Panel question No. 8.10, paras. 16-17). Morocco does not dispute that Article XVIII is only available to developing country Members, but argues that it is capable of providing contextual interpretive guidance. (Morocco's comments on Turkey's response to Panel question No. 8.10, para. 18). We see no basis for interpreting the term "establishment" under Article VI:6(a) of the GATT 1994 and footnote 9 to the Anti-Dumping Agreement in terms of the clarification in the *Ad Note* to Article XVIII of the GATT 1994 pertaining to "the establishment of particular industries". That clarification was developed, and would apply, in the specific context of "the establishment of particular industries", with a view to securing economic development in certain limited types of economies. In contrast, Article VI:6(a) and footnote 9 to the Anti-Dumping Agreement, and any requirements therein regarding the determination of injury in the form of material retardation of the establishment of the domestic industry, apply equally to all Members.

³¹⁴ The MDCCE's original statement in French is as follows:

En examinant le critère d'une nouvelle industrie dans la présente affaire, le MDCCE rappelle qu'afin de déterminer si une industrie est établie, les autorités internationales distinguent deux cas de figure: le cas où une industrie historique élargit ses activités à travers l'instauration d'une nouvelle

others, to the United States International Trade Commission's (USITC) decision in *Lime Oil from Peru*. In that case, the USITC found that unlike a new entrant, the petitioner (domestic industry) had been in the business of selling lime oil for years and could utilize existing customer contacts and distribution infrastructure in introducing distilled lime oil. The USITC found that rather than establishing an industry, the petitioner was introducing a new product line which has established a stable presence in the market.³¹⁵ The question of whether a new industry is being created, or merely a new product line introduced, is relevant, for the introduction of a new product line presupposes that the industry introducing that line is already established.

7.209. The MDCCE dismissed an interested party's argument that Maghreb Steel had, in beginning to produce hot-rolled steel sheet, simply added a new product line to an already established domestic industry. The MDCCE dismissed that argument based on the reasoning that the absence of production of a like product in the domestic market indicated the existence of a "new industry".³¹⁶ In other words, as there were no competitors producing products like hot-rolled steel sheet in Morocco, the beginning of production of hot-rolled steel sheet by Maghreb Steel constituted the creation of a new industry. The MDCCE further stated that the same conclusion could be reached on the basis of factors, such as the physical separation of the production centres, the scale of investment made, or the different client networks and distribution channels.³¹⁷ The MDCCE cited to an academic paper as support for this conclusion.³¹⁸ The MDCCE did not elaborate further on its conclusions.

7.210. We recall that in concluding that Maghreb Steel should be regarded as a "new" industry because there was no pre-existing production of a like product, the MDCCE was assessing whether Maghreb Steel's hot-rolled unit was a "new" industry for purposes of determining whether Maghreb Steel's hot-rolled unit was established. Morocco argues that in concluding that Maghreb Steel was a new industry, the MDCCE relied not only on the absence of competitors in the market, but also considered the physical separation of production facilities of hot-rolled and cold-rolled steel, the size of investment undertaken by Maghreb Steel, and the different networks of clients and distribution channels.³¹⁹ Turkey contends in response that the MDCCE failed to provide, in light of evidence on the record, any reasoned or adequate explanation of these three factors.³²⁰ We must therefore examine the basis of the MDCCE's conclusions in regard to each of these factors.

7.211. We note, at the outset, that we do not pronounce ourselves on these factors or whether they are either prescriptive or definitive for determining whether the domestic industry is unestablished. We accept that a relevant factor may be whether the domestic industry is the only producer of the like product in question in the market. At the same time, we note that whilst there could be only one producer of that product in the market, where that product constitutes merely a new "product line" of an existing industry and benefits from the existing production, marketing and other operations, such shared operations may play an important role in determining whether a distinct new industry has been established. If an existing industry chooses to introduce a new product unlike any other product currently being produced, the introduction of that new product will not necessarily result in the creation of a new industry. It may still be perceived as the introduction of a new product line into the existing industry, depending on the degree to which the overall infrastructure (including the productive, commercial, research, and administrative assets) of the existing industry is implicated. The greater the degree of overlap in the use of overall infrastructure, the less likely the perception that the introduction of the new product marks the establishment of a new industry. The fact that a domestic industry is defined by Article 4.1 of the Anti-Dumping Agreement by reference to like product, and that there are no pre-existing producers of that like product in the domestic market, does not preclude the possibility of that domestic industry utilizing existing infrastructure,

ligne de production qui s'ajoute aux anciennes, et le cas où l'industrie en question investit dans la création d'une nouvelle branche.

(Final determination, (Exhibit TUR-11), para. 105 (fn omitted)).

³¹⁵ Excerpt from USITC's preliminary determination on *Lime Oil from Peru*, (Exhibit TUR-48), fn 19.

³¹⁶ Final determination, (Exhibit TUR-11), paras. 106-107.

³¹⁷ Final determination, (Exhibit TUR-11), paras. 108-109.

³¹⁸ Final determination, (Exhibit TUR-11), fn 51 (referring to Dong Woo S, "Material retardation standard in the US antidumping law", *Law and Policy in international business*, Harvard Law School (1992)).

³¹⁹ Morocco's second written submission, para. 166.

³²⁰ Turkey's first written submission, paras. 8.77 and 8.80.

such as customer contacts and distribution channels, in its introduction of that like product in the domestic market.³²¹

7.212. Recalling Morocco's argument³²² that the MDCCE did not rely solely on the absence of pre-existing production of hot-rolled steel in Morocco in finding that Maghreb Steel was a new industry, but did consider certain additional factors in making that finding, we now turn to evaluate the MDCCE's consideration of those factors.

7.213. Morocco argues that in concluding that Maghreb Steel was a new industry, the MDCCE also considered the physical separation of Maghreb Steel's production facilities for hot-rolled and cold-rolled steel. Morocco further asserts³²³ that the MDCCE's finding as regards the physical separation of production facilities found support in the report on the initiation of the investigation, which provided that:

In 2010, the company MAGHREB STEEL undertook a major investment to build a hot-rolling complex comprising two hot-rolling mills for the production of coil and thick sheet, with capacities of one million tonnes and 500,000 tonnes, respectively, and an electric steel plant with a capacity of one million tonnes.³²⁴

7.214. In our view, this statement could be construed to indicate that Maghreb Steel had constructed a separate facility for producing hot-rolled steel. However, whilst a separate production facility may play an important role in determining whether a new industry has been established, we note at the same time that a company may well establish a production facility, separate from its other production facilities, even for the production of a new product line. The MDCCE did not provide any reasoning as to why the creation of a separate production facility would necessarily indicate that the hot-rolled steel unit was a new industry rather than a new product line.

7.215. Morocco identifies the same statement in the report on the initiation of the investigation, referred to in paragraph 7.213. above, as support for the MDCCE's finding as regards the size of investment.³²⁵ Morocco also submits³²⁶ that the statement below shows that the MDCCE took into consideration that the production of hot-rolled steel required two major investments:

[P]rior to making two such large investments, one of DH1.6 billion to develop hot-rolled coil operations, and the other of DH1.2 billion for the development of hot-rolled thick sheet operations, the company made sure of the viability of the activity through the

³²¹ We note that the Panel had posed a question to the parties regarding whether the concept of "new industry" should consider the definition of domestic industry, provided in Article 4.1 of the Anti-Dumping Agreement, which, in turn, is linked to the concept of like product. In its response, Morocco notes that Article 4.1 defines "domestic industry" as "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". Morocco further submits that the terms "domestic industry" and "such industry" in footnote 9 to Article 3 of the Anti-Dumping Agreement must be understood to refer to the domestic industry as defined by the investigating authority pursuant to Article 4.1. Morocco argues that if Turkey disagrees with the manner in which the MDCCE defined the domestic industry in the underlying investigation, it should have raised a claim under Article 4 of the Anti-Dumping Agreement. Morocco further asserts that since Turkey has not raised that claim, it is not open for the Panel to "second-guess" the MDCCE's definition of the domestic industry in the underlying investigation. (Morocco's response to Panel question No. 4.24, para. 125).

³²² Morocco's second written submission, para. 166.

³²³ Morocco's response to Panel question No. 4.20, para. 123 (referring to Initiation report, (Exhibit TUR-2), p. 5).

³²⁴ The MDCCE's original statement in French is as follows:

En 2010, la société MAGHREB STEEL a entamé un investissement considérable par l'édification d'un complexe de laminage à chaud comprenant deux laminoirs à chaud de bobines et de tôles fortes, de capacités respectives d'un million de tonnes et 500 000 tonnes, et d'une aciérie électrique d'une capacité d'un million de tonnes.

(Initiation report, (Exhibit TUR-2), p. 5).

³²⁵ Morocco's response to Panel question No. 4.21, para. 123 (referring to Initiation report, (Exhibit TUR-2), p. 5).

³²⁶ Morocco's first written submission, para. 207 (referring to Preliminary determination, (Exhibit TUR-6), para. 121).

creation of this plan, based on objective and generally accepted economic parameters.³²⁷

7.216. We consider that the statements in question do refer to Maghreb Steel's investments towards its production of hot-rolled steel. We agree with Turkey, however, that investments are required even where a company adds a new product line, and a company's investment to produce a different product line should not automatically lead to the conclusion that the company is creating "a new industry".³²⁸ The MDCCE did not provide any reasoning as to why the investments in question indicated that the hot-rolled steel unit was necessarily a new industry rather than a new product line.

7.217. In support of the MDCCE's conclusion regarding the different client networks and distribution channels, Morocco points to Maghreb Steel's questionnaire response.³²⁹ The MDCCE's determination does not show that it relied on Maghreb Steel's questionnaire response in determining that Maghreb Steel's hot-rolled steel sheet unit used client networks and distribution channels which were different from Maghreb Steel's pre-existing client networks and distribution channels. We note that, in any event, contrary to Morocco's assertion, the relevant exhibit in Maghreb Steel's questionnaire response does not show any differences that might exist in the client network and distribution channels of Maghreb Steel's hot-rolled and existing cold-rolled steel production. For the foregoing reasons, we consider that the MDCCE's conclusion that the different client networks and distribution channels indicated that Maghreb Steel was a new industry, was unsupported by evidence on the record.

7.218. Although the record does indicate the level of investment that Maghreb Steel made towards production of hot-rolled steel, the MDCCE has not explained why that investment was at a scale that should necessarily signify that the investment in question was towards a "new industry", and not towards a new product line. Further, the MDCCE failed to provide an analysis of why the factors that it considered in its analysis of the new industry criterion, indicated that Maghreb Steel was a new industry.³³⁰ We recall that it is not for the Panel to conduct a *de novo* review based on the factual elements available on the investigation record, but rather to assess whether the investigating authority objectively examined the issues and gave a reasoned and adequate explanation for its findings. We conclude that the MDCCE, in light of the evidence on the record, did not give a reasoned and adequate explanation for its finding that Maghreb Steel was a new industry.

7.6.2.1.6 Conclusion

7.219. In light of the flaws in the MDCCE's reasoning and findings in respect of the criteria that formed part of its five-tiered test, we conclude that the MDCCE did not assess, based on positive evidence and an objective examination, whether the domestic industry was established. While these flaws considered individually may not be determinative, taken together they indicate that the MDCCE did not properly examine the question of the domestic industry's establishment. We therefore find that the MDCCE acted inconsistently with Article 3.1 of the Anti-Dumping Agreement in determining that the domestic industry was unestablished.

³²⁷ The MDCCE's original statement in French is as follows:

Préalablement à la réalisation de deux investissements aussi importants, l'un de 1,6 milliard de DH en vue du développement de l'activité du laminoir à chaud de bobines (LAC) et l'autre, de 1,2 milliard de DH pour le développement de l'activité du laminoir à chaud de tôles fortes (TF), l'entreprise s'est assurée de la viabilité de l'activité au moyen de l'élaboration dudit plan, fondé sur des paramètres économiques objectifs et communément acceptés.

(Preliminary determination, (Exhibit TUR-6), para. 121).

³²⁸ Turkey's opening statement at the first meeting of the Panel, para. 4.10.

³²⁹ Morocco's response to Panel question No. 4.23, para. 124 (referring to Excerpt from Maghreb Steel's questionnaire response, section F, (Exhibit MAR-15)).

³³⁰ We recall the Appellate Body's observation that "when an investigating authority's determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified". (Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.95).

7.6.2.2 Whether the MDCCE acted inconsistently with Articles 3.1 and 3.4 in failing to conduct the "correct" injury analysis

7.220. Upon finding that the domestic industry was unestablished, the MDCCE proceeded to examine whether the establishment of that industry was materially retarded. Towards this end, the MDCCE undertook to compare Maghreb Steel's actual performance levels against the company's projected performance levels across certain economic indicators over the injury period. These projections were set out in Maghreb Steel's 2008 Business Plan.³³¹

7.221. Turkey argues that the MDCCE, having erroneously determined that the domestic industry was unestablished, failed to conduct the correct injury analysis in comparing the industry's actual performance with its projected performance levels, and therefore acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.³³² Morocco contends, in response, that the MDCCE properly found that the domestic industry was unestablished in accordance with footnote 9 to Article 3 and Article 3.1 of the Anti-Dumping Agreement, and therefore the MDCCE was correct in conducting its injury analysis in the form of "material retardation of the establishment of the domestic industry" (material retardation). Morocco further states that Turkey's claim is completely consequential to its claims under footnote 9 and Article 3.1.³³³

7.222. We note that the MDCCE stated that it saw fit to categorize Maghreb Steel as an "unestablished industry" and accordingly, to conduct its injury analysis in the form of material retardation.³³⁴ The MDCCE's reasoning that it had to conduct a material retardation analysis was therefore premised on its finding that Maghreb Steel was unestablished. We recall, however, our conclusion that the MDCCE's finding that Maghreb Steel was unestablished was flawed. We accordingly find that the MDCCE improperly proceeded to conduct its injury analysis in the form of material retardation, and thus acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.7 Articles 3.1 and 3.4 of the Anti-Dumping Agreement: The MDCCE's determination that the establishment of the domestic industry was materially retarded

7.223. In examining whether the establishment of the domestic industry, consisting of Maghreb Steel, had been materially retarded, the MDCCE compared that industry's actual performance against the industry's projected performance across nine economic indicators over the injury period.³³⁵ The MDCCE obtained the industry's projected performance levels from Maghreb Steel's 2008 Business Plan, which was based on a pre-feasibility report (the McLellan report) prepared for Maghreb Steel by McLellan and Partners Ltd., an independent consulting firm. Turkey claims that the MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because, in analysing whether the establishment of the domestic industry had been materially retarded:

- a. the MDCCE failed to examine 6 of the 15 injury factors listed in Article 3.4;
- b. the MDCCE excluded, without providing a satisfactory explanation, data pertaining to Maghreb Steel's captive production of hot-rolled steel; and
- c. the MDCCE relied on the McLellan report for the domestic industry's projected performance levels, despite having found certain "miscalculations" in that report.

³³¹ Final determination, (Exhibit TUR-11), paras. 148-150; Preliminary determination, (Exhibit-TUR-6), para. 133.

³³² Turkey's first written submission, para. 8.82.

³³³ Morocco's first written submission, paras. 210-211.

³³⁴ Final determination, (Exhibit TUR-11), para. 69; Preliminary determination, (Exhibit TUR-6), para. 92.

³³⁵ The injury period in the underlying investigation ran from January 2009 until December 2012. In its final determination, the MDCCE noted however, that given that injury cannot be attributed prior to the beginning of the marketing of the domestic like product, it considered it preferable to select definitively the period 2010-2012 as the injury period. (Final determination, (Exhibit TUR-11), paras. 11 and 121).

7.7.1 Provisions at issue

7.224. Article 3.1 of the Anti-Dumping Agreement provides as follows:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

7.225. Article 3.4 of the Anti-Dumping Agreement provides as follows:

The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.7.2 Evaluation

7.226. In its final determination, the MDCCE noted that Article 3 of the Anti-Dumping Agreement does not set out specific criteria for the analysis of material retardation of the establishment of the domestic industry (material retardation).³³⁶ The MDCCE further noted its view that the full transposition of "l'examen de dommage classique" (the classic injury analysis) to material retardation cases was not appropriate. According to the MDCCE, international practice considers that some of the factors listed in Article 3.1 of the Anti-Dumping Agreement, namely, the increase in the volume of dumped imports and the consequent impact of these imports on domestic producers, are not properly adapted to all material retardation cases.³³⁷ The MDCCE noted that the investigating authority of another WTO Member, when assessing material retardation, examines certain "relevant" economic factors.³³⁸ Based on the MDCCE's statement in this regard, we note that these factors include only some, but not all, of the injury factors listed in Article 3.4 of the Anti-Dumping Agreement.

7.227. The MDCCE proceeded to analyse the impact of dumped imports on the domestic industry by comparing the actual performance of the industry against projected performance levels in respect of nine economic indicators: production; production capacity and production utilization; sales; market share; productivity; employment; inventory; profitability; and importance of the margin of dumping. The projections pertaining to these economic indicators were set out in Maghreb Steel's 2008 Business Plan.

7.228. We will first assess whether the MDCCE failed to evaluate, consistently with the requirements of Article 3.4, 6 out of the 15 injury factors listed in that provision. We will then examine whether the MDCCE acted inconsistently with Articles 3.1 and 3.4 in excluding from its injury analysis, data pertaining to the captive market. Finally, we will evaluate whether the MDCCE acted inconsistently with Articles 3.1 and 3.4 in relying on the McLellan report.

7.7.2.1 Whether the MDCCE evaluated all injury factors listed in Article 3.4

7.229. In its determination, the MDCCE made no express reference to 6 of the 15 injury factors listed in Article 3.4: return on investments, actual and potential negative effects on cash flow, wages, growth, factors affecting domestic prices, and ability to raise capital or investments. The parties disagree over whether the MDCCE evaluated the six injury factors at issue. Turkey contends that the MDCCE failed to assess the six factors and therefore acted inconsistently with

³³⁶ Final determination, (Exhibit TUR-11), para. 112.

³³⁷ Final determination, (Exhibit TUR-11), paras. 113-114; Preliminary determination, (Exhibit TUR-6), para. 126.

³³⁸ Preliminary determination, (Exhibit TUR-6), para. 131.

Articles 3.1 and 3.4.³³⁹ Morocco asserts in response that the MDCCE did evaluate the six factors, implicitly, by way of analysing certain other factors.³⁴⁰

7.230. The issue we must resolve therefore is whether the MDCCE, in the underlying investigation, failed to evaluate each of the six injury factors at issue, and therefore acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.231. Turkey argues that Article 3.4 requires that an investigating authority evaluate the 15 injury factors listed in Article 3.4 in *every case* regardless of the form of injury at issue, and invokes previous panel and Appellate Body findings in support.³⁴¹ Although Morocco argues that the MDCCE did evaluate all 15 injury factors listed in Article 3.4, it also contends that, as the MDCCE had noted, the relevance of the factors listed in Article 3.4 will vary between an analysis of material injury and that of material retardation. Morocco asserts that requiring an investigating authority to address the Article 3.4 factors "with the same rigor" in a material retardation analysis, as in a material injury analysis, would blur the distinction between the two concepts and would ignore the practical limitations confronting an investigating authority in its material retardation analysis.³⁴²

7.232. We note that Article 3.4 states that "[t]he examination of the impact of the dumped imports ... shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" including the 15 listed factors. The words "shall include" mean that Article 3.4 requires an investigating authority to evaluate all relevant factors, including the 15 listed factors, when examining the impact of dumped imports. Our view in this regard is consistent with that of the Appellate Body and several panels that it is mandatory for an investigating authority to evaluate each of the 15 injury factors listed in Article 3.4.³⁴³ These factors are "deemed to be relevant in every investigation" and "must always be evaluated by the investigating authorities".³⁴⁴

7.233. Further, we consider that the obligation in Article 3.4 to evaluate each of the listed 15 injury factors applies as much to an investigation of injury in the form of material retardation as it does to that of material injury or threat of material injury. This is so for the following reason: Article 3.1, read in light of footnote 9 of the Anti-Dumping Agreement, requires that a determination of material retardation be based on positive evidence and objective examination of *inter alia* "the consequent impact of [dumped] imports on domestic producers". As explained above, the examination of the impact of dumped imports on domestic industry, in turn, must, in accordance with the terms of Article 3.4, include an evaluation of all relevant factors including the 15 injury factors listed in that provision.³⁴⁵ It follows that a determination of material retardation must be based on an examination of the impact of dumped imports on domestic producers, and that examination must include an evaluation of the 15 injury factors listed in Article 3.4. Our approach is consistent with the finding by the panel in *Egypt – Steel Rebar* that "the Article 3.4 factors must be examined in every investigation, no matter which particular manifestation or form of injury is at issue in a given investigation".³⁴⁶ Nothing in the text of Article 3 supports Morocco's argument that an investigating

³³⁹ Turkey's first written submission, para. 9.16.

³⁴⁰ Morocco's first written submission, paras. 228-237; second written submission, paras. 176-187.

³⁴¹ Turkey's first written submission, para. 9.15 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.93); second written submission, para. 7.4 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.203; *US – Hot-Rolled Steel*, para. 194; and *Thailand – H-Beams*, para. 128).

³⁴² Morocco's first written submission, para. 238.

³⁴³ Appellate Body Reports, *Thailand – H-Beams*, para. 125; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.203; Panel Reports, *China – X-Ray Equipment*, para. 7.179; *EC – Bed Linen (Article 21.5 – India)*, para. 6.160; *EC – Bed Linen*, para. 6.154; and *Guatemala – Cement II*, para. 8.283.

³⁴⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 194.

³⁴⁵ The Appellate Body in *US – Hot-Rolled Steel* stated that:

[A]n important aspect of the "objective examination" required by Article 3.1 is further elaborated in Article 3.4 as an obligation to "examin[e] the impact of the dumped imports on the domestic industry" through "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry."

(Appellate Body Report, *US – Hot-Rolled Steel*, para. 194).

Further, the panel in *China – Cellulose Pulp* explained that "Article 3.4 sets out a series of 'relevant economic factors and indices having a bearing on the state of the industry', which must be evaluated by the investigating authority in all cases when examining the consequential impact of dumped imports on that industry, as required by Article 3.1". (Panel Report, *China – Cellulose Pulp*, para. 7.20).

³⁴⁶ Panel Report, *Egypt – Steel Rebar*, para. 7.93 (emphasis original); see also Appellate Body Report, *US – Hot-Rolled Steel*, para. 194.

authority is not required to address the Article 3.4 factors "with the same rigor" in a material retardation analysis as in a material injury analysis.

7.234. As a starting point in examining whether the MDCCE did evaluate the six injury factors in question, we take into consideration Turkey's assertion that the MDCCE did not consider that a "full transposition" of a material injury analysis to material retardation cases would be appropriate.³⁴⁷ We recall that the MDCCE considered that reliable information on the volume of dumped imports and the consequent impact of these imports on domestic producers, factors set out in Article 3.1, is only available in cases where the domestic industry has maintained production over a significant period of time and has managed to stabilize its production operations. As noted in paragraph 7.233., an examination of the impact of dumped imports on domestic producers under Article 3.1 is carried out through, *inter alia*, an evaluation of the 15 injury factors listed in Article 3.4. The MDCCE's statement that reliable information on factors listed in Article 3.1 was available only where the domestic industry stabilizes its production and maintains it for a long period suggests therefore that the MDCCE effectively considered that reliable information on the injury factors listed in Article 3.4 was also available only in those cases, as distinct from the underlying investigation where it had found that the domestic industry did not meet those criteria. The MDCCE's statement in this regard is not determinative of the issue of whether the MDCCE evaluated all 15 factors listed in Article 3.4. That statement, read together with the absence of any express reference to 6 of the 15 injury factors in the MDCCE's determination, does suggest, however, that the MDCCE sought to lay down, in its final determination, a justification for not evaluating all injury factors listed in Article 3.4. Further, we note that Morocco confirms that the MDCCE considered that "the relevance of the factors listed in Article 3.4 will vary between an ordinary injury analysis and an analysis of material retardation".³⁴⁸ Morocco further submits that the MDCCE noted that the investigating authority of another WTO Member had considered only certain of the 15 injury factors listed in Article 3.4 in their material retardation analysis.³⁴⁹ As Morocco itself points out, "the MDCCE referred to international practice in determining that all the factors mentioned in Article 3 may not be appropriate in the injury test for material retardation".³⁵⁰

7.235. We consider that in referring to the MDCCE's statement that *a priori* suggested that not all factors listed in Article 3.4 were relevant, and that reliable information in respect of those factors was unavailable in an analysis of material retardation, Turkey makes a *prima facie* case that the MDCCE did not evaluate the six injury factors at issue listed in Article 3.4, and therefore the MDCCE acted inconsistently with that provision. We will now consider whether Morocco has rebutted this *prima facie* case.³⁵¹

7.7.2.1.1 Return on investments, actual and potential negative effects on cash flow, and ability to raise capital or investments

7.236. The MDCCE made no explicit reference to "return on investments", "actual and potential negative effects on cash flow", and "ability to raise capital or investments" in its analysis of the impact of dumped imports on the domestic industry, as set out in its final and preliminary determinations. Morocco argues that in discussing, in its determinations, Maghreb Steel's break-even threshold, the MDCCE "necessarily" also evaluates the domestic industry's return on investments, actual and potential negative effects on cash flow, and ability to raise capital or investments.³⁵² Morocco contends in particular that failure to meet the break-even threshold means that sales are made at a loss, which in turn, "necessarily" means negative cash flow and negative return on investments. Further, negative cash flow and return on investment "necessarily" mean difficulty in raising capital or investment.³⁵³ Turkey argues in response that the MDCCE addressed the break-even threshold in its analysis of whether the industry was "established" and not in its analysis of "the impact of dumped imports on the domestic industry" as required under Article 3.4.

³⁴⁷ Turkey's first written submission, paras. 9.11-9.12.

³⁴⁸ Morocco's first written submission, para. 238.

³⁴⁹ Morocco's first written submission, para. 214.

³⁵⁰ Morocco's first written submission, para. 214.

³⁵¹ We bear in mind the observations of a past panel that in the context of an anti-dumping investigation "a Member is placed in a difficult position in rebutting a *prima facie* case that an evaluation [under Article 3.4 of the Anti-Dumping Agreement] has *not* taken place if it is unable to direct the attention of a panel to some contemporaneous written record of that process". (Panel Report, *Egypt – Steel Rebar*, para. 7.49 (emphasis original)).

³⁵² Morocco's first written submission, para. 229.

³⁵³ Morocco's first written submission, paras. 230-233.

Turkey argues that Morocco therefore fails to explain how the MDCCE actually assessed cash flow, return on investments, and ability to raise capital, and asserts that the MDCCE never undertook those evaluations.³⁵⁴ Turkey contends that Morocco assumes that Maghreb Steel's failure to meet the break-even threshold necessarily amounted to the company's negative performance in respect of those injury factors. Turkey contends that this is an *ex post* rationalization, as the MDCCE, itself, did not make any such "evaluation".³⁵⁵

7.237. We note that, as Morocco asserts, the Appellate Body has clarified that Article 3.4 does not regulate the *manner* in which an investigating authority sets out the results of the "evaluation" of each factor in its published documents. Therefore, an investigating authority is not required in every anti-dumping investigation to make a separate record of the evaluation of each of the injury factors listed in Article 3.4.³⁵⁶ The Appellate Body further stated that whether a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case.³⁵⁷ As regards the nature of "evaluation" of injury factors that Article 3.4 requires an investigating authority to undertake, the Appellate Body clarified that only because the analysis of a factor is implicit in the analyses of other factors does not necessarily lead to the conclusion that such a factor was not evaluated.³⁵⁸

7.238. In view of the Appellate Body's findings discussed in the preceding paragraph, we consider that even if an investigating authority did not make a separate record of the evaluation of a particular factor, and had implicitly evaluated that factor through its evaluation of other factors, the record would need to show that the authority did in fact implicitly evaluate that factor. At issue here therefore is whether the record of the underlying investigation shows that the MDCCE, in addressing the domestic industry's break-even threshold, implicitly evaluated that industry's cash flow, return on investment, and ability to raise capital or investments.

7.239. We note, at the outset, that Morocco's argument that Maghreb Steel's failure to meet the break-even threshold "necessarily" meant that the industry's cash flow, return on investment, and ability to raise capital experienced negative performance is premised on the assumption that failure to meet the break-even threshold means that sales are made at a loss. However, the MDCCE's discussion of Maghreb Steel's failure to meet its break-even threshold did not conclusively show that Maghreb Steel had sold at a loss during the injury period.³⁵⁹ Therefore, the basic premise of Morocco's argument is flawed.

7.240. Further, even if the MDCCE's discussion of Maghreb Steel's failure to meet the break-even threshold *did* show that Maghreb Steel had sold at a loss, Morocco fails to persuade us that losses suffered by a company necessarily mean that the company will also experience negative cash flow and return on investment.³⁶⁰

7.241. Morocco argues that sales made at a loss "necessarily" mean negative cash flow over the same period because the company in question is spending more paying for its costs than it is receiving in sales revenues.³⁶¹ Turkey contends in response that cash flow and profits are two different concepts. Turkey points out that the concept of cash flow pertains to "the ability of the entity to generate cash and cash equivalents and the needs of the entity to utilise those cash flows".³⁶² Profit or loss, in contrast, is defined as "the total of income less expenses, excluding the components of other comprehensive income".³⁶³ Turkey asserts that a company incurring loss during

³⁵⁴ Turkey's second written submission, paras. 7.6-7.7.

³⁵⁵ Turkey's second written submission, para. 7.7.

³⁵⁶ Morocco's second written submission, para. 178 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161).

³⁵⁷ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.

³⁵⁸ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 160.

³⁵⁹ See para. 7.184. above.

³⁶⁰ In any event, the MDCCE's determination does not show that it analysed the trends in any losses suffered by the domestic industry throughout the injury period.

³⁶¹ Morocco's first written submission, para. 230.

³⁶² Turkey's response to Panel question No. 9.1, para. 38 (referring to International Accounting Standard 7, *Statement of cash flows* (24 March 2010), (Exhibit TUR-69), p. 1).

³⁶³ Turkey's response to Panel question No. 9.1, para. 38 (referring to International Accounting Standard 1, *Presentation of Financial Statements*, (Exhibit TUR-70), p. 2).

a particular year could, for instance, generate positive cash flow over the same year by way of incoming cash from its sales of goods produced in a previous year.³⁶⁴ Morocco does not contest the plausibility of this example *per se*, but questions its relevance for this case, noting that Turkey has not identified record evidence showing that Maghreb Steel would have generated positive cash flow through the sale of hot-rolled steel produced in previous years.³⁶⁵ Further, Morocco posits that it would be "highly unlikely" that a start-up, like Maghreb Steel, the domestic industry in the underlying investigation, would have a positive cash flow despite incurring losses.³⁶⁶ Turkey does not disagree that it would be "highly unlikely" for a start-up to have a positive cash flow despite incurring losses.³⁶⁷

7.242. In our view, Morocco's proposition that sales made at a loss "necessarily" mean negative cash flow implies that it is impossible for a company to register a positive cash flow while it is incurring losses. However, in response to the Panel's questioning, Morocco submits that it would be "highly unlikely" that a start-up, such as Maghreb Steel, would have a positive cash flow despite incurring losses. In advancing that argument, Morocco itself acknowledges that it is not impossible that a start-up has a positive cash flow despite incurring losses, thus implying that sales made at a loss do not "necessarily" mean negative cash flow. Given that Morocco itself suggests that sales at a loss by a start-up do not "necessarily" mean negative cash flow, Morocco's defence fails. We therefore consider that Morocco has not shown how the MDCCE actually evaluated Maghreb Steel's cash flow during the injury period. Further, we consider that any reasoning that Morocco presents before us in these proceedings, explaining why Maghreb Steel could not have generated positive cash flow because it had incurred losses, would need to have been part of the MDCCE's determination because that reasoning is specific to the particular facts of the underlying investigation. Since Morocco's reasoning is not part of the MDCCE's determination, we reject it as *ex post* rationalization.

7.243. As regards Morocco's argument that sales made at a loss "necessarily" mean a negative return on investment, Turkey contends that it is possible that a company can have a positive return on investment despite suffering losses. According to Turkey, this is because a company, despite its losses, may earn income from other sources such as property and stocks, which, although unrelated to the ordinary business activity of the company, would have a bearing on the return on investment made in the company.³⁶⁸ We note that Morocco states, in response to the Panel's questions in these proceedings, that it would be "very difficult" to have a positive return on investment despite suffering losses during the same period, especially for a start-up company like Maghreb Steel. Morocco acknowledges that it is possible that a company could have receivables from previous years that are paid during the year at issue and that these exceed the costs for current production. Morocco contends that this scenario would however be "highly unlikely" in the context of a start-up company.³⁶⁹ Turkey contends in response that in stating that "[i]t would be very difficult", Morocco appears to accept that it is not impossible "to have a positive return on investment despite suffering losses during the same period".³⁷⁰ We agree. We understand Morocco to accept that it is "very difficult" and "highly unlikely", but not impossible "to have a positive return on investment despite suffering losses during the same period", and by implication, that sales made at a loss do not "necessarily" mean a negative return on investment. Given that Morocco itself suggests that sales at a loss do not "necessarily" mean negative return on investment, Morocco's defence fails. We therefore consider that Morocco has not shown how the MDCCE actually evaluated Maghreb Steel's return on investment during the injury period. Further, we consider that any reasoning explaining why Maghreb Steel, in the particular facts of this case, could not have a positive return on investment because it had incurred losses would need to have been part of the MDCCE's determination. Since Morocco's reasoning is not part of the MDCCE's determination, we dismiss it as *ex post* rationalization.

7.244. Morocco further argues that negative cash flow and return on investment, which is "necessarily" implicit in the MDCCE's discussion of Maghreb Steel's failure to meet the break-even threshold, mean difficulty in raising capital or investment. However, since we have found that Morocco has failed to advance arguments persuading us that the MDCCE's discussion of Maghreb

³⁶⁴ Turkey's response to Panel question No. 9.1, para. 39.

³⁶⁵ Morocco's comments on Turkey's response to Panel question No. 9.1, para. 30.

³⁶⁶ Morocco's response to Panel question No. 9.1, para. 54.

³⁶⁷ Turkey's comments on Morocco's response to Panel question No. 9.1.

³⁶⁸ Turkey's response to Panel question No. 9.2(b), para. 45.

³⁶⁹ Morocco's response to Panel question No. 9.2(b), para. 56.

³⁷⁰ Turkey's comments on Morocco's response to Panel question No. 9.2(b).

Steel's failure to meet the break-even threshold "necessarily" means that the industry was experiencing negative cash flow and negative return on investment, we decline to rule on whether its analysis of the break-even threshold would "necessarily" have indicated negative performance on the ability to raise capital or investments.

7.245. We consider that the MDCCE's determination does not show, and Morocco has failed to explain, that the MDCCE evaluated actual and potential negative effects on cash flow, return on investment, and ability to raise capital or investments. We therefore conclude that Morocco has failed to rebut the *prima facie* case made by Turkey that the MDCCE did not evaluate "return on investments", "actual and potential negative effects on cash flow", and "ability to raise capital or investments", and therefore acted inconsistently with Articles 3.1 and 3.4.

7.7.2.1.2 Growth

7.246. The MDCCE made no explicit reference to "growth" in its injury analysis, as set out in its final and preliminary determinations. Morocco asserts that the MDCCE addressed in its final determination trends in certain of the factors listed in Article 3.4 – production, capacity utilization, market share, sales volume, employment, productivity, stocks, and profitability – and found that Maghreb Steel had not reached its reasonably anticipated levels with regard to any of them in the injury period. Relying on the Appellate Body's findings in *EC – Tube or Pipe Fittings*, Morocco argues that, in doing so, the MDCCE also evaluated the growth factor.³⁷¹ Morocco also notes that in *Egypt – Steel Rebar*, the panel found that the investigating authority in question had addressed growth by addressing sales volume and market share.³⁷² Turkey recognizes that an investigating authority's analysis of growth may flow, to some extent, from its analysis of sales and market share, but the analysis of sales and market share, alone, does not offer a conclusion on growth.³⁷³ Turkey posits that equating growth with sales and market share effectively reads "growth" out of Article 3.4 as an independent injury factor. In certain cases where the analysis of growth may be consequential, the investigating authority must state so expressly in its published determination.³⁷⁴

7.247. We must therefore assess whether, in addressing trends in certain of the factors listed in Article 3.4 in its injury analysis, the MDCCE also evaluated the growth factor.

7.248. Morocco asserts that the Appellate Body found in *EC – Tube or Pipe Fittings* that growth can be reflected in the performance of certain other injury factors listed in Article 3.4, and therefore the analysis of these other factors would satisfy the requirement to evaluate growth.³⁷⁵ We disagree with Morocco's characterization of the Appellate Body's findings in *EC – Tube or Pipe Fittings*. We understand the Appellate Body in that case to reason that while the evaluation of the growth factor necessarily entails an analysis of certain other factors listed in Article 3.4, an evaluation of those factors "could", but does not necessarily, amount to the evaluation of the growth factor.³⁷⁶ Whether or not an evaluation of certain factors listed in Article 3.4 may also be considered to amount to an evaluation of the growth factor, will depend on the particular facts of each case and on whether the record of the investigation in question contains "sufficient and credible evidence" to demonstrate that the growth factor has been evaluated.³⁷⁷ In view of the particular facts of the case before it, the Appellate Body in *EC – Tube or Pipe Fittings* found it reasonable for the panel to have concluded that the European Commission had addressed and evaluated growth.

7.249. The facts of this dispute make it clear that the MDCCE did not explicitly evaluate growth. The question is whether the MDCCE did so implicitly. In order to resolve this matter, we will examine, as did the Appellate Body, whether the record of the underlying investigation contains "sufficient and credible evidence" to show that the MDCCE evaluated growth, even though the MDCCE did not make a separate record of the evaluation of that factor.

³⁷¹ Morocco's response to Panel question No. 9.5(a), paras. 58-60 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 165).

³⁷² Morocco's response to Panel question No. 9.5(a), para. 58 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.37).

³⁷³ Turkey's response to Panel question Nos. 9.5(a) and (b), para. 53.

³⁷⁴ Turkey's second written submission, para. 7.11.

³⁷⁵ Morocco's response to Panel question No. 9.5(a), para. 58 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 165).

³⁷⁶ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 162.

³⁷⁷ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.

7.250. The evidence on record in this dispute, as distinct from that in *EC – Tube or Pipe Fittings* and *Egypt – Steel Rebar*, indicates that the MDCCE made a statement in its determination, as noted in paragraph 7.234. , suggesting that reliable information on the impact of dumped imports on domestic producers, and therefore on the injury factors set out in Article 3.4, is not available in material retardation cases. We recall that in referring to that statement, Turkey sets out a *prima facie* case that the MDCCE did not evaluate, among others, the growth factor. Morocco points to nothing on the record that rebuts that *prima facie* case. Morocco asserts that in evaluating certain of the factors listed in Article 3.4 – production, capacity utilization, market share, sales volume, employment, productivity, stocks, and profitability – the MDCCE also evaluated growth.³⁷⁸ However, consistent with the views of the Appellate Body in *EC – Tube or Pipe Fittings*, we consider that an evaluation of these other factors listed in Article 3.4 that Morocco points to *could*, but does not necessarily, amount to the evaluation of the growth factor. Therefore, we consider that Morocco's assertion in this regard is insufficient to rebut the *prima facie* case made by Turkey that the MDCCE did not evaluate "growth" and therefore acted inconsistently with Articles 3.1 and 3.4.

7.7.2.1.3 Wages

7.251. The MDCCE made no explicit reference to "wages" in its injury analysis. In its final determination, the MDCCE stated, in the context of evaluating employment in the domestic industry, that in 2012 Maghreb Steel announced the laying off of more than 300 workers, which took place in 2013.³⁷⁹

7.252. Morocco argues that the MDCCE's reference to Maghreb Steel's announcement in 2012 regarding a loss of more than 300 jobs sufficed as an evaluation of "wages" under Article 3.4, because such a "massive layoff" would certainly exert downward pressure on wages.³⁸⁰ Turkey contends that Article 3.4 lists "employment" and "wages" separately, and a decline in employment does not necessarily mean a reduction in wages.³⁸¹

7.253. We agree with Turkey that a decline in employment does not necessarily mean a fall in wages. As Turkey argues, government-set minimum wages or agreed minimum wages with labour unions may prevent companies from lowering wages even in dire economic conditions.³⁸² Further, we consider that, in any event, the MDCCE's determination did not explain how a loss of jobs in 2013, that is *after* the injury period, had an impact on the wages *during* the injury period. In response to the Panel's question in this regard, Morocco contends that the announcement in 2012 of a loss of jobs in 2013 would already have exerted a downward pressure on wages in 2012, or at the very least, have had a "chilling effect" on them.³⁸³ We note however, that the MDCCE itself did not make that analysis in its determinations, in the absence of which, we reject Morocco's argument as an *ex post* rationalization. Morocco also contends, referring to the MDCCE's preliminary determination, that Maghreb Steel had "announced layoff of 400 employees in 2012".³⁸⁴ However, in its preliminary determination, the MDCCE refers only to Maghreb Steel's consideration that at least 400 people at the company's existing level of production would be seriously threatened with redundancy, and does not refer to any particular announcement of a "layoff" by Maghreb Steel.³⁸⁵ We therefore do not accept Morocco's assertion in this regard.

7.254. Therefore, we conclude that Morocco has failed to rebut the *prima facie* case made by Turkey that the MDCCE did not evaluate "wages", and therefore acted inconsistently with Articles 3.1 and 3.4.

7.7.2.1.4 Factors affecting domestic prices

7.255. The MDCCE made no explicit reference to "factors affecting domestic prices" in its injury analysis. Under the section of its final determination addressing the impact of dumped imports on

³⁷⁸ Morocco's response to Panel question No. 9.5(a), paras. 59-60.

³⁷⁹ Final determination, (Exhibit TUR-11), para. 183.

³⁸⁰ Morocco's first written submission, para. 234.

³⁸¹ Turkey's opening statement at the first meeting of the Panel, para. 4.16.

³⁸² Turkey's opening statement at the first meeting of the Panel, para. 4.16.

³⁸³ Morocco's response to Panel question No. 5.8, para. 152; second written submission, para. 184.

³⁸⁴ Morocco's second written submission, para. 184 (referring to Preliminary determination, (Exhibit TUR-6), para. 150).

³⁸⁵ Preliminary determination, (Exhibit TUR-6), para. 150.

prices of the domestic like product, the MDCCE, however, found that the dumped imports of hot-rolled steel had a non-negligible impact on the undercutting of the domestic industry's selling prices.³⁸⁶ In its causation analysis as set out in the final determination, the MDCCE addressed certain comments from interested parties regarding an alleged increase in prices of raw materials, and stated that an increase in raw material prices had affected the entire global steel industry, and that the effect of that increase on Maghreb Steel would not have been much less significant in the absence of dumped imports.³⁸⁷

7.256. Turkey argues that the MDCCE did not evaluate "factors affecting domestic prices" and therefore acted inconsistently with Articles 3.1 and 3.4.³⁸⁸ Morocco responds that the MDCCE did evaluate factors affecting domestic prices, in finding that the dumped imports of hot-rolled steel had a non-negligible impact on the undercutting of the domestic industry's selling prices, and by assessing an alleged increase in the price of raw materials in its causation analysis.³⁸⁹ Turkey contends that the statements that Morocco refers to appear in different parts of the challenged determinations and in different contexts, which pertain to the MDCCE's inquiry under Articles 3.2 and 3.5, and are unrelated to the analytical inquiry required under Article 3.4.³⁹⁰

7.257. Morocco argues in response that the precise location of the analysis is not determinative of the issue of whether a certain factor has been analysed. Morocco contends that the Appellate Body has clarified that Article 3.4 does not regulate the manner in which the results of the analysis of each injury factor are to be set out in the published documents³⁹¹, and in general, Article 3 does not provide a prescribed format or template that an investigating authority must adhere to in making its injury determination.³⁹² Turkey acknowledges that in certain cases an investigating authority may analyse evidence relevant to one or more Article 3.4 factors under another provision of Article 3. However, in such case the authority may refer to the factual analysis set out in another section in order to avoid repetition, but the authority is not absolved of the obligation to evaluate each of the relevant factors under Article 3.4. Turkey takes the view that in such case, the authority must still ensure that the relevant factor is explicitly mentioned in the analysis of the injury factors, even if there is a reference to the factual discussion in another part of the report.³⁹³

7.258. We must therefore examine whether the MDCCE evaluated factors affecting domestic prices by way of the following statements:

- a. the MDCCE's statement that dumped imports had a non-negligible impact on the undercutting of the domestic industry's selling prices³⁹⁴; and
- b. the MDCCE's statement addressing an alleged increase in the price of raw materials.³⁹⁵

7.259. We recall that Article 3 does not provide a prescribed template or format that an investigating authority must adhere to in making its determination of injury, provided that its determination comports with the disciplines that apply under the discrete paragraphs of Article 3.³⁹⁶ Therefore, we agree with Morocco that what is material for our assessment is not the location of the statements at issue in the MDCCE's determinations, but whether those statements show that the MDCCE did evaluate factors affecting domestic prices, as required under Article 3.4.

7.260. We turn first to examine the MDCCE's statement that dumped imports had a non-negligible impact on the undercutting of the domestic industry's selling prices. We note that this statement shows that the MDCCE assessed the effect of dumped imports on domestic prices, which in our view,

³⁸⁶ Final determination, (Exhibit TUR-11), para. 145.

³⁸⁷ Final determination, (Exhibit TUR-11), paras. 221-225.

³⁸⁸ Turkey's first written submission, para. 9.10.

³⁸⁹ Morocco's first written submission, para. 235 (referring to Final determination, (Exhibit TUR-11), paras. 145 and 221-225).

³⁹⁰ Turkey's opening statement at the first meeting of the Panel, para. 4.17.

³⁹¹ Morocco's response to Panel question No. 5.7, para. 149 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161).

³⁹² Morocco's response to Panel question No. 5.7, para. 149 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141).

³⁹³ Turkey's second written submission, para. 7.5.

³⁹⁴ Final determination, (Exhibit TUR-11), para. 145.

³⁹⁵ Final determination, (Exhibit TUR-11), para. 225.

³⁹⁶ Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141.

does amount to an evaluation of at least one factor affecting domestic prices.³⁹⁷ In addition, the MDCCE had also considered the effect of an alleged increase in raw material prices which is also a factor affecting domestic prices.³⁹⁸ Turkey's argument that the MDCCE failed to evaluate factors affecting domestic prices suggests, on the contrary, that the MDCCE failed to evaluate *any* factors affecting domestic prices. Therefore, we consider that Turkey's argument that the MDCCE failed to evaluate factors affecting domestic prices rests on a factually incorrect premise. We further note that Morocco argues that Turkey has not identified which other factors affecting prices the MDCCE should have analysed.³⁹⁹ In response to that argument, Turkey contends that Article 3.4 requires that an investigating authority always evaluate all relevant factors in every investigation and "if the authority is not aware of other relevant factors affecting prices, it must say so explicitly in its published report".⁴⁰⁰ We disagree with Turkey. We consider, consistent with the observations of the panel in *EU – Footwear (China)*, that nothing in Article 3.4 provides any guidance as to the scope of "factors affecting domestic prices", nor how or based on what information, an investigating authority must proceed to evaluate this injury factor.⁴⁰¹ In light of the lack of specific obligations in that regard in Article 3.4, we consider that the manner in which an investigating authority decides to evaluate factors affecting domestic prices falls within the bounds of the authority's discretion. We thus do not read in Article 3.4, as does Turkey, an obligation for an investigating authority to make an express statement in its determination to the effect that the authority is "not aware of other relevant factors affecting prices".

7.261. For the foregoing reasons, we reject Turkey's claim that the MDCCE did not evaluate "factors affecting domestic prices", and therefore do not find that the MDCCE acted inconsistently with Articles 3.1 and 3.4 in that regard.

7.7.2.1.5 Conclusion

7.262. Based on the foregoing, we conclude that the MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in failing to evaluate 5 of the 15 injury factors listed in Article 3.4, in particular, return on investments, actual and potential negative effects on cash flow, wages, growth, and ability to raise capital or investments. We do not find that the MDCCE acted inconsistently with Articles 3.1 and 3.4 by failing to evaluate factors affecting domestic prices.

7.7.2.2 Whether the MDCCE acted inconsistently with Articles 3.1 and 3.4 in excluding, from its injury analysis, Maghreb Steel's captive production

7.263. Turkey claims that the MDCCE acted inconsistently with Articles 3.1 and 3.4 because, in analysing the injury factors listed in Article 3.4, the MDCCE excluded, without providing a satisfactory explanation, data pertaining to the captive market and considered data pertaining to only the merchant market.⁴⁰²

7.264. Morocco argues that the MDCCE had "focused" on the merchant market in its injury analysis, and asserts that the MDCCE did explain, reasonably and adequately, why it had focused on that market.⁴⁰³ Morocco contends further that even though the MDCCE focused on the merchant market in its injury analysis, it did not entirely ignore the captive market, as Maghreb Steel's captive sales

³⁹⁷ We note that the panel in *EU – Footwear (China)* took a similar view in finding that the investigating authority "did address at least one factor affecting domestic prices, when it concluded that dumped imports undercut the prices of the domestic like product, and that the domestic industry's sales prices were depressed". (Panel Report, *EU – Footwear (China)*, para. 7.445). Further, we note that the Appellate Body found that the results of the inquiries, pursuant to Articles 3.2 and 3.5 of the Anti-Dumping Agreement, are also relevant to the impact analysis required under Article 3.4, given that this provision requires the evaluation of *all* relevant economic factors and indices having a bearing on the state of the industry, including factors affecting domestic prices. (Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.209).

³⁹⁸ Turkey has not challenged, and therefore the Panel has not considered, whether the MDCCE objectively examined the effect of dumped imports or the alleged increase in raw material prices on domestic prices.

³⁹⁹ Morocco's response to Panel question No. 5.7, para. 151.

⁴⁰⁰ Turkey's second written submission, para. 7.12.

⁴⁰¹ Panel Report, *EU – Footwear (China)*, para. 7.445.

⁴⁰² Turkey's first written submission, paras. 9.28-9.29; opening statement at the first meeting of the Panel, para. 4.19.

⁴⁰³ Morocco's first written submission, paras. 242-243; opening statement at the first meeting of the Panel, para. 69.

were factored into the company's break-even threshold.⁴⁰⁴ In its second written submission, Morocco posits that the MDCCE "expressed misapprehension" about considering the captive market in the injury analysis.⁴⁰⁵ It further contends that because the MDCCE had taken into consideration the captive market in analysing the break-even threshold, it "necessarily" also took into consideration the captive market in analysing the domestic industry's return on investment, actual and potential negative effects on cash flow, and the ability to raise capital or investments. Further, Morocco contends that the MDCCE did not distinguish between the captive and merchant markets in analysing the domestic industry's employment, and therefore also did not make that distinction in analysing wages. Finally, Morocco asserts that the MDCCE also took the captive market into consideration in evaluating the domestic industry's production.⁴⁰⁶

7.265. Turkey rejects Morocco's arguments, and pointing to the MDCCE's final determination, asserts that the MDCCE did state that the exclusion of the captive market from the assessment of the injury factors was perfectly justified.⁴⁰⁷ Further, Turkey asserts that Morocco did confirm that the MDCCE "considered [that] it was not necessary to examine directly or specifically the captive market in its retardation analysis".⁴⁰⁸

7.266. We note that the MDCCE's determinations do not demonstrate whether or not the MDCCE excluded the captive market in analysing each of the nine factors listed in Article 3.4 that it expressly referred to in its injury analysis. In particular, the MDCCE does not clearly state in its determinations whether it had excluded the captive market in analysing these factors. In its final determination, in the section addressing volume of dumped imports, the MDCCE stated that it considered that the exclusion of captive sales was completely justified insofar as the domestic market is characterized by a clear separation between the captive market and the merchant market, and because Maghreb Steel's captive sales do not compete directly with imports.⁴⁰⁹ However, the MDCCE appears to have made that statement specifically in the context of analysing changes in volume of imports in relation to domestic production and consumption, and not in the context of its injury analysis as a whole. Further, in analysing the domestic industry's production, the MDCCE noted that part of "this" production is destined for internal consumption within Maghreb Steel, suggesting that the MDCCE took Maghreb Steel's captive production into consideration in that particular analysis.⁴¹⁰ Therefore, while the MDCCE's determinations do not conclusively show that the MDCCE excluded the captive market in analysing every factor that it evaluated as part of its injury analysis, they do show that the MDCCE excluded the captive market in analysing changes in volume of imports in relation to domestic production and consumption.

7.267. Further, even Morocco does not argue that the MDCCE took the captive market into consideration in analysing *all* the injury factors that the MDCCE assessed. As evident from Morocco's assertions set out in paragraph 7.264. , the MDCCE took the captive market into account only in some but not all injury factors listed in Article 3.4. Further, in response to the Panel's question regarding the MDCCE's evaluation of the domestic industry's profitability, Morocco confirmed that in analysing the profitability factor, the MDCCE did not take the captive market into account.⁴¹¹ We therefore consider that regardless of whether the MDCCE excluded the captive market in analysing all injury factors, based on the record and Morocco's submissions⁴¹², it follows that the MDCCE excluded the captive market in analysing at least some of them. We will therefore evaluate Turkey's claim on the basis that our assessment pertains to the MDCCE's analysis of those injury factors in respect of which the MDCCE did exclude the captive market.

7.268. Turkey argues, invoking the Appellate Body's findings in *US – Hot-Rolled Steel*, that, by excluding the captive market from the scope of the industry, the MDCCE conducted a "selective

⁴⁰⁴ Morocco's first written submission, paras. 244-245; opening statement at the first meeting of the Panel, para. 70.

⁴⁰⁵ Morocco's second written submission, para. 189.

⁴⁰⁶ Morocco's second written submission, para. 193 (referring to Preliminary determination, (Exhibit TUR-6), para. 135); response to Panel question No. 5.3(a), para. 133.

⁴⁰⁷ Turkey's opening statement at the first meeting of the Panel, para. 4.19 (referring to Final determination, (Exhibit TUR-11), para. 137).

⁴⁰⁸ Turkey's second written submission, para. 7.14 (quoting Morocco's opening statement at the first meeting of the Panel, para. 69).

⁴⁰⁹ Final determination, (Exhibit TUR-11), para. 137.

⁴¹⁰ Preliminary determination, (Exhibit TUR-6), para. 135.

⁴¹¹ Morocco's response to Panel question No. 5.4, para. 135.

⁴¹² Morocco's response to Panel question No. 5.3(a), para. 133; second written submission, para. 193.

examination of one part of a domestic industry" and therefore acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.⁴¹³ Turkey contends, based on the Appellate Body's reasoning, that while the MDCCE was not precluded from splitting its analysis of the state of the industry into the merchant and captive markets, it was required to provide an even-handed explanation of each of these market segments. Turkey further contends that the MDCCE failed to satisfactorily explain why it was not necessary to examine the part of the domestic industry concerning the captive market.⁴¹⁴

7.269. Based on Turkey's argument, the main issue before us is whether the MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in disregarding, in its analysis of certain injury factors, data pertaining to the captive market.

7.270. We note that the facts and issue before the Appellate Body in *US – Hot-Rolled Steel* are similar to the facts and issue before the Panel in this dispute. In that case, the USITC did not analyse data pertaining to the domestic industry's captive market in its injury investigation.⁴¹⁵ Similar to the facts in this dispute, the domestic like product that domestic producers internally transferred to the captive market was used by an integrated producer to manufacture a downstream product, and did not generally enter the merchant market. Domestic producers whose production was captive, therefore did not compete directly with imports.⁴¹⁶ The issue before the Appellate Body, *inter alia*, was whether the USITC, in failing to analyse the domestic industry's captive market in its injury investigation, acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.271. We recall that the Appellate Body found that in the absence of a satisfactory explanation, Article 3.1 of the Anti-Dumping Agreement does not entitle investigating authorities to conduct a selective examination of one part of the domestic industry.⁴¹⁷ At the outset, the Appellate Body noted that it follows clearly from the definition of injury in footnote 9 to Article 3 of the Anti-Dumping Agreement that the focus of the injury determination is the state of the "domestic industry", which read in light of Article 4.1 of the Anti-Dumping Agreement, is the domestic industry *in totality*. An investigating authority, in its investigation, may therefore not focus on simply one part, sector or segment of the domestic industry.⁴¹⁸

7.272. The Appellate Body reasoned that the standard of objectivity in Article 3.1 called upon an investigating authority to examine all parts of the domestic industry to ensure that the authority would not focus only on parts that were performing poorly as distinct from those that were performing well, or *vice versa*. An investigating authority, by focusing only on poorly performing parts to the exclusion of parts performing well, would raise the likelihood, as a result of the fact-finding or evaluation process, of determining that the domestic industry is injured.⁴¹⁹

7.273. We consider the Appellate Body's reasoning applicable to the facts of this dispute. The MDCCE, in focusing in its injury analysis on data pertaining exclusively to the merchant market, selectively examined the performance of only one part of the domestic industry, that is, the part that was supplying to the merchant market. In doing so, it excluded evaluating Maghreb Steel's performance in the captive market, a part of the domestic industry which was shielded from competition with imports, and which the MDCCE cited the McLellan report as finding, had secured a guaranteed market.⁴²⁰ In particular, as noted earlier in paragraph 7.173. above, the McLellan report, upon which the MDCCE had relied in the underlying investigation, itself concluded that almost half of Maghreb Steel's production, which was directed to the captive market, had access to a guaranteed market, and would therefore hold "bonnes perspectives commerciales" (good commercial prospects) for the domestic industry.⁴²¹ In our view, an unbiased and objective investigating authority, in analysing the state of the domestic industry, would not disregard a guaranteed market which held "good commercial prospects" for the domestic industry's performance, and which accounted for half of that industry's production, and would

⁴¹³ Turkey's first written submission, para. 9.18 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 214).

⁴¹⁴ Turkey's first written submission, para. 9.24.

⁴¹⁵ Appellate Body Report, *US – Hot-Rolled Steel*, para. 212.

⁴¹⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 181.

⁴¹⁷ Appellate Body Report, *US – Hot-Rolled Steel*, para. 214.

⁴¹⁸ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 189-190.

⁴¹⁹ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 196 and 204.

⁴²⁰ Preliminary determination, (Exhibit TUR-6), para. 120.

⁴²¹ Preliminary determination, (Exhibit TUR-6), para. 120.

therefore have taken that captive market into consideration in its analysis. We agree with Turkey that in the underlying investigation this consideration is particularly pertinent, given that the McLellan report, a study on which the MDCCE had relied in its injury analysis, itself recognized the significance of the captive market in the overall viability of the domestic industry.⁴²²

7.274. In failing to evaluate each of the two parts that made up the hot-rolled steel domestic industry in Morocco, the MDCCE failed to even-handedly evaluate the domestic industry as a whole, and therefore failed to meet the requirement of objectivity set out in Article 3.1 of the Anti-Dumping Agreement. Further, we consider that the requirement of objectivity in Article 3.1 applies to the MDCCE's evaluation of each injury factor that formed part of its injury analysis, and therefore required the MDCCE to evaluate data pertaining to the captive market in its evaluation of *each* of those injury factors. This is because the overarching obligation in Article 3.1 that an investigating authority conduct its investigation based on objective examination extends to the injury analysis as a whole, and therefore to the authority's evaluation of *all* rather than only certain injury factors that form part of its analysis.

7.275. Morocco argues that the Appellate Body in *US – Hot-Rolled Steel* stated that it is permissible for an investigating authority not to examine all of the other parts that make up the industry if it provides an explanation as to why it is not necessary to examine, directly or specifically, the other parts of the domestic industry. It contends further that the MDCCE did explain why it focused on the merchant market in its injury analysis, and therefore in focusing on that market in its analysis, it did not act inconsistently with Articles 3.1 and 3.4.⁴²³

7.276. We note that the MDCCE explained that it considered that the exclusion of captive sales was completely justified insofar as the domestic market is characterized by a clear separation between the captive market and the merchant market, and because Maghreb Steel's captive sales do not compete directly with imports.⁴²⁴ However, as Turkey points out, the Appellate Body in *US – Hot-Rolled Steel* considered that it may be "highly pertinent for investigating authorities to evaluate the relevance of the fact that a significant proportion of the domestic production of the like product is shielded from direct competition with imports, and that the part of the domestic industry that is most likely to be affected by the imports is limited to the merchant market".⁴²⁵ Therefore, this explanation, which the MDCCE set out as a justification for *not evaluating* the domestic industry's performance in the captive market, is for the Appellate Body a "highly pertinent" ground for *evaluating* the domestic industry's performance in the captive market. We agree with the Appellate Body's reasoning that the absence of competition with imports constitutes a ground for evaluating, rather than disregarding, the performance of a particular domestic industry in the captive market, and apply it in the present case.

7.277. In the case at hand, the domestic like product destined for the captive market which was "shielded from direct competition with imports" amounted to about 50% of the domestic production.⁴²⁶ That a significant part the domestic production of the like product was shielded from direct competition with imports would, in our view, have led an objective and unbiased authority to inquire into whether that part of the domestic production was performing positively. An unbiased and objective investigating authority would thus have understood the absence of competition with imports as a ground *for*, and not *against*, examining the captive market in analysing the state of the industry. We therefore consider that the MDCCE's explanation that Maghreb Steel's captive sales do not compete directly with imports did not serve as a satisfactory explanation based on which the MDCCE could exclude the captive market from its injury analysis.

7.278. Based on the foregoing, we conclude that the MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in disregarding the captive market in its injury analysis.

⁴²² Turkey's first written submission, para. 9.27.

⁴²³ Morocco's first written submission, paras. 241-243.

⁴²⁴ Final determination, (Exhibit TUR-11), para. 137.

⁴²⁵ Appellate Body Report, *US – Hot-Rolled Steel*, para. 198.

⁴²⁶ Final determination, (Exhibit TUR-11), para. 158.

7.7.2.3 Whether the MDCCE acted inconsistently with Articles 3.1 and 3.4 in relying on the McLellan report

7.279. As noted in paragraph 7.227. , in its injury analysis, the MDCCE compared projected performance levels for the domestic industry against the actual performance of the industry across nine injury factors. These projections were set out in Maghreb Steel's 2008 Business Plan (Business Plan), which was based on a pre-feasibility report (the McLellan report).⁴²⁷ The MDCCE considered both the McLellan report and the Business Plan in its analysis.⁴²⁸ The MDCCE enumerated, however, certain projections in Maghreb Steel's Business Plan that it noted had proved inaccurate pertaining specifically to domestic demand, sales of downstream products, and the price of slab, a raw material used in manufacturing hot-rolled steel. In its final determination, the MDCCE noted the need to assess these inaccurate projections in light of actual developments, and proceeded to explain why it considered that the inaccuracies were not significant.⁴²⁹ After undertaking that assessment, the MDCCE stated its decision to rely on the projections in the Business Plan and the McLellan report as valid benchmarks against which to compare the domestic industry's actual performance.⁴³⁰ In its final determination, the MDCCE found that the domestic industry had suffered injury in the form of material retardation because, among others, the domestic industry's actual performance fell short of its projected performance.⁴³¹

7.280. Turkey contends that the "miscalculations" in the McLellan report identified by the MDCCE had an impact on the MDCCE's injury analysis, as the projections in that report formed the benchmark against which the MDCCE compared the domestic industry's actual performance in order to assess injury.⁴³² Turkey argues that since the MDCCE failed to properly assess the relevance and consequences of these miscalculations, the MDCCE's reliance on the McLellan report was incorrect, and therefore its overall analysis which was based on that study, is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.⁴³³ Morocco contends in response that the MDCCE found that some of the projections in the Business Plan were imprecise rather than incorrect, and in any event, the MDCCE did not simply accept the projections but assessed them in light of actual developments. Morocco argues that therefore the MDCCE was correct in relying on the Business Plan and McLellan report, and did not act inconsistently with Articles 3.1 and 3.4.⁴³⁴

7.281. We must evaluate whether the MDCCE, in relying on the Business Plan (which was based on the McLellan report), despite having found certain inaccuracies in it, made an injury determination which was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. In particular, we must examine whether an unbiased and objective investigating authority would have relied on the Business Plan despite having found the inaccuracies that the MDCCE found in that document.

7.282. The first inaccuracy in the Business Plan that the MDCCE addressed pertains to the projected increase in domestic consumption of hot-rolled steel. The MDCCE found that the Business Plan forecast an increase in domestic consumption of hot-rolled steel of 10% per year which was not reached. It noted, however, that domestic consumption of hot-rolled steel did indeed increase by 6.3% between 2010 and 2012, in contrast to the trend in Europe. It further stated that the total rise in domestic consumption of hot-rolled steel sheet had, nevertheless, reached 10% between 2010 and 2012.⁴³⁵

7.283. Turkey asserts that the projected domestic demand was about 40% higher than the actual figure.⁴³⁶ In our view, a projection on domestic consumption of a product would, in the normal course, affect projections of sales, investment decisions, inventories, among others, of the industry manufacturing that product. An unbiased and objective investigating authority would therefore have considered that an overestimation of the projected domestic consumption of hot-rolled steel would, in all likelihood, lead to an overestimation in the projections of certain factors relevant to the injury analysis. Morocco contends, however, that the MDCCE analysed what had actually happened in the

⁴²⁷ Preliminary determination, (Exhibit TUR-6), para. 118.

⁴²⁸ Final determination, (Exhibit TUR-11), para. 150.

⁴²⁹ Final determination, (Exhibit TUR-11), paras. 159-162.

⁴³⁰ Final determination, (Exhibit TUR-11), para. 163.

⁴³¹ Final determination, (Exhibit TUR-11), para. 195.

⁴³² Turkey's first written submission, para. 9.32.

⁴³³ Turkey's first written submission, para. 9.38.

⁴³⁴ Morocco's first written submission, para. 248.

⁴³⁵ Final determination, (Exhibit TUR-11), para. 160.

⁴³⁶ Turkey's first written submission, para. 9.33.

market, in particular that the domestic consumption of hot-rolled steel had still grown by 6.3%. In light of that analysis, the MDCCE considered that the inaccuracy at issue, which was only a "slight" overestimation of demand, did not affect the overall projection. It therefore decided that the use of these inaccurate projections was appropriate.⁴³⁷ We consider however that the inaccuracy at issue would have led an unbiased and objective investigating authority to question, and further investigate, the impact of the inaccuracy on the actual and projected performance of the hot-rolled steel industry in respect of the relevant injury factors before dismissing that inaccuracy as insignificant. The MDCCE however, did not do so. We therefore consider that the MDCCE did not act objectively in dismissing the inaccuracy in the forecasted domestic consumption of hot-rolled steel in the Business Plan.

7.284. The second inaccuracy that the MDCCE addressed pertains to projections for the sales of the downstream product, cold-rolled steel. In particular, the MDCCE found that sales of the downstream product did not increase by 10% as the Business Plan had forecast. The MDCCE's determination indicates that the sales of the downstream product, on the contrary, actually decreased.⁴³⁸ Turkey asserts that information on sales of downstream products is critical for a producer of intermediate goods because an increase in sales of the downstream products will mean an increase in sales of the intermediate goods. Turkey argues that therefore the "miscalculation" in the sales of downstream products in the Business Plan will have had effects on the projections of the hot-rolled steel industry's production, sales, market share, return on investment, and cash flow, among others.⁴³⁹

7.285. We agree with Turkey that an increase in sales of a downstream product, here cold-rolled steel, is likely to mean an increase in sales of the intermediate good, here hot-rolled steel, which is used in the manufacture of that downstream product. This is because an increase in sales of cold-rolled steel would imply an increase in demand for the intermediate good, hot-rolled steel. In the underlying investigation, the MDCCE found that the sales of cold-rolled steel did not increase as forecasted, but actually declined. Morocco contends that the MDCCE did note that the decrease in the level of sales of cold-rolled steel however did not lead to slow-down in internal consumption of hot-rolled steel, which remained "very solid" throughout the period.⁴⁴⁰ We understand the MDCCE's statement that Morocco points to as indicating that the internal consumption of hot-rolled steel remained strong despite the decrease in sales of cold-rolled steel. However, that statement does not indicate that the MDCCE found that the internal consumption of hot-rolled steel remained "unaffected" by the decrease in sales of cold-rolled steel. In particular, the MDCCE's statement does not indicate whether the internal consumption of hot-rolled products remained at the same level as it would have if the sales of cold-rolled steel had risen to the projected level. Therefore, the MDCCE's statement in question does not suffice as an analysis of the impact of the inaccuracy at issue on the actual and projected performance of the hot-rolled industry, which we consider an unbiased and objective investigating authority would have undertaken, before deciding to rely on the Business Plan.

7.286. The third inaccuracy that the MDCCE identified in the Business Plan pertained to the price of slab, a raw material used to manufacture hot-rolled steel. The MDCCE noted that the Business Plan had forecast the price of slab to stand at about USD 440/tonne, whereas the price of slab actually reached USD 550/tonne during the period under investigation. Turkey asserts that considering that slab is an intermediate product used to manufacture hot-rolled steel, the price of slab forms part of the cost-structure of hot-rolled steel. An incorrect projection of the price of slab therefore means an incorrect projection of the cost-structure of the hot-rolled industry, and must have had an impact on business decisions, such as investment and production capacity, among others.⁴⁴¹ Morocco contends in response that the MDCCE found that the inaccurate projection of the price of slab did not have a major effect in Maghreb Steel's overall operations because the MDCCE considered that Maghreb Steel quickly reduced its purchases of slab as its electric steel plant was put into operation in 2012.⁴⁴²

7.287. In our view, an unbiased and objective investigating authority would consider that an inaccurate projection of the price of slab, given that it is an intermediate product used to

⁴³⁷ Morocco's first written submission, para. 249.

⁴³⁸ Final determination, (Exhibit TUR-11), para. 161.

⁴³⁹ Turkey's first written submission, para. 9.34.

⁴⁴⁰ Morocco's first written submission, para. 250 (referring to Final determination, (Exhibit TUR-11), para. 161).

⁴⁴¹ Turkey's first written submission, para. 9.36.

⁴⁴² Morocco's first written submission, para. 251.

manufacture hot-rolled steel, would affect the projected cost of production of hot-rolled steel, and therefore the projections of the hot-rolled industry's performance. Such an authority would consider that because the domestic industry's actual performance was compared against those projections of the domestic industry's performance to analyse injury to the industry, an inaccurately projected price of slab could affect the overall injury analysis. In the case at hand, the MDCCE dismissed the significance of the inaccuracy in the projected price of slab on the basis that Maghreb Steel quickly stopped purchasing slab. We consider that the MDCCE's explanation was not reasoned and adequate. As Turkey asserts⁴⁴³, Maghreb Steel's electric works were implemented in 2012, which even assuming that the works were implemented in January 2012, was 19 months after the company began producing hot-rolled steel. We recall that the entire 19-month period fell within the injury period.⁴⁴⁴ We agree with Turkey that in those 19 months, the inaccuracy in the projected price of slab was likely to have had an impact on Maghreb Steel's performance. We therefore consider that the MDCCE did not act objectively in dismissing the significance of the inaccuracy in the projected price of slab, without investigating the actual impact of the inaccuracy on the hot-rolled steel industry's performance.

7.288. Based on the foregoing, we take the view that the inaccuracies in the Business Plan were of a nature that an unbiased and objective investigating authority would not have relied on them, without further analysis. The MDCCE dismissed the significance of the inaccuracies in the Business Plan, without further investigating the impact of those inaccuracies on Maghreb Steel's actual and projected performance levels, and did so based on explanations that were not reasoned and adequate. Therefore, the MDCCE improperly relied on the McLellan report (on which the Business Plan was based). As a result, we find that the MDCCE's overall injury analysis, which was based on that report, is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.7.3 Overall Conclusion

7.289. For the foregoing reasons, we conclude that:

- a. The MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in failing to evaluate 5 of the 15 injury factors listed in Article 3.4, in particular, return on investments, actual and potential negative effects on cash flow, growth, wages, and ability to raise capital or investments. The MDCCE did not act inconsistently with Articles 3.1 and 3.4 by failing to evaluate factors affecting domestic prices.
- b. The MDCCE acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in disregarding the captive market in its injury analysis.
- c. The MDCCE, in relying in its injury analysis on the McLellan report (on which the Business Plan was based) without properly investigating the significance of inaccuracies in that report, did not base its injury determination on an objective examination, and therefore acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set out in this Report, we conclude that the following claims of Turkey are outside our terms of reference:

- a. the claim under footnote 9 to Article 3 of the Anti-Dumping Agreement in respect of the MDCCE's finding of "establishment";
- b. the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement in respect of the confidential treatment of the domestic industry's (Maghreb Steel) break-even threshold; and

⁴⁴³ Turkey's first written submission, para. 9.37.

⁴⁴⁴ See fn 347 above.

- c. the claim under Article 6.9 of the Anti-Dumping Agreement in respect of the alleged failure to inform all interested parties of the domestic industry's (Maghreb Steel) break-even threshold.

8.2. For the procedural reasons set out in this Report, we decline to rule on:

- a. the claim under Article VI:6(a) of the GATT 1994 in respect of the MDCCE's finding of "establishment"; and
- b. the claim under Article 6.9 of the Anti-Dumping Agreement in respect of any "essential facts" used by the MDCCE in cross-checking the facts available rate.

8.3. For the reasons set out in this Report, we conclude that Turkey has established that Morocco acted inconsistently with:

- a. Article 5.10 of the Anti-Dumping Agreement by failing to conclude the investigation within the 18-month maximum time limit set out in that provision;
- b. Article 6.8 of the Anti-Dumping Agreement by rejecting the reported information and establishing the margins of dumping for the two investigated Turkish producers on the basis of facts available;
- c. Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of: (i) any essential facts in respect of the additional, unidentified export sales that the MDCCE considered the producers to have failed to report; and (ii) the essential facts in respect of the data for the C&F prices and for the adjustments used in arriving at the producers' margins of dumping using facts available;
- d. Article 3.1 of the Anti-Dumping Agreement in determining that the domestic industry was "unestablished";
- e. Articles 3.1 and 3.4 of the Anti-Dumping Agreement by improperly conducting the injury analysis in the form of "material retardation of the establishment of the domestic industry"; and
- f. Articles 3.1 and 3.4 of the Anti-Dumping Agreement by: (i) failing to evaluate 5 of the 15 injury factors listed in Article 3.4; (ii) disregarding the captive market in the injury analysis; and (iii) relying in the injury analysis on the McLellan report without properly investigating the significance of inaccuracies in that report.

8.4. For the reasons set out in this Report, we conclude that Turkey has not established that Morocco acted inconsistently with:

- a. Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of the movement certificates and commercial invoices in respect of the [[***]] tonnes of allegedly unreported export sales in sufficient time for the two investigated Turkish producers to defend their interests; and
- b. Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to evaluate "factors affecting domestic prices".

8.5. We do not consider it necessary to address Turkey's claims under paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement.

8.6. Pursuant to 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 of benefits under that Agreement. Accordingly, to the extent the MDCCE has acted inconsistently with certain provisions of the Anti-Dumping Agreement, we conclude that Morocco has nullified or impaired benefits accruing to Turkey under this Agreement.

8.7. Pursuant to Article 19.1 of the DSU, we recommend that Morocco bring its measures into conformity with its obligations under the above-mentioned Agreement.

8.8. In light of the inconsistencies of the measures with the Anti-Dumping Agreement, including with Article 5.10, Turkey also requests the Panel to exercise its discretion under the second sentence of Article 19.1 of the DSU and to suggest that Morocco bring its measures into conformity with its WTO obligations by immediately revoking the anti-dumping measure at issue.⁴⁴⁵

8.9. We consider that Article 19.1 of the DSU allows, but does not require, us to suggest ways in which the Member concerned could implement the Panel's recommendations.⁴⁴⁶ Further, implementation of DSB recommendations and rulings is left, in the first instance, to the discretion of the implementing Member.⁴⁴⁷ We therefore deny Turkey's request.

⁴⁴⁵ Turkey's first written submission, paras. 5.20 and 11.4.

⁴⁴⁶ Panel Report, *US – Stainless Steel (Korea)*, para. 7.9.

⁴⁴⁷ Panel Reports, *US – Shrimp II (Viet Nam)*, para. 8.6; *EC – Fasteners (China)*, para. 8.8; *US – Hot-Rolled Steel*, para. 8.11.